Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
	)	
2010 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	)	MB Docket No. 09-182

To: The Commission

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. ("Sinclair"), hereby submits its comments in response to the Notice of Inquiry released May 25, 2010, initiating the Commission's review of its broadcast ownership rules as mandated by Section 202(h) of the Telecommunications Act of 1996. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56, (1996) ("*1996 Act*") at § 202(h).

1. Fourteen years ago, Congress recognized that, due to the tremendous changes then affecting the video and audio marketplaces, the FCC's pre-existing multiple ownership regime might be too restrictive. Therefore, in 1996 Congress adopted sweeping amendments to the 1934 Communications Act "[t]o promote competition and reduce regulation" and required the Commission to conduct a rulemaking to determine whether to retain, modify, or eliminate its restrictions on the number of television stations that a person or entity may own, operate or control within the same television market. *1996 Act*, § 202(c)(2). In a reflection of Congressional concern that the rapidly evolving marketplace for news and video might require future adjustment of any rules adopted as part of such a rulemaking, Congress expressly required the Commission periodically to review its broadcast ownership rules to "determine whether any

of such rules are necessary in the public interest as the result of competition" and charged it with the statutory **obligation** to "repeal or modify any regulation it determines to be no longer in the public interest." *1996 Act* §202(h).[1]

2. Sinclair has attached to this filing, and incorporates herein by this reference, the brief (the "Brief") filed by Sinclair on May 17, 2010 in the United States Court of Appeals for the Third Circuit, in the matter *Prometheus Radio Project, et.al. v. Federal Communications Commission, et. al.,* Case No. 08-3078(L) (3rd Circuit 2010). The Brief provides significant support in favor of eliminating the "eight-voices" test as well as for eliminating the "top-four" restriction to limit mergers only among the top-three-rated television stations in a market.

3. In addition to incorporating the arguments included in the Brief in this filing, Sinclair would like to highlight the following three items for the Commission's consideration: (A) real world experience supports a relaxation of the rules, (B) real world changes have eliminated any position of dominance once enjoyed by broadcast stations and (C) the Commission itself, no doubt because of the real world situation, has previously concluded that its rules, at least in part, are not necessary in the public interest.

A. Real World Experience Supports Relaxing the Ownership Rules

4. Opponents of loosening the ownership restrictions make numerous arguments against allowing additional duopolies. They present economic studies, created in ivory towers by consultants paid by these opponents, to support their arguments. They trot out their supporters at public hearings to state why they believe media consolidation is problematic.[2] And

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1 Initially the review was to be conducted biennially, but Congress subsequently revised §202(h) to require quadrennial reviews. Consolidated Appropriations Act, 2004, Pub. L. No. 108-109 § 629, 118 Stat. 3 (2004).

2 Many hearken back to the "Golden Age" of television, when, presumably, all was right with the world. The only problem is, of course, that during that Golden Age of the 1950s and 1960s, few markets had more than three or four operating television stations – far below the eight that are now deemed essential to the public good – and the Internet and cable television programming services did not exist.

they flood the Commission's e-mail inbox with thousands of identical form letters from their members espousing the theories developed by these so-called "public interest" groups.

5. In the end, however, the one consistency in these arguments, studies, public comments and theories is that they are just that: "theories." The arguments against relaxing the ownership rules are based on nothing more than conjecture and gut feelings. This contrasts sharply with the primary argument in favor of relaxing the rules, namely that (1) as a result of time brokerage and similar agreements, which have been in effect since at least 1992,[3] a large number of structures exist which absent certain stays and grandfathering are precisely the structures the rule relaxation opponents are concerned about and (2) in the more than 18 years such structures have existed no demonstrable harm has resulted from such structures.

6. In a record as complete and voluminous as the one surrounding the FCC's ownership rules, a matter which has not only been the subject of numerous rulemakings by the Commission but which has been in continuous litigation for close to ten years, it is inconceivable that if any actual harm had occurred that it would not have been reported. Yet in the thousands of pages of filings opposing the relaxation of the rules, among the theories and the beliefs, not a single instance of actual harm has been demonstrated.[4] Apparently not a single advertiser has

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[3] Time brokerage agreements have been in use for many years, initially to provide an opportunity for program producers of foreign language programming to reach limited audiences on a part time basis. These agreements typically covered a few hours or less per week. In about 1990 programmers began to use time brokerage agreements, often termed Local Marketing Agreements ("LMAs") to program a substantial majority of a station's available program time. By 1992, a random survey of radio and television stations found 6% of the stations surveyed to be subject to time brokerage agreements, 8 of which involved 92% or more of the station's programming. *Broadcast Station Time Brokerage Survey Completed*, 7 FCC Rcd 1658 (1992).

[4] The sole exception to the lack of presenting actual claims of harm comes in the form of recent filings by multi-channel video program distributors ("MVPDs") claiming that they are harmed by the alleged increased leverage enjoyed by one who negotiates on behalf of two of the big-4 network affiliates. It should be noted that (1) the MVPDs are interested parties who are attempting to gain an advantage in retransmission consent negotiations, (2) the issue of retransmission consent reform is the subject of a separate Commission proceeding and should not be considered as part of the Commission's review of the ownership rules and (3) even the MVPDs do not argue that any harm comes from the combinations of two stations unless both are affiliated with a big-4 network.

ever been able to show that it was disadvantaged as a result of a duopoly;[5] not a single viewer has established even one instance where they were disadvantaged from a programming standpoint as a result of two stations being operated together; not a single news watcher has identified a solitary circumstance where news coverage suffered in any way from the ownership structures.[6]

7. The proponents of relaxing the ownership rules can, and have, countered the theoretical arguments put forth by their opponents. More importantly, however, they have years of experience to support their position. While the "public interest" groups are hysterically claiming that the sky is falling, the Commission need only look at the results of the last 18 years to know that this simply is not the case.

B. Television is no Longer the Dominant Source of News and Entertainment

8. The opponents of relaxing the ownership rules appear to be trapped in some sort of time-warp where local broadcast stations dominate the market for providing news and entertainment. While this may have been the case when these rules were first promulgated, an argument that this dominance continues today clearly does not even pass the "straight-face test." As detailed in length in the Brief, the growth of the Internet and Cable Television (including 24-hour news channels) has virtually eliminated any basis at all for the current ownership

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[5] Significantly, the Antitrust Division of the United States Department of Justice, which considers specifically the impact on competition for advertising from television station combinations, has not opposed the combination of two television stations in a number of markets, including combinations of two big-4 affiliates.

[6] It should be noted that under the Commission's rules one television station in a market is permitted to provide up to 15 percent of another in-market station's programming. In compliance with this rule, as a result of the severe economic downturn which has impacted the broadcast industry and in an effort by broadcasters to continue to go above and beyond their obligation to serve the public interest, numerous examples exist of one station in a market providing news programming to another station in the market. Given the right of stations to provide up to 3.6 hours of such news programming a day, programming which is clearly the most important in terms of viewpoint diversity, it is difficult to understand a restriction which prohibits the provider of news from simply owning the recipient station.

restrictions.[7] Consumers have a myriad of choices for obtaining news and entertainment and declining broadcast viewership figures clearly demonstrate that these choices are being utilized. As a result, advertisers too have broad discretion as to where to spend their advertising dollars and again the facts, in the form of well-documented declining revenues for broadcast stations, support that such discretion is being utilized. As we move fully into the second decade of the 21st Century, it is time for the Commission's rules to jibe with the reality of the marketplace, rather than to continue to reflect the long-ago world where three broadcast networks and their affiliates dominated the viewing universe and the advertising markets.

C. The Eight-Voices Restriction is Inconsistent with Commission Findings

9. In 2002 the D.C. Circuit Court of Appeals remanded the eight-voices test to the Commission with instructions to either justify the necessity for the restriction or eliminate it. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Commission subsequently concluded that it could not justify the eight-voices restrictions and eliminated it. *Review of the Commission's Broadcast Ownership Rules and Other Rules, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13723-37 (2003) ("*2002 Review Order*"). Nonetheless, following an order of the Third Circuit Court of Appeals to continue to enforce a rule effectively invalidated by the D.C. Circuit, the Commission inexplicably permanently reinstated the restriction. *2006 Quadrennial Regulatory Review Order*, 22 FCC Rcd 14621

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[7] As shown in a recent Pew Study, the days of loyalty to a particular news organization on a particular piece of technology in a particular form are gone. The overwhelming majority of Americans (92%) use multiple platforms to get news on a typical day, including national TV, local TV, the internet, local newspapers, radio, and national newspapers. Some 46% of Americans say they get news from four to six media platforms on a typical day. Just 7% get their news from a single media platform on a typical day. Pew Internet & American Life Project, Understanding the Participatory News Consumer, *How internet and cell phone users have turned news into a social experience*, at 3 (Mar. 2010), *available at* http://www.pewinternet.org/Reports/2010/ Online-News.aspx. (last visited on July 9, 2010). And as the FCC itself has recognized, nearly *30 million* more households receive video programming from cable, satellite or other multichannel video programming distributors today than in 1999 when the eight voices test was adopted. *Compare In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 F.C.C.R. 6005, 6008, at ¶ 6 (2001) *with In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546, at ¶ 8 (2009).

