**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
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| 2014 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. 14-50 |
| | ) | |
| 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 |
| | ) | |
| Promoting Diversification of Ownership In the Broadcasting Services | ) | MB Docket No. 07-294 |
| | ) | |
| Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets | ) | MB Docket No. 04-256 |

**CBS CORPORATION SUBMISSION OF DOCUMENTS**

As referenced in its Comments filed in this docket, CBS Corporation hereby submits the material it previously filed in dockets 09-182 and 07-294 for inclusion and incorporation into the above-captioned dockets.

Respectfully submitted,

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August 6, 2014

Attachments

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**COMMENTS OF CBS CORPORATION**


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# COMMENTS OF CBS CORPORATION

## I. INTRODUCTION AND SUMMARY

Despite transformative developments in the media marketplace and an express Congressional directive to reexamine the media ownership rules and make adjustments to take account of competition, the broadcast ownership rules have now remained essentially unchanged for more than a decade. In this fifth periodic review[1] of the Federal Communications Commission's ("FCC's" or "Commission's") media ownership rules undertaken pursuant to Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"),[2] CBS Corporation ("CBS") respectfully submits that the time for change is now.

Today, the traditional media compete with an ever-increasing and constantly changing array of alternative sources of news, information, and entertainment. Many of

[1] *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202(h) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 11-186, MB Docket No. 09-182 (rel. Dec. 22, 2011) ("*NPRM*").

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

these competitors were non-existent or in their mere infancy when Congress commanded the FCC to "repeal or modify" any of its media ownership rules that it finds to be "no longer necessary in the public interest as the result of competition."[3] As the Commission rightly recognizes in the *NPRM*, its radio/television cross-ownership rule clearly meets this test, and CBS strongly supports the proposal to eliminate this rule and commends the FCC for advancing it. As demonstrated below, however, the agency's tentative conclusions that the local television ownership (or "duopoly") rule, the dual network rule, and the local radio ownership rule should be retained intact are misplaced. These rules, too, are ripe for repeal or at the very least relaxation, and Section 202(h) and the First Amendment mandate such a result.

## II. COMPETITIVE DEVELOPMENTS HAVE RENDERED IT IMPOSSIBLE FOR THE COMMISSION TO JUSTIFY RETENTION OF ITS RULES UNDER SECTION 202(h) OR THE FIRST AMENDMENT.

Congress adopted Section 202(h) of the 1996 Act in order to drive systematic deregulation over time, as the plain language of the provision and its design and context,[4] legislative history,[5] and stated purpose[6] make plain. Properly interpreted, the provision

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[3] *Id.*

[4] Section 202(h) is the coda to a number of dramatic, consistently deregulatory, requirements of Section 202 which lifted entirely or loosened then-existing media ownership restrictions. *See id.* § 202(a) (eliminating national radio station ownership cap); *id.* § 202(b) (increasing numerical limits for local radio station ownership and eliminating audience share limitation); *id.* § 202(c) (repealing national television station ownership cap, increasing national audience reach limitation, and ordering rulemaking on local ownership limits); *id.* § 202(d) (relaxing one-to-a-market rule); *id.* § 202(e) (easing dual network ownership restrictions); *id.* § 202(f) (abolishing cable-broadcast cross-ownership restriction). In light of this statutory context, Section 202(h) was clearly intended to "continue the process of deregulation" that the rest of Section 202—and indeed, the entire 1996 Act—commenced. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) ("*Fox I*"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir 2002); *see Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

[5] The House Report indicates that because of "the explosion of video distribution technologies and subscription-based programming sources . . . Congress and the [FCC] must reform Federal policy and the current regulatory framework to reflect [ ] new marketplace realities." H.R. Rep. No. 104-204, at 55 (1995). Even in 1995, Congress recognized that the industry was "operating under archaic rules that better

"carries with it a presumption in favor of repealing or modifying the ownership rules."[7] Section 202(h) plainly requires the FCC to "'monitor the effect of . . . competition . . . and make appropriate adjustments to its regulations.'"[8] Indeed, the statute "[r]ecogniz[es] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules."[9] Accordingly, Section 202(h) "requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain 'necessary in the public interest.'"[10] At a minimum, it is clear that the FCC may only retain existing ownership rules if it "*reasonably* determines that the rule is 'necessary in the public interest.'"[11]

The media ownership rules operate as a direct restriction on speech and differentiate among various speakers; accordingly, the First and Fifth Amendments also

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suited the 1950's than the 1990's," but "the broadcast environment . . . [wa]s the most competitive it[ had] ever been." S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns).

[6] *See* 1996 Act, Preamble, 110 Stat. 56 (stating that the 1996 Act was primarily intended "to promote competition and reduce regulation").

[7] *Fox I*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

[8] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004) (quoting *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4727 (¶ 5) (2003)); *see Fox I*, 280 F.3d at 1033.

[9] *Prometheus*, 373 F.3d at 391.

[10] *Id.* In requiring the agency "periodically . . . [to] justify its existing regulations," the statute created a new obligation that "extends *beyond* [the Commission's] normal monitoring responsibilities." *Id.* at 395 (emphasis added). Even absent Section 202(h)'s periodic review requirement, the FCC would still face obligations under the Administrative Procedure Act to "evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (quoting *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)); *see also Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry Co.*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."); *NBC v. United States*, 319 U.S. 190, 225 (1943) (the Commission cannot retain a rule "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[]").

[11] *Fox I*, 280 F.3d at 1048 (emphasis added); *see Sinclair*, 284 F.3d at 159.

constrain the Commission's authority to maintain these rules. Although broadcasters historically have been afforded diminished protection under the First Amendment based on the "scarcity rationale," the agency itself[12] and the courts[13] have long recognized that the premises underlying that rationale have been discredited or eroded by revolutions in the media marketplace. Because the supposed technological basis for applying a lower level of scrutiny to broadcast is clearly absent today—and because the media ownership rules are grounded largely in content-based considerations[14] and "discriminate among

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[12] *See Syracuse Peace Council*, 2 FCC Rcd 5043, 5053, ¶ 65 (1987), *petition denied*, *Syracuse Peace Council v. FCC*, 867 F.2d 654, 661-62 (D.C. Cir. 1989) ("the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press").

[13] *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 & n.5 (1994) ("*Turner I*") (noting the "dubious" foundations of the scarcity doctrine and that "courts and commentators have criticized the scarcity rationale since its inception"); *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984) (stating that "technological developments have advanced so far that some revision of the system of broadcast regulation may be required"); *Time Warner Entm't Co. L.P. v. FCC*, 105 F.3d 723 (1997) (Williams, J., joined by Edwards, C.J., Silberman, J., Ginsburg, J., and Sentelle, J., dissenting) (dissenting from D.C. Circuit's denial, by a 5-5 vote, of rehearing *en banc* of a panel decision upholding, on the basis of *Red Lion*, a requirement that DBS providers reserve a specified percentage of their channel capacity "exclusively for non-commercial programming of an educational and informational nature," and stating that: "*Red Lion* has been the subject of intense criticism. . . . [partly based] on the perception that the 'scarcity rationale' never made sense. . . . While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice before extending it to another medium."); *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508, 509 n.5 (D.C. Cir. 1986) (explaining that "[i]t is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media" and that *League of Women Voters* "suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete"); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring) ("*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting in part) (explaining that the scarcity doctrine was "dubious from [its] infancy"); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting) ("it is no longer responsible for courts to apply a reduced level of First Amendment protection … on the indefensible notion of spectrum scarcity"); *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (Arnold, R., C.J., concurring in judgment) ("the legal landscape has changed enough since that time to produce a different result"); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring).

[14] *See, e.g.*, *NPRM*, ¶ 6 ("a major goal of the rules is to encourage the provision of local news"); *id.* at ¶ 14 (noting that its localism goal is based on determinations regarding "whether programming is responsive to local needs and interests" with a "focus" on "news and public affairs programming"); *id.* at ¶ 17 (stating

media" and "among different speakers within a single medium"[15]—these rules can be maintained only if they can satisfy strict scrutiny, which they clearly cannot. Even under intermediate scrutiny,[16] they would be unconstitutional because the FCC cannot "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way."[17]

The exponential growth in the media marketplace that has occurred in recent years has completely undermined the Commission's ability to demonstrate that its broadcast ownership rules remain "necessary in the public interest" as required under Section 202(h), or that they are appropriately tailored to serve a government interest of sufficient import to satisfy any potentially applicable level of Constitutional review. As the *NPRM* acknowledges, with "[c]onsumers . . . increasingly turning to online and mobile platforms to access news content and audio and video programming[,] . . . content providers are increasingly looking to the Internet and other new media platforms to bypass traditional media and reach consumers directly."[18] The importance of the Internet

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that its diversity goal also seeks to promote the "availability of local news and information" and resulting "level[s] of civic engagement"); *id.* at ¶ 21 (noting importance of "national news and information" and "investigative journalism" and stating that an "additional policy goal" of the media ownership rules is to "promot[e] the availability of community-responsive news and public affairs programming").