(2008). It did so despite its own prior conclusion that such restriction could not be justified and despite the continued decline of broadcasting's position as the primary source of news and entertainment. In effect, the Commission simply took advantage of forum shopping engaged in by those favoring ownership restrictions in order to reinstate a rule that it admittedly did not think was necessary to the public interest. Such an unsupported change of heart simply cannot be countenanced.

10. There is no legal, factual, or logical basis to conclude that all markets, regardless of size, need eight independent television "voices" to ensure that competition exists. Markets vary enormously in area, population, and composition. There is no basis to conclude that there is a single "one size fits all" solution as to the number of competing "voices" necessary to support competition in all markets.

11. Indeed, if "eight voices" is essential to in every market to insure that competition exists, why does the Commission's allocation scheme result in the majority of television markets not having eight independent voices in the entire market? The Commission has the authority and statutory obligation under Section 307(b) of the Communication's Act, 47 U.S.C. § 307(b), as amended, to provide a "fair, efficient, and equitable distribution" of licenses among communities. If eight competing over-the-air TV stations are the minimum necessary to ensure competition, why has the Commission not met its Section 307(b) obligation by granting licenses to at least eight stations in every market?

12. The answer, of course, is that no harm comes from having fewer than eight independent television "voices." As is the case with LMAs, those opposed to a loosening of the Commission's rules can point to no concrete examples of harm having resulted from a lack of eight television voices in markets where the Commission has allocated fewer licenses.

CONCLUSION

Under the circumstances, the only appropriate conclusion is that neither the "Eight Voices Test" nor the "Top Four Rule" are required to further the goals set forth in the Communications Act. Neither is necessary in the public interest as the result of competition, and the FCC therefore has a statutory **obligation** to repeal or modify these outdated regulations. *1996 Act* §202(h). The Commission has no discretion in this regard; it must eliminate these impediments forthwith.

Respectfully submitted,

/s/
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Dated: July 12, 2010

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ATTACHMENT A

RECORD NOS. 08-3078(L), 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 08-4459, 08-4460, 08-4461, 08-4462, 08-4463, 08-4464, 08-4465, 08-4466, 08-4467, 08-4468, 08-4469, 08-4470, 08-4471, 08-4472, 08-4473, 08-4474, 08-4475, 08-4476, 08-4477, 08-4478, 08-4652

In The

United States Court of Appeals

For The Third Circuit

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

***Respondents*.**

ON APPEAL FROM THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONER
SINCLAIR BROADCAST GROUP, INC.

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and
Statement of Financial Interest

No. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 08-4459, 08-4460, 08-4461, 08-4462, 08-4463, 08-4464, 08-4465, 08-4466, 08-4467, 08-4468, 08-4469, 08-4470, 08-4471, 08-4472, 08-4473, 08-4474, 08-4475, 08-4476, 08-4477, 08-4478, 08-4652

PROMETHEUS RADIO PROJECT, et al.
Petitioners,

v.

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

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Sinclair Broadcast Group, Inc. makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None, to Sinclair's knowledge

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

/s/ Clifford M. Harrington
(Signature of Counsel or Party)

Dated: May 17, 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

REGULATIONS

OTHER

INTRODUCTION

Sinclair Broadcast Group, Inc. ("Sinclair") adopts the Jurisdictional Statement, Statement of Related Cases and Proceedings, Statement of the Case (with respect to the local television ownership rule), and Standard of Review in the Brief of the National Association of Broadcasters.

ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission ("FCC" or "Commission") violated § 202(h) of the Telecommunications Act of 1996 (the "*1996 Act*"), Pub. L. No. 104-104, 110 Stat. 56, as amended by § 629 of the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, by reverting to 1999 ownership rules in 2008, even though the video market had become vastly more competitive. Oct. 23, 2006 Sinclair Comments at i-iii, 2, 8-12, 34-39 (JA__).

2. Whether the FCC acted arbitrarily and capriciously or contrary to law in failing to repeal or modify the local television ownership rule. Oct. 23, 2006 Sinclair Comments at i-iii, 34-39 (JA__).

3. Whether the FCC's local television ownership rule violates the First Amendment by singling out and placing unique speech restrictions on television broadcasters. Oct. 23, 2006 Sinclair Comments at 39-41 (JA__).

STATEMENT OF THE FACTS

This Court should vacate the FCC's *Report and Order and Order on Reconsideration*, 23 F.C.C.R. 2010 (2008) ("*2008 Order*") (JA__) for three reasons. First, the decision is inconsistent with § 202(h) of the *1996 Act*. Second, the decision is arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(a). Third, the decision violates the First Amendment because it impermissibly singles out and places unjustified unique and burdensome restrictions on the speech of television broadcasters. This case consolidates the appeals by several parties of the FCC's *2008 Order*. Sinclair's Brief addresses only the portion of the *2008 Order* that establishes limits on the number of television broadcast stations that one entity may control in a single television market. *2008 Order*, 23 F.C.C.R. 2010, 2069, ¶ 110 (JA__).

This case has a complicated procedural history, but on the merits it is simple. In 1996 Congress required the FCC to review its broadcast ownership rules at regular intervals to "determine whether any of such rules are necessary in the public interest as the result of competition." *1996 Act*, Pub. L. No. 104-104, 110 Stat. 56 § 202(h). The Commission must therefore "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* In 1999 and again in 2003, the FCC conducted proceedings under § 202(h) of the *1996 Act* and concluded that increasing competition in the video marketplace required its broadcast ownership rules to be relaxed. But in its *2008 Order* the FCC reverted to the more stringent 1999 local television ownership rule without providing any coherent explanation for doing so. *2008 Order*, 23 F.C.C.R. 2010 (JA__). Yet between 1999 and 2008 media competition generally, and television competition in particular, grew to levels that could not have been foreseen in 1999. Even in hindsight the growth in competition in those years was stunning.

By going backwards to a more stringent ownership rule after a decade of astonishing growth in competition, the FCC deliberately placed its own judgment above that of Congress on a crucial media regulation that limits the economic strength and First Amendment rights of television broadcasters. Upon finding that competition has grown immensely, the FCC *must* relax or eliminate its ownership restrictions. If it does not, it must provide clear and compelling reasons for not doing what § 202(h) admonishes the FCC to do. When competition grows immensely, the FCC *cannot* shrink the flexibility of broadcasters to respond to that increased competition.

Because § 202(h) requires the Commission to repeal or relax its ownership rules to respond to increased competition in the market, consideration of the market changes between 1999 and 2008 must form the central pillar of this Court's review of the *2008 Order*. We discuss below the vast and undisputed market changes that required the FCC at least to relax, if not eliminate entirely, the local television ownership rules.

I. The History of the FCC's Local Ownership Limits

The Communications Act of 1934, which established the FCC and set its jurisdictional authority, authorizes the FCC to regulate the operation of radio stations and to set criteria for licensing of those stations. 47 U.S.C. §§ 151, *et seq*. The 1934 Act, though, did not set limits on how many radio stations one party could own, either locally or nationally. But by 1943 the FCC had adopted rules barring ownership in a single market of more than one station in a given broadcast service – the "one-to-a-market" rules. *See Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (June 26, 1940) (FM radio); *Rules Governing Standard and High Frequency Broadcast Stations*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (television); *Rules Governing Standard and High Frequency Broadcast Stations*, 8 Fed. Reg. 16065 (Nov. 27, 1943) (AM radio).

The FCC modified the broadcast ownership rules over the years. In 1964 it prohibited the ownership of two or more television stations with overlapping "Grade B" primary service area contours. *See Report and Order in Docket 14711*, 45 F.C.C. 1476 (1964), *recons. granted in part*, 3 R.R.2d 1554 (1964). The FCC enforced that version of the rule for more than 30 years. During that time cable and satellite television, videotapes and DVDs became prevalent, and the FCC authorized hundreds of new television stations.

II. In 1996 Congress Required the FCC to Review its Local Broadcast Rules Periodically and Repeal or Modify Rules No Longer Necessary in the Public Interest to Promote Competition

By the mid-1990s there was concern that, in light of the rapidly growing numbers of competing broadcast stations, as well as the entry of new forms of electronic media, the FCC's multiple ownership regime might be too restrictive. In 1996 Congress adopted sweeping amendments to the 1934 Communications Act "[t]o promote competition and reduce regulation." *1996 Act*, Pub. L. No. 104-104, 110 Stat. 56 § 202. One of many deregulatory provisions of the *1996 Act* required the Commission to conduct a rulemaking to determine whether to retain, modify, or eliminate its restrictions on the number of television stations that a party may own, operate or control within the same television market. *See id.* § 202(c)(2). In a further reflection of Congressional concern that the rapidly evolving marketplace for news and video might require future adjustment of any rules retained by the FCC after its initial review, Congress expressly required the Commission periodically to review its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* § 202(h).[1]

The United States Court of Appeals for the District of Columbia Circuit later stated that the periodic review provision of § 202(h) was designed "to continue the process of deregulation" and to "carr[y] with it a presumption in favor of repealing or modifying the ownership rules." *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, 1048 (D.C. Cir. 2002).