[15] *Turner I*, 512 U.S. at 659. Indeed, when the Supreme Court upheld the FCC's restriction on newspaper/broadcast cross-ownership in 1976 as constitutional under the Fifth Amendment, it emphasized that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications," which were at that time also restricted. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 801 (1978) (emphasis added). The same cannot be said today, when broadcasters and television networks are singled out and subjected to restrictions on the number of outlets that they can own, while the plethora of new media with which they compete operate free from any similar rules.

[16] Intermediate scrutiny applies to all regulations that "interfer[e] with" an entity's "speech rights by restricting the number of viewers to whom [it] can speak." *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001).

[17] *Turner I*, 512 U.S. at 664, 666 (internal quotation marks omitted) (plurality).

[18] *NPRM*, ¶ 2.

as a source of competition to broadcasters is also documented in the comprehensive report released by the FCC's Future of Media Working Group in June 2011, which found "that the Internet has created more diversity and choice in news and information, and that most communities have seen a rise in the number and diversity of outlets, as well as more diversity in commentary and analysis."[19] It found, moreover, that "[t]he [television] broadcast audience [is] continu[ing] its drift to cable, satellite, and the Internet,"[20] and that over-the-air radio faces competition from satellite radio, which saw its subscriptions grow 7.5% to 20 million and its revenue rise 12% to $2.8 billion in 2010, as well as Internet radio, which is predicted to have its revenue increase from $552 million in 2010 to $1 billion in 2015.[21] And other recent studies confirm the trend towards greater choice for consumers in news, information, and entertainment as well as the increasing importance of alternative media, including the Internet.[22] These competitive developments have rendered the media ownership rules obsolete and counterproductive.

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[19] *Id.* at ¶ 133 (citing Steve Waldman & the Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 119-20 (June 2011) ("*Future of Media Report*"), *available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf (last visited Mar. 5, 2012)).

[20] *Future of Media Report*, at 73-74 (citing data from the National Association of Broadcasters).

[21] *Id*. at 68, 70 (citations omitted); *see NPRM*, ¶ 1 (noting that satellite radio companies have reported increases in subscribership).

[22] *See, e.g.*, Pew Project for Excellence in Journalism, Pew Internet & American Life Project & Knight Foundation, *How People Learn About Their Local Community* (Sept. 2011) at 22, *available at* http://www.knightfoundation.org/media/uploads/publication_pdfs/Pew_Knight_Local_News_Report_FINAL.pdf (last visited Mar. 5, 2012) ("The [I]nternet has already surpassed newspapers as a source Americans turn to for national and international news. The findings from this survey now show its emerging role as a source for local news and information as well."); *see also id*. at 22 (noting that the Internet is either the most popular source or tied with newspapers as the most popular source among all adults for five of the 16 local topics covered by the survey, and that the Internet is an even more significant source for local news and information among the 79 percent of Americans who are online); Edison Research, *The Infinite Dial 2011: Navigating Digital Platforms*, Executive Summary, http://www.edisonresearch.com/Infinite_Dial_2011_ExecSummary.pdf (last visited Mar. 5, 2012) ("Forty-

## III. THE COMMISSION SHOULD REPEAL THE RADIO/TELEVISION CROSS-OWNERSHIP RULE.

In the *NPRM*, the Commission tentatively concludes that elimination of the radio/television cross-ownership rule is appropriate because the rule is no longer "necessary to promote the public interest."[23] This is undoubtedly the right result, and we congratulate the Commission for reaching it.

The *NPRM* recognizes that the radio/television cross-ownership rule is not necessary to protect competition because neither advertisers nor consumers consider radio stations and television stations to be good substitutes for one another.[24] This conclusion is amply justified, particularly because, as the FCC notes, the Department of Justice has long considered the radio advertising market to be a separate antitrust market,[25] and the Commission itself has found "that the video programming market is distinct from the radio listening market."[26]

The agency also properly acknowledges, as it has in the past, that the radio/television cross-ownership rule is not necessary to promote localism.[27] Indeed, it emphasizes elsewhere in the *NPRM* that "radio stations generally are not the dominant

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five percent of all Americans aged 12 and older now say the Internet is the medium which is 'most essential to your life' compared with 20% in 2002.").

[23] *NPRM*, ¶ 119.

[24] *Id.* at ¶¶ 123-24. These determinations are consistent with the Commission's findings in previous proceedings. *Id.*

[25] *Id.* at ¶ 123 & n.287 (citing cases).

[26] *Id.* at ¶ 33 (citing *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd 2010, 2064 (¶ 97) (2008) ("*2006 Quadrennial Review Order*")).

[27] *Id.* at ¶ 127.

source consumers turn to for local news and information."[28] Although CBS is committed to delivering high quality local news through its radio stations, these findings undermine any attempt by the agency to justify the local radio ownership rule based on localism concerns.

In addition, the results of the FCC's relevant media ownership studies support the conclusion that radio/television cross-ownership rule cannot be justified based on localism concerns. For example, Study 4 finds that, at the station level, cross-owned stations appear to air more local news on average than their non-cross-owned counterparts.[29] And, as the *NPRM* notes, Study 1 produced "ambiguous results" with respect to the impact of cross-ownership on local news.[30] But ambiguity is insufficient to justify a conclusion that the radio/television cross-ownership rule is "necessary" to promote localism, particularly in the face of other evidence that cross-ownership inures to the benefit of the public interest and prior conclusions that the rule is not necessary to promote localism.[31]

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[28] *Id.* at ¶ 112; *see id.* at ¶ 112 (tentatively concluding "that a substantial amount of news and talk show programming on radio stations is nationally syndicated"); *id.* at ¶ 120 (noting Commission's prior conclusion in 2006 that "newspapers and television were 'far and away the most important sources' of news and information, with radio 'a distant third'") (citing *2006 Quadrennial Review Order*, 23 FCC Rcd at 2060 (¶ 84 n.279)).

[29] Study 4, at 28. Specifically, the study found that for every additional in-market radio station a parent owns, the television station will air 3.7 more minutes of local news. *Id.* Although the study finds that, at the local market level, increases in radio/television cross-ownership correlate to decreases in the total news minutes provided, it also notes that, due to economies of scale, this negative correlation is partially mitigated as the average number of broadcast outlets per cross-owned station group in the market increases. *Id.* at 24, 49.

[30] *NPRM*, ¶ 129; *see* Study 1, at 16, 21, Table 3.

[31] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (an agency reversing course "must show that there are good reasons for the new policy," and "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"); *see id.* at 1824 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.").

The Commission observes that its own studies, as well as the record that has already been compiled in this proceeding, support the conclusion that the radio/television cross-ownership rule is not necessary to promote diversity either. Of the two studies relevant to this question, one (Study 8A) found that such cross-ownership has a "negligible effect on viewpoint diversity,"[32] while the other (Study 8B) found that cross-ownership *increases* the diversity of issues covered and that, otherwise, there is "little evidence that market structure influences diversity."[33] And, the agency states that "radio stations are not the primary outlets that contribute to local viewpoint diversity."[34] In the face of these results and determinations, the FCC must eliminate the radio/television cross-ownership rule because it is clearly not "necessary" to address diversity concerns.

Freely allowing radio stations and television stations to combine their operations, moreover, will *enhance* competition, localism, and diversity. Such station combinations will operate more efficiently, and have natural incentives to pass along the resulting cost savings to consumers in the form of better programming. Because a commitment to serving local communities is the lifeblood of a successful broadcast operation—and because the *local* aspect of broadcasting is among its unique features in today's Internet-dominated environment—increased investment in local programming, and in particular local news and informational programming, is likely to occur. Accordingly, the

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[32] *NPRM*, ¶ 132.

[33] *Id.*

[34] *NPRM*, ¶ 112. Here again, the Commission's finding in this regard is consistent with past precedent, and any departure from this fact-based determination would require a heightened justification. *See, e.g.*, *2006 Quadrennial Review Order*, 23 FCC Rcd at 2052 (¶ 73) (stating that "radio is not as influential a voice as television").

Commission should follow through on its tentative conclusion that repeal of the radio/television cross-ownership rule is appropriate.

## IV. THE DUOPOLY RULE IS RIPE FOR REPEAL OR, AT A MINIMUM, RELAXATION IN THE NATION'S LARGEST MARKETS, AND THERE IS CLEARLY NO BASIS TO INCREASE ITS RESTRICTIVENESS.

In the *NPRM*, the FCC tentatively concludes that it should retain virtually intact the very same local television ownership rule that has been in effect since 1999.[35] A decision to do so, however, could not be squared with the dramatic increases in alternative video programming sources that now compete with television broadcasters or the Commission's own prior determination that the rule is "overly restrictive," particularly insofar as it fails to allow for greater common ownership in the nation's largest markets.