III. In 1999 the FCC Relaxed the Local Television Ownership Rule, but the D.C. Circuit Court of Appeals Ruled that the Decision was Insufficiently Deregulatory

The Commission completed the first review of its ownership rules, as required by § 202(h), in 1999. *See In re Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12903 (1999) ("*1999 Order*"). By 1999 the television market had become much more competitive even since the *1996 Act*. DBS satellite television services (for example DirecTV) that had just been launched in 1995 had become large, sophisticated competitors. Their all-digital service, offering hundreds of signals, had raised the bar and forced cable operators to begin upgrading their own services. Spurred by DBS competition, the number of multichannel video programming distributor households grew by

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[1] Initially the review was to be conducted biennially, but Congress subsequently revised § 202(h) to require quadrennial reviews.

approximately 10 million between 1996 to the end of 1999.[2] Between 1996 and 1999 the number of program channels available to consumers had also jumped, and VCRs and videotapes had given way to DVDs. According to the *1999 Order*, the "record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars." *1999 Order*, 14 F.C.C.R. 12903, 12907, at ¶ 7.

About the same time that President Clinton signed the *1996 Act*, Larry Page and Sergey Brin began a university research project that the world would soon know as Google and the DVD (and now Blu-ray) rental service Netflix was established. In 1999, the first high speed, "always on" Internet access lines were being deployed to homes and businesses. Internet video services were little more than rudimentary experiments.

The FCC's *1999 Order* recognized that because of the increased competition that had arisen in the video programming market and the increased diversity of video programming that existed at that time, it would be in the public interest to relax the multiple ownership rules by, among other things, adopting a new local

[2] *See In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 F.C.C.R. 1034, 1039-40, at ¶ 11 (1998); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 F.C.C.R. 6005, 6008, at ¶ 8 (2001).

television rule. That relaxed rule permitted a single entity to own two television stations (a "duopoly") in the same market only if: (i) either (a) the Grade B contours of the stations did not overlap or (b) at least eight independently owned and operated full-power commercial and non-commercial TV stations would remain post-merger in the television market in question, and (ii) the two stations were not both among the top four-ranked stations in the market, as measured by audience share ("Top Four Rule") (these two restrictions on ownership are collectively referred to herein as the "1999 Eight Voices Test"). 47 C.F.R. § 73.3555(b). The 1999 Eight Voices Test excluded all media sources except broadcast television in counting independent "voices." In contrast, the cross-ownership rules for radio and television ownership adopted by the FCC in the same Order defined independent "voices" far more broadly, counting television stations, radio stations, as well as independently owned daily newspapers (with circulation minimums) and cable systems that provided generally available service.

Sinclair challenged the *1999 Order*, and demonstrated that the FCC had not justified retaining the prohibition on owning two stations in one market. As explained below, Sinclair was particularly affected by the *1999 Order*, because it threatened to force Sinclair to unwind historically permissible business arrangements. Ruling on Sinclair's appeal, the D.C. Circuit found that the 1999 Eight Voices Test was arbitrary and capricious and that the FCC had failed to justify it as "necessary in the public interest" as required under § 202(h) of the *1996 Act*. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). The D.C. Circuit determined that the FCC had not justified why non-broadcast sources (such as newspapers and radio stations) counted as "voices" for the purposes of cross-ownership of different media while the number of "voices" for local television ownership purposes included only broadcast television stations. In 2002, the D.C. Circuit remanded the matter to the FCC, with instructions to better justify the 1999 Eight Voices Test or eliminate it.

IV. The FCC Abandoned the 1999 Rule and Adopted a Less Restrictive Rule

The FCC consolidated the D.C. Circuit's 2002 *Sinclair* remand with its next periodic ownership review under § 202(h), and completed that review in 2003. While the review of the FCC's 1999 Eight Voices Test was pending before the D.C. Circuit, media competition grew even faster than before. With new rights to deliver local broadcast signals, DBS services pushed into metropolitan areas, forcing major cable systems to upgrade facilities to offer even more channels, high definition, video on demand and high speed Internet access over cable lines. Multi-channel video provider penetration continued to increase, and by "clustering" large systems in major cities and building local "interconnects," cable systems made great strides into the local television advertising market. *See, e.g.*, Oct. 23, 2006 Sinclair Comments at 26-30 (JA__); Oct. 23, 2006 NAB Comments at 25-31, 106-107 (JA__). Consumers and businesses signed up for high speed Internet access lines as fast as they could be deployed. Newspapers that had not already done so launched new Internet web sites, and television and radio stations followed suit. Online video, though, was still rudimentary.

In 2003 the FCC concluded that the 1999 Eight Voices Test "is not necessary in the public interest to promote competition . . . [and] does not promote, and may even hinder, program diversity, and localism." *In re 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunication Act of 1996*, 18 F.C.C.R. 13620, 13668, at ¶ 133 (2003) ("*2003 Order*") (JA__). The *2003 Order* eliminated the 1999 Eight Voices test and adopted a new and less restrictive local television rule.

V. This Court Ruled the FCC Had Not Justified the 2003 Local Television Ownership Rule So it Stayed the 2003 Order and Remanded to the FCC for Additional Justification

This Court reviewed the *2003 Order* in *Prometheus Radio Project v. FCC,* 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*"), *cert. denied*, 545 U.S. 1123 (2005), and determined that § 202(h) imposed an obligation on the FCC to review and revise its multiple ownership rules that goes beyond its normal responsibility under the APA. The Court found that "Section 202(h) requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have . . . . If [a regulation is no longer deemed useful], it must be vacated or modified." *Prometheus I,* 373 F.3d at 395 ("In 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. Yet no matter what the Commission decides to do to any particular rule . . . it must do so in the public interest and support its decision with a reasoned analysis."). The Court agreed with the *2003 Order* that media other than broadcast television effectively contribute to viewpoint diversity in local markets. *See id.* at 414. The Court also rejected challenges to the FCC's conclusion that consolidation can improve local programming. *Id.* at 415.

The *Prometheus I* decision nonetheless concluded that the FCC had not justified the local television ownership rule adopted in the *2003 Order*. The Court stayed the effectiveness of the *2003 Order* and later rejected, *inter alia*, the 2003 rule as arbitrary and capricious. The Court remanded the case, ordering the FCC to justify the basis for the numerical limits established by the rule, and retained jurisdiction to review the FCC's treatment of the television ownership rule on remand.

Prometheus I did not address the 1999 Eight Voices Test that had troubled the D.C. Circuit Court in the *Sinclair* decision. The *Prometheus I* stay, however, had the effect of requiring the FCC to temporarily apply the 1999 Eight Voices

Test, the same test the D.C. Circuit Court found to be insufficiently deregulatory and that the FCC had later determined that it could not justify.

VI. The FCC Ruled on this Court's Remand Five Years Later, and Simply Reverted to the 1999 Rule that the D.C. Circuit Had Rejected

This Court remanded the *2003 Order* to the FCC in June of 2004. The FCC did nothing in response. But in 2006 the FCC was required by § 202(h) to review and justify its ownership rules again, and it initiated the § 202(h) review and consolidated this Court's 2004 remand order with the 2006 ownership rule review. The FCC therefore set up a proceeding in which it was nominally supposed to be justifying and reconsidering its 2002 order, which was adopted based on market changes between 1999 and 2002, while at the same time considering the need for those same rules under the radically changed market condition that existed in 2006. The FCC compounded the incongruity of this task by waiting until 2008 to complete its review and issue an order.

By all measures, competition in the television market specifically and the video market generally grew far faster from 2003 to 2008 than it had even in the torrid growth years of 1999 to 2003. Yet in 2008 the television broadcast industry remained subject to a nearly decade-old ownership rule that both the D.C. Circuit and the FCC itself had found to be unjustified in light of the competitive markets that had existed years earlier. In the nearly four years between the *Prometheus I* remand and the FCC's release of the *2008 Order*, competition in media markets generally, and in the video and television markets in particular, increased faster than ever before. By 2006, MVPDs served millions more homes than they had in 2003 and the number of television program channels available increased enormously. *See*, *e.g.*, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2506-07, 2521, 2579 (2006). Major sports programming - long an anchor of national broadcast networks and local station schedules alike - migrated to cable network services that could count on huge subscriber fee increases to outbid broadcast networks and stations.

By 2006, sales of local advertising by cable systems increased dramatically too, while total advertising sales by television broadcast stations dropped during the same time. *See* Oct. 23, 2006 NAB Comments at 29-35 (JA__). Online video grew from a hobby to serious business. *Id.* at 34 (JA__). In 2006, Google was valued at well over $100 billion, and the combined enterprise value of Google and Yahoo! was significantly more than that of all of the top 20 local television, radio, and newspaper companies <u>combined</u>. *See* Oct. 23, 2006 Belo Comments at 18 (JA__). Video-sharing website YouTube was founded in 2005, a year after the *Prometheus I* remand, and by the summer of 2006 it was one of the world's most popular websites. *See* Oct. 23, 2006 NAB Comments at 16-18 (JA__). High speed connections that make the Internet a practical source of video programming grew more than 50-fold, from 2 million lines in 1999 to 102 million lines in 2008.[3]

Instead of addressing this Court's concerns promptly (as should be expected, given the quadrennial review mandate, the rapid pace of technological change and increase in video competition, and the presence of aging but never justified rules), the FCC finally ruled on this Court's decision on February 4, 2008, when it released its *2008 Order*. Recognizing the "presence of other media sources in local markets, such as the Internet and cable," the FCC relaxed the rules limiting cross-ownership between newspapers and other broadcast stations subject to a new four-part test. *2008 Order*, 23 F.C.C.R. 2010, 2018-19, 2021, at ¶¶ 13, 18 (JA__). However, the FCC did not modify any other ownership rules and found, notwithstanding the FCC's own determination that the 1999 Eight Voices Test could not be justified, that "the local television ownership rule as it is currently in effect [the 1999 Eight Voices Test] should be retained." *Id.* at ¶ 87 (JA__).

According to the *2008 Order*, the FCC based this decision on its conclusion that the 1999 Eight Voices Test "promotes competition for viewers and advertisers

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[3] *See* FCC News Release, FCC Industry Analysis and Technology Division, Common Carrier Bureau, "High Speed Services for Internet Access," at 3 (2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0054.html; FCC Industry Analysis and Technology Division, Wireline Competition Bureau Statistical Reports, "High Speed Services for Internet Access," at 9 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

within local television markets" and that "a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace." *Id.* at ¶¶ 97, 99 (JA__). Protecting competition in this way is necessary, according to the FCC, "to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *Id.* at ¶ 99 (JA__).

Thus, in the *2008 Order* the FCC suddenly reversed its own finding in the *2003 Order* that the 1999 Eight Voices Test was not necessary to promote competition. In an unexplained turnaround the *2008 Order* found in a conclusory manner "that eliminating the rule could harm competition." *Id.* at ¶ 101 (JA__). In support of this new conclusion, the FCC relied only upon the conclusory statements of three special interest groups that had claimed that retention of the 1999 rule would lead to better programming and more diversity of local newscasts. *Id.* (JA__). Without <u>any</u> other authority, evidence, or analysis, the *2008 Order* concluded, "[w]hile other outlets contribute to the diversity of voices in local markets . . . eight independently owned local television stations [are necessary] in order to ensure robust competition for local television viewers and the continued provision of video programming responsive to the needs and interests of viewers in local markets." *Id.* at ¶ 101 (JA__).

VII. The 2008 Order Is Especially Harmful to Sinclair Because it Threatens Sinclair's Longstanding Business Operations

In the Argument section below Sinclair explains that the *2008 Order* is inconsistent with the letter and spirit of the *1996 Act* because it imposes unwarranted constraints on the ability of television broadcasters to compete with other media providers. But the *2008 Order* also imposes very specific harms on Sinclair. Before the FCC adopted the *1999 Order* Sinclair had entered into a number of "local marketing agreements" ("LMAs") with owners of other broadcast stations in which Sinclair owned television stations. An LMA, sometimes known as a time brokerage agreement, "is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming." *2003 Order*, 18 F.C.C.R. 13620, 13677, at ¶ 153 n.301 (2003) (citations omitted).

In a companion Order to the *1999 Order*, the Commission held that a local marketing agreement ("LMA") would constitute an attributable interest (*i.e.*, would count as ownership for purposes of the market limitations in the 1999 Eight Voices Test) if it involved more than 15% of the programmed station's air time. *See In re Review of the Commission's Regulations Governing Attribution of Broad. & Cable/MDS Interests*, 14 F.C.C.R. 12559, 12597, at ¶ 83 (1999), *on recons*., 16 F.C.C.R. 1097 (2001) ("*1999 LMA Order*"). In the *1999 LMA Order* the FCC decided that LMAs executed on or after November 5, 1996 ("non-grandfathered LMAs"), would have until August 6, 2001, either to come into compliance with the new rules or be terminated. *See 1999 Order*, 14 F.C.C.R. 12903, 12964, at ¶ 142. LMAs executed prior to November 5, 1996 ("grandfathered LMAs"), would be exempted from this requirement until further review by the Commission in its 2004 biennial review. *Id*. at 12965-66, ¶¶ 146-49.

The *1999 LMA Order* meant that certain Commission-approved LMAs between Sinclair and Cunningham Broadcasting Corporation ("Cunningham") stations became attributable to Sinclair. Because they were located in markets that could not comply with the 1999 Eight Voices Test, these agreements became subject to potential divestiture as violative of the ownership limitations.[4] The D.C. Circuit in *Sinclair* stayed this aspect of the FCC's rules.

In July 2002, three months after the D.C. Circuit remanded the 1999 Eight Voices Test for reconsideration by the FCC, Sinclair and Cunningham, through their subsidiaries, filed applications and associated waiver requests to transfer or assign to Sinclair the television station licenses held by Cunningham. Sinclair and

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[4] Cunningham, through its subsidiaries, holds the FCC licenses for television stations, WNUV-TV, Baltimore, Maryland, WRGT-TV, Dayton, Ohio, WTAT-TV, Charleston, South Carolina, WTTE(TV), Columbus, Ohio, WVAH-TV, Charleston, West Virginia, and WMYA-TV, Anderson, South Carolina. Sinclair owns and operates another television station in each of the markets in which the Cunningham stations operate. Pursuant to the LMAs, Sinclair has programmed and sold the commercial inventory of three of the Cunningham stations since 1998 and the other three Cunningham stations since either 1995 or 1996.

Cunningham made showings that sufficient competition existed in each market to justify granting the applications. In September 2002, without addressing the merits of the applications, the FCC's Media Bureau issued a letter decision dismissing the applications as "premature" in light of the then-pending *2003 Order* rulemaking proceeding. Sinclair sought agency review of the dismissal of those applications, and that review request has been pending before the FCC without action for more than six years.

VIII. In the Twelve or More Years These Matters Have Been Ongoing, the Television Marketplace has Grown More Competitive Than Anyone Could Have Anticipated

Nearly 30 million more households receive video programming from cable, satellite or other multichannel video programming distributors today than in 1999, an increase of about 50%.[5] In 1999 broadcast television accounted for substantially more than half of all television viewing. Broadcasters today collectively account for well under half of all viewing, and broadcast audiences are still declining. In 1996 Sinclair noted that the vast majority (more than 85%) of households received television via a subscription service. *See* Oct. 23, 2006 Sinclair Comments at 22 (JA__). Competition facing broadcast television has never been more fierce, with bankruptcies on the rise and many station groups

[5] *Compare In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 F.C.C.R. 6005, 6008, at ¶ 6 (2001) *with In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546, at ¶ 8 (2009).

struggling to survive. Subscription television penetration has only grown since 2006.

According to the FCC's recently issued National Broadband Plan, "[t]he percentage of households viewing television solely through over-the-air broadcasts steadily declined over the last decade, from 24% in 1999 to 10% in 2010." FCC, "Connecting America: The National Broadband Plan," at 36 (2010), *available at* http://www.broadband.gov/Plan (last visited on May 14, 2010). Cable and satellite subscription and advertising revenues are up dramatically from 1999 levels, while broadcast television revenues are down. The FCC has acknowledged that "[s]ince 2005 broadcast TV station revenues have declined 26%, and overall industry employment has declined as well." *Id.*

Since 2004, when this Court considered high speed Internet connections to be "limited in availability," the number of Internet connections has continued to increase exponentially. As noted, more than 102 million homes and businesses now have high speed Internet connections that support video programming delivery, a more than 50-fold increase since 1999, and data transmission speeds are much faster than they were just a few years ago. Broadcasters face the reality of this rampant video competition every day as consumers integrate new viewing options in their daily lives. Although it seems unlikely that anyone in Congress or elsewhere could have foreseen the almost unlimited choices for video programming that consumers enjoy today, Congress did recognize that competition was growing rapidly even in 1996 and it specifically admonished the FCC to periodically account for new competition and eliminate regulatory burdens when appropriate.

As Sinclair and others demonstrated in comments submitted to the FCC, the growth and popularity of online news has also increased at a frantic pace since 1999. The FCC reported that there were over 147 million Internet users in the U.S. in 2006, and "some 50 million Americans turn to the internet for news on a typical day." *See* Oct. 23, 2006 Sinclair Comments at 17 (JA__). The numbers are far higher today. Online news is the source of choice for the younger generation – "71% of adults 18-29 say they get their news online, yet only 46% say they regularly watch local TV news." *Id.* at 18 (JA__).