The *NPRM* repeatedly emphasizes the ever-expanding array of new media with which today's television broadcasters compete. In other proceedings, too, the agency has given significant attention to the growing importance of Internet-enabled platforms, and, in particular, those that involve video. For example, in the National Broadband Plan the Commission observed that:

> Both consumers and businesses are turning to applications and content that use video. Cisco forecasts that video consumption on fixed and mobile networks will grow at over 40% and 120% per year, respectively, through 2013. . . . Video, television (TV) and broadband are converging in the home and on mobile handsets. The presence of broadband connections and TVs in the home could facilitate the development of a new medium for accessing the Web and watching video content. . . . Broadband-

[35] *Id.* at ¶¶ 26-27. The only proposed change involves elimination of the Grade B contour overlap provision of the duopoly rule. *Id.* at ¶ 27. As the Commission acknowledges, in some cases this rule modification would actually *increase* the restrictiveness of the rule, *id.*, rendering its permissibility in the course of this Section 202(h) review questionable at best.

> enabled video could grow as more innovative and user-friendly devices reach the home, allowing access to both traditional linear and Internet content via the TV.[36]

Nevertheless, the FCC proposes to cling to an outdated media ownership construct in which the only type of competition that is relevant to its analysis is the competition that broadcasters face from other broadcasters.[37] But this approach conflicts with the D.C. Circuit's decision—issued a decade ago—which struck down the very same "eight voices" component of the duopoly rule that the Commission now again proposes to retain, due to the FCC's failure to give adequate weight to non-broadcast media.[38] It is also flatly inconsistent with both market realities and the evidence compiled in this and related proceedings that broadcasters are losing market share and revenue due to the ever-increasing competitive impact of non-broadcast video programming providers. Indeed, the *NPRM* itself finds that "the growth of these new technologies both challenges established business models and provides opportunities to reach new audiences and generate new revenue streams," resulting in a situation in which "[b]roadcast . . . consumption in traditional forms is in decline, and advertising revenues have been shrinking in recent years."[39] YouTube, for example, is attempting to steer

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[36] Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan, at 17 (2010).

[37] *NPRM*, ¶¶ 33-35.

[38] *Sinclair*, 284 F.3d at 162-65.

[39] *NPRM*, ¶ 3; *see id.* at ¶ 2 (acknowledging increases in subscribership reported by satellite television companies, as well as the widespread availability of online video content); *Future of Media Report* at 73 (stating that the television broadcast industry has been suffering economic declines as "[t]he broadcast audience continue[s] its drift to cable, satellite, and the Internet" and providing chart which shows that, in 2010-2011, ad-supported cable had a 60 percent household primetime share level as compared to 36 percent for television broadcasters); *see also id*. at 102 (stating that "the audience is shifting away from broadcast television to cable and the Internet, both of which are drawing off viewers and advertisers").

advertising dollars out of the pockets of local broadcasters and into its own by creating "channel lineups" that are designed to provide a broadcast-like viewing experience.[40]

The illogic of the Commission's proposed approach is even more apparent in the nation's largest markets. Previously recognizing that these markets can tolerate a greater degree of common ownership, the FCC concluded in 2003 that Section 202(h) *required* its local television ownership rule to be revised to allow ownership of up to three stations (so-called "triopolies") in the largest markets because the existing rule was "overly restrictive and not necessary to protect competition."[41] If a rule that limited a party to two stations in large markets was "overly restrictive" and unjustifiable based on competitive concerns in the marketplace that existed almost a decade ago, that very same rule cannot plausibly be maintained today. Furthermore, in the recent debate which has now culminated in legislation authorizing the FCC to conduct voluntary incentive auctions of television broadcast spectrum for broadband use, it has been suggested by some, including Chairman Genachowski, that some markets may currently have *too many* television stations and that the "beauty of incentive auctions is [that] the market will decide"[42] the right number. In markets such as New York, with at least 23 television

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[40] *See* Michael Learmonth, *Toyota, GM, Unilever Channel Big Bucks to YouTube, Platform's Steep Asking Price Shows Its Determination to Compete for TV Budgets*, AdAge Digital, Feb. 27, 2012, *available at* http://adage.com/article/digital/toyota-gm-unilever-channel-big-bucks-youtube/232958/ (last visited Mar. 5, 2012).

[41] *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13677 (¶ 153) (2003) ("*2002 Biennial Review Order*").