A recent Pew study concludes with what everyone knows to be obvious: there exists today myriad readily available video programming substitutes to broadcast TV. According to the study:

> In the digital era, news has become omnipresent. Americans access it in multiple formats on multiple platforms on myriad devices. The days of loyalty to a particular news organization on a particular piece of technology in a particular form are gone. The overwhelming majority of Americans (92%) use multiple platforms to get news on a typical day, including national TV, local TV, the internet, local newspapers, radio, and national newspapers. Some 46% of Americans say they get news from four to six media platforms on a

typical day. Just 7% get their news from a single media platform on a typical day.[6]

In comments in the Commission's ownership proceeding filed with the FCC, Sinclair showed that viewers consider local cable network channels as substitutes for broadcast television. *See*, Oct. 23, 2006 Sinclair Comments at 21-25 (JA__). Indeed, as long ago as 2003 the FCC recognized that broadcasters "face intense competitive pressure from alternative video programming" (*2003 Order*, 18 F.C.C.R. 13620, 13666, at ¶ 125) and viewers unquestionably consider programming offered on cable or satellite channels as substitutes for broadcast programming. *See id.* at 13673, ¶ 143 ("These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations."). Competition from cable networks and online sources is so fierce that those sources are beginning to displace broadcasting altogether for core content. One study conducted by Penn State University predicted that the sports segments of newscasts will eventually disappear from local news broadcasts and migrate online. *See* Oct. 23, 2006 Sinclair Comments at 18 (JA__). For the first time the NCAA Men's Basketball tournament will no longer be carried exclusively by CBS and will be migrating in part to a cable

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6 Pew Internet & American Life Project, Understanding the Participatory News Consumer, *How internet and cell phone users have turned news into a social experience*, at 3 (Mar. 2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf (last visited on May 17, 2010).

channel,[7] and NFL Monday Night Football, after a thirty-five year run on broadcast television, is now carried on cable by ESPN.[8]

As the full record before the FCC in this proceeding shows, since 1964 the television market has grown enormously, to the point that cable and satellite television dwarfs broadcasting by every measure, including revenue, viewing, and number of channels. And all television sources combined – broadcast, cable, satellite and fiber – are just a subset of the larger video marketplace. Today, the television broadcast industry is just one small segment in a vibrant, multi-faceted video marketplace, and that marketplace continues to grow at a breakneck pace, even while television broadcasting has actually declined, both in terms of viewing and advertising revenue. The FCC's National Broadband Plan (at 36), released just two months ago, sums up the state of the broadcast industry succinctly: "Over-the-air broadcast television . . . faces challenging long-term trends."

Broadcasters face the reality of this rampant video competition every day as consumers integrate new viewing options in their daily lives. It seems unlikely that anyone in Congress or elsewhere could have foreseen the almost unlimited choices for video programming that consumers enjoy today. But Congress did

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[7] *See* Joe Flint, *CBS cuts in Turner on NCAA basketball tournament*, Los Angeles Times, Apr. 23, 2010, at B 3.

[8] *See* Leonard Shapiro & Mark Maske, *Monday Night Football Changes the Channel*, Washington Post, Apr. 19, 2005, at A01.

recognize that competition was growing rapidly even in 1996, when it specifically admonished the FCC to periodically account for new competition and eliminate regulatory burdens when appropriate. Yet the FCC has been parsimonious in adjusting its television ownership rules, and even in spite of § 202(h) of the *1996 Act*, the local television ownership rule the FCC is enforcing today is only incrementally less restrictive than the 1964 rule. Its *2008 Order* actually went backwards, re-adopting regulations from 1999 that the D.C. Circuit found to be insufficiently deregulatory years earlier.

SUMMARY OF ARGUMENT

The proceedings leading to this appeal began more than a dozen years ago, when the FCC initiated the proceeding that resulted in the *1999 Order*. All of the proceedings at issue here have their roots in § 202(h) of the *1996 Act*, and the *raison d'être* for § 202(h) is to ensure that the FCC's media ownership regulations keep pace with the competitive reality of the markets. While these proceedings have played out, competition in video markets has been growing and even its character has been changing month by month. No one disputes that the changes in the market over the last decade-plus have been profound. Yet the question before the Court in this proceeding – a proceeding already more than four years old when this Court remanded it seven years ago – is whether the FCC has justified continued application of rules it originally adopted in 1999 to address market conditions that had already changed profoundly from those of 1999 when the most recent review was completed.

The *Prometheus I* and *Sinclair* decisions remanded for further FCC consideration different versions of the local television ownership rules – the 1999 version establishing the Eight Voices Test (D.C. Circuit) and the 2003 version that abandoned this test in favor of caps based solely on audience share and the number of broadcast television stations in a given market (Third Circuit). Because *Prometheus I* and *Sinclair* analyzed separate versions of a rule designed to regulate the same conduct, they do not conflict with one another. The FCC should have adopted a rule that addressed both Courts' concerns consistent with marketplace realities and increased levels of competition and diversity offered by cable television, other multi-channel video providers and the Internet. However, it decided instead to re-adopt the outmoded 1999 Eight Voices Test, ignoring the rapidly evolving competitive marketplace and directives of this Court's *Prometheus I* decision, and acting as if the *Sinclair* decision had never been issued.

Section 202(h) was intended to dislodge just the sort of regulatory inertia that nonetheless persists: it is 2010 and we are debating whether a rule adopted in 1999 was appropriately re-justified in 2008 after a 2002 relaxation of the 1999 rule was remanded in 2003. While competition speeds relentlessly forward, the FCC's ownership regulations have actually gone backwards through the course of three proceedings, each of which Congress intended to be an opportunity for appropriate deregulation, not increased regulation. Considering the remarkable growth in the diversity of media and the profound shifts of revenue, advertising, and content to pay television platforms and the Internet, the FCC was required to offer an exceptionally clear rationale for reverting to a 1999 regulation in a proceeding Congress intended to facilitate deregulation. But the *2008 Order*'s explanation is muddled and strained. It does not relate the 1999 Eight Voices Test to the new market realities. In short, the *2008 Order* is the antithesis of what § 202(h) requires.

The Commission's decision is also arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(a). The APA requires a court to "consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." Here, the FCC, without explanation, abruptly reversed its 2003 finding that the 1999 Eight Voices Test was no longer necessary to protect competition. *2008 Order*, 23 F.C.C.R. 2010, 2066, at ¶ 101 (JA__). The Commission also inexplicably reversed its finding that the 1999 Eight Voices Test potentially threatens local programming and that the efficiencies gained by relaxing the rule could result in a higher quality of local video programming. *Id.* at 2067, ¶ 103 (JA__). It did so even though this Court explicitly accepted the FCC's 2003 conclusion that localism can benefit from consolidation.

On remand from *Prometheus I*, the Commission did not justify its reversion back to the 1999 Eight Voices Test and it failed to demonstrate that there is any logical basis to define "voices" differently in each of its different local ownership rules. And it did all this in the face of insurmountable empirical evidence of rampant growth in competition, in spite of the D.C. Circuit's *Sinclair* holding that the rule was arbitrary and capricious and outdated even in 2002, and in spite of the FCC's own 2003 conclusion that the arbitrary and capricious 1999 Eight Voices Test could not be justified in light of continued growth in competition to television broadcasters. Instead of carefully measuring the 1999 Eight Voices Test against the factual record developed for the *2008 Order*, the Commission went backwards and reaffirmed the 1999 Eight Voices Test line without any discussion of the state of competition as it then existed. *2008 Order*, 23 F.C.C.R. 2010 (JA__).

Finally, the FCC's re-adoption of the 1999 Eight Voices Test violates the First Amendment because it perpetuates an unfair and unnecessary restriction specifically targeting television broadcasters. The FCC years ago recognized that broadcasters "face intense competitive pressure from alternative video programming" (*2003 Order*, 18 F.C.C.R. 13620, 13666, at ¶ 125 (JA__)) and viewers unquestionably consider programming offered on cable or satellite channels as substitutes for broadcast programming. *See id.* at 13673, ¶ 143 (JA__). Despite these explicit findings, the FCC's disparate treatment of local broadcast television stations continues and improperly singles out such stations as a communications medium and class of speakers, triggering heightened scrutiny of the regulation. In this day and age, the "1969 Scarcity Rationale" of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), no longer justifies restricting broadcast speech under a rational basis test. The FCC's 1999 Eight Voices Test impermissibly burdens the ability of television broadcasters to speak and therefore must be vacated.

The vast market changes that have occurred in the last decade are not disputed. The FCC itself has repeatedly acknowledged the constant and pervasive growth in video programming competition generally, and the increased competition specifically faced by local television broadcasters during this time. To sum up the question that is at the heart of this case: what is the probability that rules adopted by the FCC in 1999 to address the competitive market that then existed then would be the appropriate rules for the FCC to adopt based on the competitive market that existed in 2008 (or the even more competitive market that exists today)?

ARGUMENT

I. THE COMMISSION'S DECISION TO RETAIN THE 1999 EIGHT VOICES TEST VIOLATES SECTION 202 OF THE 1996 ACT AND IS ARBITRARY AND CAPRICIOUS

A. The Commission's Decision Violates Section 202(h) of the 1996 Act Because it Failed to Consider the Sweeping Changes that have Occurred in Television and Video Markets

This proceeding marks the FCC's third attempt to establish a coherent, rational local television ownership rule since Congress ordered the FCC under § 202(h) of the *1996 Act* to periodically review all of its broadcast ownership rules. Section 202(h) requires the Commission to evaluate "the result of competition" and to "repeal" or "modify" any rule "no longer in the public interest." *1996 Act*, Pub. L. No. 104-104, 110 Stat. 56 § 202(h). Once again the FCC failed to meet its statutory obligation, and decided that the agency should keep old regulations in place no matter how much the market had changed.

Section 202(h) imposes on the Commission a statutory duty to reexamine its ownership rules and make <u>deregulatory</u> adjustments to those rules in light of competitive changes in the marketplace. *Prometheus I*, 373 F.3d at 394-95 ("What, then, makes § 202(h) "deregulatory"? It is this: § 202(h) requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have. A regulation deemed useful when promulgated must remain so. If not, it must be vacated or modified."); *see also Fox Television Stations, Inc.*

v. FCC, 280 F.3d 1027, 1048 (D.C. Cir. 2002) ("Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules"); *Sinclair*, 284 F.3d at 159 (Section 202(h) "limit[s] the Commission's authority only to retain a rule 'necessary in the public interest'"). The Commission's decision to retain the 1999 Eight Voices Test is flatly inconsistent with that mandate.

Based on the plain language of § 202(h), and the consistent interpretation of that provision by the Courts, including this one, the Commission was required to demonstrate that its current ownership rules continue to be necessary in the public interest to protect competition in the local media marketplace. If it could not do so, it was required to repeal or modify those rules to deregulate and accommodate current competitive conditions. The Commission was thus required, in an order it released in 2008, to examine its rules in light of the facts as they existed <u>then</u>, not the state of affairs that existed nine years before when the Commission adopted the 1999 Eight Voices Test. Yet that is precisely what the FCC chose to do in its 2008 decision, paying lip service to the enormous increase in the number and variety of media outlets both locally and nationally since 1999, while at the same time failing to take into account that new technology for the distribution of video programming has fundamentally altered the balance of competition and diversity in local television markets since the 1990s.

It cannot be legitimately questioned that the record before the FCC in the *2008 Order* is replete with evidence of the proliferation of video programming via cable, satellite, and telephone company lines, offering consumers vastly more video programming than was available in 1999. In 1999 Internet video was, at best, a collection of uncoordinated experiments. Since this Court's *Prometheus I* decision, the exponential increase in competition and the number and variety of video programming outlets fundamentally changed the video programming landscape. By 2008, Internet video had become a staple of the media landscape, offering vast libraries of video programming. The only rational conclusion the Commission could reasonably have drawn from the sweeping market changes is that its local television ownership rules needed a serious overhaul. Instead, the Commission inexplicably returned to a rule it had adopted almost a decade earlier based on marketplace conditions that had long since vanished. As a result, the broadcast television industry is laboring under a 1999 era rule that was unjustified even then and is hopelessly out of touch with today's marketplace.

In 2002, the D.C. Circuit held that the 1999 Eight Voices Test did not comply with § 202(h) of the *1996 Act* because the FCC had not explained why "voices" for the purposes of cross-ownership of different media included a number of non-broadcast sources, but "voices" for local television ownership purposes were limited solely to broadcast television stations. Yet again in the *2008 Order*, the FCC ignored this directive and decided that the 1999 Eight Voices Test will still count only full power broadcast television stations as "voices." For purposes of the local television rule alone, the FCC made a strained distinction between viewpoint diversity (which it said should count other voices) and competition (which it said should not). The FCC thus concluded that:

> [T]he local television ownership rule is no longer necessary to foster [viewpoint] diversity because there are other outlets for diversity of viewpoint in local markets, and a single-service ownership restriction is not necessary to foster diversity. Therefore, although we recognize that other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets, we do not believe they should be counted as voices under the local television ownership rule. *2008 Order*, 23 F.C.C.R. 2010, 2065-66, at ¶ 100 (JA__).

In direct contravention of the D.C. Circuit's 2002 remand, and impermissibly reversing its own 2002 conclusion by claiming that consolidation can improve local programming <u>after this Court had affirmed that conclusion</u>, the FCC re-adopted the 1999 Eight Voices Test on a permanent basis. The FCC purported to explain the 180-degree turnaround from its *2003 Order* that the 1999 Eight Voices Test was not in the public interest. Its only support for this remarkable about-face, however, consisted of the unsupported statements of three "public advocacy" groups and the creation by the FCC – out of thin-air – of a new and separate broadcast television programming competition need that cannot be supplied by other media. By doing so, the FCC failed to take into account the vast and rapidly growing supplies of video programming available online and elsewhere as "competition" to broadcast television. Even more remarkably, the FCC did not count the three or more suppliers of cable and satellite television services that reach the great majority of Americans as "competition" for broadcast television, even though the FCC readily admits they do provide competition for advertisers and foster local viewpoint diversity.

In light of the changes in technology, in competition, and the unprecedented increase in the number of outlets providing news, information, and entertainment to consumers between 1999 and 2008, the Commission's constraints on the number of television broadcast stations a single entity may own in a local market cannot be justified under any reasoned analysis of today's competitive market conditions. Consequently, because the Commission failed to repeal or modify its rules to take into account overwhelming empirical record evidence before it, its backward-looking and re-regulatory decision violates its obligations under § 202(h) of the *1996 Act* and must be vacated.

B. The Commission's Re-adoption of the Outdated 1999 Eight Voices Test is Arbitrary and Capricious

Under the APA, a "reviewing court shall . . . hold unlawful [or] set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). The

APA standard requires a court to "consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment" and a court must vacate an agency's orders if they are arbitrary and capricious. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). An agency has acted arbitrarily and capriciously when it has failed to "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made,'" has not considered "an important aspect of the problem," has "relied on factors which Congress has not intended it to consider," or has not provided "an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). And as this Court has recognized, the APA requires an agency that "sharply change[s] its substantive policy" to provide a reasoned explanation for the change. *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 350-51 (3d Cir. 2007) (internal citation and quotations omitted). The FCC has not met its burden in this case.

1. The Commission's Selection of "Eight Voices" as the Standard for Competition in Markets and Its Refusal to Count Non-Broadcast Television Voices for Purposes of the 1999 Eight Voices Test Cannot Withstand Scrutiny

In neither its *1999 Order* nor its *2008 Order* does the FCC ever articulate why "eight" television voices are necessary to promote competition. And while this Court in *Prometheus I* stated that it must "uphold an agency's line-drawing decision when it is supported by the evidence in the record," that has no application here because there is no supporting evidence in the record for the FCC's decision. The Commission has provided no evidence of why it decided to select the number "eight" when it could have just as easily chosen four, seven, or seventeen voices to meet its purported diversity or competition goals. The Commission's selection of "eight" is thus wholly lacking rational justification or support in the record and, therefore, the Commission's conclusion cannot stand.

Moreover, the inconsistency between the definition of "voices" in the 1999 Eight Voices Test and its other ownership rules is a classic example of arbitrary and capricious decision-making. Indeed, on this exact issue the D.C. Circuit in the *Sinclair* case found that the FCC committed reversible error when it failed to justify its decision to define "voices" differently for its various ownership rules. Under the 1999 Eight Voices Test, this problem – which led the *Sinclair* court to remand the rule in 2002 – has been exacerbated because the voice-count provision in the television ownership rule continues to include only the number of television stations in a given market. But the voice-count provision in the newspaper/broadcast cross-ownership rule now counts both newspapers *and* television stations and the radio/television cross-ownership rule includes not only radio and television stations, but also English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny, plus any independently owned out-of-market radio stations with a minimum share as reported by Arbitron. 47 C.F.R. §§ 73.3555(c), (d).

The FCC also irrationally blends the concepts of viewpoint diversity and competition together, negating the distinction between the two that forms the basis of the FCC's justification for retaining the 1999 Eight Voices Test. For example, eight independent broadcast television stations are necessary, under the FCC's rationale, "to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *2008 Order*, 23 F.C.C.R. 2010, 2065, at ¶ 99 (JA__). However, for the purposes of viewpoint diversity, "other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets." *Id.* at 2065, ¶ 100 (JA__). The FCC's failure to explain why competition is aided by only one type of voice yet viewpoint diversity is aided by a range of voices, is particularly arbitrary because its description of the goals of competition is nearly indistinguishable from the stated goals of viewpoint diversity. *Cf. id.* at 2065, ¶ 99 (JA__) (describing increased competition as enhancing "dynamic and vibrant alternative fare, including local news and public affairs programming") with *id.* at 2059, ¶ 84 (JA__) (describing viewpoint diversity in the radio ownership context as being a "vibrant marketplace of ideas to ensure a diversity of editorial content").

To further illustrate the arbitrary nature of the Commission's decision, the FCC attempted to justify the disparate treatment of the local television ownership rule and the newspaper/broadcast cross-ownership rule by claiming, among other things, that "consumers rely mostly on newspapers and television for news and information." *2008 Order*, 23 F.C.C.R. 2010, 2042, at ¶ 57 (JA__). According to the FCC, approximately 38.2 percent of all respondents to a study it commissioned consider broadcast television stations, and 30.1 percent consider local newspapers, "the most important source of local news or local current affairs." *Id.* (JA__). However, the Commission chose not to count <u>newspapers</u> as "voices" for purposes of the 1999 Eight Voices Test. Paradoxically, it did count other kinds of "voices" for the local newspaper/broadcast cross-ownership rule.

In an effort to justify its decision to retain the dissimilar treatment of "voices" that the *Sinclair* court determined to be arbitrary and capricious and that the FCC previously determined to be unjustified, the FCC has adopted a completely different rationale than when the rule was first fashioned. It does this by attempting to cast the 1999 Eight Voices Test as no longer being necessary to promote viewpoint diversity but instead as being retained "to foster competition among local television stations." *2008 Order*, 23 F.C.C.R. 2010, 2065, at ¶ 100 (JA__).[9] Because its goal has changed, according to the FCC, limiting the voice count provision to only broadcast television voices has now become appropriate because:

> [w]hile other outlets contribute to the diversity of voices in local markets . . . it is necessary in the public interest to ensure that there are at least eight independently owned local television stations in order to ensure robust competition for local television viewers and the continued provision of video programming responsive to the needs and interest of viewers in local markets. *Id.* at 2066, ¶ 101 (JA__).

The problems with this approach are several. First, and most important, the FCC has no authority to change its *goals* in response to changes in the market. Congress defined the goal, and the goal is to eliminate or modify regulations that are no longer necessary. Plainly, § 202(h) does not contemplate, much less authorize, the Commission to change or re-define its own goals simply to rationalize the perpetuation of regulations that § 202(h) would otherwise require the FCC to discard.

Second, the FCC, without justification or adequate explanation, came to the exact opposite conclusion regarding competition than it did for the local television

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[9] As will be seen, the Commission's reference is not to economic competition, but to programming competition – just another term for program diversity.

ownership rule reviewed by this Court in *Prometheus I*. Seven years ago, in 2003, the Commission stated based upon a lengthy record and numerous empirical studies (including a number of its own studies), that "in light of the myriad sources of competition to local television broadcast stations . . . our current local TV ownership rule is not necessary in the public interest to promote competition . . . [and] does not promote, and may even hinder, program diversity and localism." *2003 Order*, 18 F.C.C.R. 13620, 13668, at ¶ 133 (JA__) (emphasis added). The FCC offers no factual support or reasoned analysis that would justify abandoning its determination that the 1999 Eight Voices Test is not necessary to protect competition. This revisionist history is unsupportable especially given the aforementioned dramatic changes and increase in competition that have occurred since 1999.

In the *2003 Order* the FCC agreed and explicitly stated that it was unable to justify the 1999 Eight Voices Test. *See 2003 Order*, 18 F.C.C.R. 13620, 13671, at ¶ 140 (JA__) (concluding that competition is at the heart of the local ownership rule); *see also id.* at 13683, ¶ 164 (JA__) ("owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do"); *id.* at 13683, ¶ 165 (JA__) ("we have no record evidence linking relaxation of the local ownership rule to a reduction in local control over content");

id. at 13685, ¶ 169 (JA__) ("evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations" and with the costs of local news production rising places some broadcasters under financial pressure which could cause them to choose a less expensive option than producing their own local programming).

People everywhere in the United States have access to many sources of local, national and international news and information through television and radio broadcast media, non-broadcast electronic and print media, and on the Internet. Local broadcast ownership rules, whether restrictive or relaxed, can have very little effect on viewpoint diversity. Moreover, viewpoint diversity is not a legitimate basis for justifying local television ownership restrictions. The Commission equates viewpoint diversity with diverse ownership or control of sources of local news. *See 2003 Order*, 18 F.C.C.R. 13620, 13687-88, at ¶¶ 175-77 (JA__). Yet, the FCC's broadcast rules do not require that television stations (or any FCC licensee for that matter) actually provide any news content, on the theory that such a combination would reduce the diversity of news content. Thus, under the 1999 Eight Voices Test, the owner of a local television station, which provides absolutely no news content, could be prohibited from buying another station, which also provides no news content, apparently on the grounds that such a combination would reduce news content. In contrast, the owner of a cable television system, with a popular twenty-four hour local news channel would be permitted to purchase a top-rated local television station with the market's most popular news programming. This result illustrates that continued application of the Commission's 1999 Eight Voices Test is arbitrary and capricious.

Another of the indefensible and arbitrary underpinnings of the FCC's decision is that the FCC takes for granted, without support, that all markets, regardless of size, need eight independent television voices to ensure that competition exists. There is no support in the record for the FCC's dubious conclusion that the 4th ranked market of Philadelphia and the 207th ranked market of Juneau both need a minimum of eight independent television stations to adequately ensure that competition exists in those markets, even though they are poles apart. Competition in the two markets, for everything from television to taxis to cheese steaks could hardly be more different. Furthermore, if the number "eight" is so important, why do the vast majority of television markets not have eight independent television voices?

Moreover, the FCC has never provided any evidence that having fewer than "eight" independently operated television stations in a market (such as six or seven, or even two or three) results in higher advertising rates or harms viewers in any way. Many television markets have far fewer than eight television stations (e.g., Helena, Montana; St. Joseph, Missouri; Mankato, Minnesota; Zanesville, Ohio). If eight over-the-air TV stations are the minimum necessary to ensure competition in markets, why has the Commission not exercised its authority (and obligation) under § 307(b) of the Communication's Act, 47 U.S.C. § 307(b), as amended, to provide a "fair, efficient, and equitable distribution" of licenses among communities by authorizing at lest eight stations in every market? At the same time, the FCC has relaxed the newspaper-broadcast ownership rule, even though most cities only have a single independent major newspaper.

The notion that local video markets would be damaged by multiple ownership of television stations is also contrary to the FCC's own finding that the record before it was "unpersuasive regarding the effects of multiple ownership on local programming." *2008 Order*, 23 F.C.C.R. 2010, 2067, at ¶ 103 (JA__). It also contradicts the FCC's observation that it had received evidence from numerous sources showing that multiple ownership contributes to expanded local news and programming responsive to local communities. *Id.* (JA__). As noted, in *Prometheus I* this court rejected arguments that the FCC had not justified its conclusion that consolidation can improve the quality of local news. Convoluted reasoning should not be permitted to serve as a justification for the FCC's position that the 1999 Eight Voices Test should be re-adopted for the purposes of "enhancing" local programming.

The FCC was also compelled to heed this Court's directive in *Prometheus I* "to harmonize certain inconsistencies and better support its assumptions and rationale" (*Prometheus I*, 373 F.3d at 412) and those of the D.C. Circuit in *Sinclair* admonishing the FCC for not recognizing media other than local television stations when adopting television ownership restrictions. Yet the FCC has inexplicably and unjustifiably failed to do either. Instead, it reinstated the outdated 1999 Eight Voices Test relic without reasoned analysis and continues to apply that test arbitrarily to only one set of transactions, the purchase and sale of television stations. Without intervention by this Court, the 1999 Eight Voices Test and its disparate treatment of "voices" will continue to be applied as if the *Prometheus I* and *Sinclair* decisions had never been issued, and as if the video marketplace remains frozen in the year 1999.

2. There is Not Sufficient Support in the Record for the Commission to Maintain its Top Four Rule Portion of the Eight Voices Test

As noted, the Commission was required to address the issues remanded to the FCC in *Prometheus I* and also to fulfill its statutory obligation to periodically review "<u>all of its ownership rules</u> . . . [to] determine whether any of such rules are necessary in the public interest as the result of competition." *1996 Act*, Pub. L. No. 104-104, 110 Stat. 56 § 202(h) (emphasis added). Accordingly, it was required to re-evaluate the Top Four Rule portion of the 1999 Eight Voices Test and either repeal or modify that rule or justify why it was still necessary. The D.C. Circuit found the Top Four Rule to be arbitrary and capricious in 2002 because it does not take into account the competition and diversity provided by broadcast and non-broadcast outlets alike. The Top Four Rule certainly cannot meet the APA standards today without an especially hard look, particularly in light of the astonishing growth in competition to local broadcast television stations since it was first adopted in 1999.

The Top Four Rule is arbitrary and capricious and should be eliminated. The rule is based on conjecture that a combination of top four-ranked stations in a local market would create or enhance market power. *2003 Order*, 18 F.C.C.R. 13620, 13696, at ¶ 197 (JA__). But, as described, that analysis is based on an out-dated framework that assumes that the relevant market consists only of local television stations. In reality, local broadcasters face intense competition for viewers and advertisers from a vast number of sources, including cable and satellite programming networks and Internet content providers, and for advertising dollars from a wide variety of media outlets now providing video content, including cable operators, newspapers, radio stations, and Internet websites.

The FCC ignored thousands of pages of empirical record evidence before it, choosing instead to base its re-adoption of the Top Four Rule on a novel and tortured competition theory. The FCC cites <u>no</u> evidence that mergers or joint operations of two top-four stations harm competition. The APA requires that the Commission must, at a minimum, provide specific evidence to validate its conjectures or, alternatively, it should properly concede that its Top Four Rule cannot be justified. *See, e.g.*, *Pa. Fed'n of Sportsmen's Clubs, Inc.*, 497 F.3d at 350-51. Since 2003 - and certainly since 1999 - the increase in the number and variety of media outlets - locally and nationally - that deliver video programming has fundamentally altered the balance of competition and diversity in local television markets. No rational individual or agency could honestly claim otherwise.

Nevertheless, the FCC now claims, without explanation, that none of this is true. In an unjustified about-face, the FCC would have the public believe that the Top Four Rule is necessary to avoid harming local competition in the advertising market in the face of real-world marketplace realities that belie the FCC's claim. For example, for a number of years in Columbus, Ohio, Dayton, Ohio, and Charleston, West Virginia, Sinclair has owned a top four-ranked station and programmed another top four-ranked station pursuant to a grandfathered LMA. To Sinclair's knowledge, no advertiser or competitor has ever raised a complaint or expressed a concern about any anticompetitive result of those LMAs. In fact, for each of the proposed acquisitions of the LMA stations, Sinclair submitted the requisite Hart-Scott-Rodino antitrust filing, and neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission took action to prohibit the agreement.

Moreover, the Top Four Rule, which the FCC has acknowledged specifically targets mergers between local stations affiliated with ABC, CBS, Fox, and NBC (*2003 Order*, 18 F.C.C.R. 13620, 13695, at ¶ 196 (JA__)), ignores the important fact that network affiliations are not set in stone. Networks may and do change affiliates in a given market when affiliation agreements expire, and affiliates are also free to drop or add network affiliations at any time, subject to their contractual obligations. The FCC has no involvement in the process. Consequently, while the FCC can use its top-four restriction to bar assignments or transfers, which require its prior approval, parties can freely change their network affiliations at other times, readily circumventing the rule. In a series of cases involving objections to changes in stations' programming formats, the FCC declined to become involved because programming formats are transitory and freely can be changed. *See, e.g.*, *Dev. Of Policy re Changes in the Entm't Formats of Broad. Stations*, 60 F.C.C.2d 858 (1976), *recons. denied*, 66 F.C.C.2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838, 858 n.56 (D.C. Cir. 1979) (the public interest is best served by promoting diversity in entertainment formats through market forces and competition), *rev'd*, 450 U.S. 582 (1981); *see also*, *Riverside Broad. Co.*, 53 R.R.2d 1154 (1983), *recons. denied*, 56 R.R.2d 618 (1984), *remanded on other grounds sub nom., Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985). Yet the Commission disregards these cases in establishing its top-four limitation.

Similarly, shifts in local viewer preferences can also circumvent the FCC's alleged policy goal because the rule considers only the current ratings information at the time of the filing of a transfer or assignment application. For example, nothing would prohibit the owner of a top four station-ranked station from buying another station that dropped out of the top four in ratings to the number five spot. Ironically, this could create a perverse incentive for an owner to program a station in a manner to reduce its popularity, and thereby increase its sale value to market competitors. And under the FCC's rules, if the acquired station's ranking were to improve later, the combined ownership of the two stations would be legal. Indeed, in another context, the Commission itself has recognized such anomalies and has argued that market share is simply too "fluid" a measure to be a basis for ownership regulations. *See 2003 Order*, 18 F.C.C.R. 13620, 13694, at ¶ 193 (JA__).

The Top-Four Rule also erroneously assumes that affiliations with the major networks are exact substitutes for one another. The fact is, however, that Fox affiliates are unlike those of the other three major broadcast networks. Even though many Fox stations air local newscasts, the Commission has recognized that the percentage of Fox affiliates that actually originate (rather than simply rebroadcast) news is far less than those associated with affiliates of the other three major networks. *Id.* at 13696-97, ¶ 198 (JA__). Additionally, most Fox affiliates do not broadcast more than one hour of local news per day compared with an average of more than two hours per day for the other major broadcast networks' affiliates. Fox local news is also aired at different times to correspond to the different Fox network programming schedule, and thus a merger could result in additional local newscasts, contrary to the Commission's conclusion otherwise.

More generally, Sinclair noted in its comments that the Fox network on average provides its affiliates only approximately two hours of programming per weekday, compared to approximately twelve hours/day for ABC, ten hours/day for CBS, and ten and a half hours/day for NBC. *See* Oct. 26, 2006 Sinclair Comments at 39 (JA__). Sinclair also pointed out that ABC, CBS and NBC provide their affiliates with a national evening news program and a morning program with heavy news emphasis each weekday, whereas Fox generally provides only *Fox News Sunday*, a one-hour weekly program. *Id.* (JA__). Moreover, the ability of stations in today's digital world to multicast and affiliate with more than one broadcast network further erodes the FCC's alleged "network affiliation" policy bases for the Top Four Rule. For example, as Sinclair noted in its Comments, television station WTAP(TV) in Parkersburg, West Virginia, the 194th ranked market that does not include "eight voices," simultaneously aired NBC, Fox, and My Network programming on its digital primary and multicast channels. *Id.* at 36 (JA__).

There are other marketplace realities that the Top Four rule fails to take into account. As Sinclair detailed in its comments using Columbus, Ohio as an example, Time Warner owned the dominant cable system, an extremely popular Internet access service and content provider, CNN and Headline News (as well as other cable channels like HBO, Cinemax, TBS, TNT, Cartoon Network, and Turner Classic Movies), and the CW Network, and would have been free to start a local cable news channel. *Id.* at 34 (JA__). The FCC's rules would not have prohibited Time Warner from also buying a top four-ranked broadcast station in the market (nor should such a prohibition exist). *Id.* (JA__). Indeed, the FCC is currently considering applications for transfer of the television stations (and two related broadcast networks) owned by NBC to Comcast, the largest U.S. cable operator and owner of numerous cable programming networks.

In short, because there is an absence in the record that mergers of top-four ranked stations *harm* the public interest and because the FCC has failed to justify prohibiting such television station mergers in markets of any size, the Commission's Top Four Rule is a blatant violation of the APA.

II. THE EIGHT VOICES TEST SINGLES OUT A PARTICULAR COMMUNICATIONS MEDIUM FOR UNIQUE RESTRICTIONS ON SPEECH AND THEREFORE VIOLATES THE FIRST AMENDMENT

As noted, the FCC limits the number of stations a television broadcaster may own in local markets, but there are no comparable ownership restrictions on other media, such as cable, satellite, and the Internet. This is so even though the FCC years ago recognized that broadcasters "face intense competitive pressure from alternative video programming" from such sources (*2003 Order*, 18 F.C.C.R. 13620, 13666, at ¶ 125 (JA__)) and viewers unquestionably consider programming offered on cable or satellite channels as substitutes for broadcast programming. *See id.* at 13673, ¶ 143 (JA__). In fact, the FCC's own studies conducted in conjunction with the now dated ownership proceeding indicated even then that ratings for programming provided by cable networks have been steadily increasing while ratings for programming provided by broadcast networks have been on the decline. *Id.* at 13665-66, ¶ 124 (JA__).

Despite these findings, the FCC's disparate treatment of local broadcast television stations continues and improperly singles out television stations as a communications medium and class of speakers, triggering heightened scrutiny of the regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) ("[L]aws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State.") (internal citation and quotations omitted); *Minneapolis Star & Tribune Co. v. Minnesota Cmm'r of Revenue*, 460 U.S. 575, 582 (1983) (state regulation singling out the press "burdens rights protected by the First Amendment [and] cannot stand unless the burden is necessary to achieve an overriding governmental interest."); *FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (heightened scrutiny applies where the statute "singles out noncommercial broadcasters and denies them the right to address their chosen audience on matters of public importance").

An internal memo of the FCC concludes that the "1969 Scarcity Rationale" of *Red Lion* can no longer provide a basis for regulating television broadcast ownership under a rational basis test. The FCC study, entitled "*The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*," concludes as follows:

> [N]ow that there are several media other than traditional TV and radio by which to reach listeners and viewers, conditions placed only on them are not so easily characterized as over-reaching by the government . . . [and] [t]hat predicate is much more difficult to prove today than it was when most Americans had only three TV channels, and makes a weaker basis for depriving speakers of their First Amendment rights.
>
> * * * *
>
> The Scarcity Rationale was intellectually questionable from its inception. Moreover, even its proponents knew it might not be needed long. The *Red Lion* Court realized that new technologies may require changes in old ideas. The technologies that have appeared since *Red Lion*, as well as other factors described above, have nullified The Scarcity Rationale. It no longer provides a rational basis for regulating

> traditional broadcasters. . . . Government remains strongly interested in American media and in ensuring that news, information, opinion (especially about local issues) and entertainment reach all Americans. Government also has antitrust interests in promoting competition in the sale of advertising and the creation and purchase of programming. The interment of The Scarcity Rationale need not frustrate any of those interests. On the contrary, it could re-focus attention on the media of today, its shortcomings (if any), and remedies for them that will solve today's problems rather than those of a channel-poor and fortunately bygone time.[10]

Of course the FCC is not bound to defer to or even acknowledge a research paper published by a member of its Media Bureau staff. But it cannot perennially ignore the market conditions, visible to everyone today, that its own staff considers to be decisional. Dramatic changes in the video marketplace since the Supreme Court first endorsed the scarcity rationale forty years ago, including the increase in cable subscriptions and proliferation of cable networks, the advent of DBS service and the Internet, undermine the justification for such an intrusive regulation. The local television ownership rule targeting television broadcasters and burdening their ability to speak through the acquisition of and operation of television stations must be scrutinized under a strict standard. Under that standard, the FCC's backward looking re-affirmation of the outmoded 1999 Eight Voices Test must be invalidated.

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[10] John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," FCC Media Bureau Staff Research Paper, at 30 (Mar. 2005) (JA__).

The FCC's 1999 Eight Voices Test creates an outdated ownership restriction that targets television broadcasters and limits their speech, but not the speech of other media companies, such as cable operators, Internet service and content providers, and satellite operators. In light of the wealth of new media outlets and sources in the modern media marketplace, the FCC's conclusion that the so-called "1969 Scarcity Rationale" continues to be a valid justification for a rational basis review of FCC regulations on broadcasters cannot be sustained, and the disparate treatment of television broadcasters violates the First Amendment.

CONCLUSION

For the reasons shown in this Brief and those provided in the Brief of the National Association of Broadcasters, Sinclair requests the Court vacate the FCC's 1999 Eight Voices Test.

Respectfully submitted,

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in FRAP 32(a)(5)(A) for a brief produced with a proportional font. This brief contains 12,376 words, not including the Table of Contents and Table of Authorities, permitted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF DIGITAL SUBMISSION

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

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