[42] Todd Spangler, *CES: FCC's Genachowski Calls Net-Neutrality Lawsuit 'Distracting'*, Multichannel News, Jan. 11, 2012, *available at* http://www.multichannel.com/article/478995-CES_FCC_s_Genachowski_Calls_Net_Neutrality_Lawsuit_Distracting_.php (last visited Mar. 5, 2012) (indicating that Chairman Genachowski "noted that New York City has 28 full-power TV stations" and then stated: "'I grew up in New York and I don't think anyone can name 28 TV stations . . . What's the right number for New York?... The beauty of incentive auctions is, the market will decide.'").

stations, Los Angeles, with 25 television stations, and Chicago, with 16 television stations, it simply makes no sense to limit an owner to just two.[43] The premise that television voices can be eliminated *entirely* without causing harm cannot be squared with a regulatory regime that restricts ownership of more than two stations in a market with many based upon a supposed desire to promote diversity.

Furthermore, the failure of the local television ownership rule to distinguish between small and large markets is inconsistent with the Commission's approach to regulation of other media, rendering it irrational for this reason as well. Under the FCC's current and proposed approaches to other media combinations, the size and diversity of the market clearly are relevant characteristics. For example, the local radio ownership rule allows varying degrees of common ownership depending on the number of stations in the market,[44] and the Commission is proposing in the *NPRM* to presumptively allow newspaper/broadcast combinations in the largest, most diverse markets.[45] Accordingly, if the FCC determines that some restriction on local television ownership must be maintained, it should, at the very least, allow triopolies in the nation's largest media markets.

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[43] *See TV Station Directory*, New York DMA, TV NewsCheck, *available at* http://www.tvnewscheck.com/station-directory/dma/1 (last visited Mar. 2, 2012); *TV Station Directory*, Los Angeles DMA, TV NewsCheck, *available at* http://www.tvnewscheck.com/station-directory/dma/2 (last visited Mar. 2, 2012); *TV Station Directory*, Chicago DMA, TV NewsCheck, *available at* http://www.tvnewscheck.com/station-directory/dma/3 (last visited Mar. 2, 2012).

[44] 47 C.F.R. § 73.3555(a).

[45] *See, e.g.*, *NPRM*, ¶ 105 (stating that "the top 20 DMAs are notably different from other markets, both in terms of voices and in terms of television and radio households" and that, "[b]ased on the range of media outlets available in the top 20 DMAs, we tentatively conclude that diversity in those largest markets is healthy and vibrant in comparison to other DMAs").

The *NPRM* seeks comment on three additional issues related to the local television ownership rule: (1) whether it should examine situations in which a change of network affiliation results in an existing duopoly owner having both of its stations being in the top four; (2) the impact of multicasting on its analysis and, in particular, whether it should restrict a single station from having dual network affiliations; and (3) whether the FCC should expand the scope of its broadcast attribution rules to reach additional types of agreements between broadcast stations.[46] As shown above, the duopoly rule cannot be justified in its *current* form. Accordingly, and even assuming that the Commission could take action to tighten rules in the course of a Section 202(h) proceeding (which CBS respectfully submits that it cannot), there is certainly no basis for increasing its restrictiveness by subjecting network affiliation changes to special scrutiny, restricting the ability of a station owner to affiliate with a second network on a multicast (or "D-2") stream, or drawing additional types of business arrangements into its attribution analysis.

As to whether the FCC should in some circumstances consider or restrict network affiliations, it bears noting that seventeen years ago the Commission found that, in light of the "enormous changes" in the video programming market that had occurred in the preceding twenty years—including a greatly increased number of television stations and enlarged supply of non-network television programming—special restrictions on network ownership of television stations in small markets were no longer required by the public interest.[47] For the same reasons, the FCC repealed its "secondary affiliation rule," which required a network to offer its programming to an independent station in a market before

[46] *Id.* at ¶¶ 45, 57, 204-08.

[47] *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 4538 (1995).

entering into a secondary affiliation with an existing affiliate of another network.[48] In other contexts, the agency has similarly recognized that "penalizing enterprises that grow into stronger competitors" is inconsistent with the goal of "promot[ing] robust competition."[49] A decision to scrutinize the impact of network affiliation changes or restrict a station from entering into a second affiliation for a multicast stream would run counter to these prior decisions. And the Commission cites no evidence—because there is none—that these types of restrictions are warranted in today's media marketplace, which is *exponentially* more competitive than the one that existed when the FCC rightly abandoned its prior policies.

Similarly, the FCC should decline to expand the reach of its attribution rules to cover cooperative arrangements such as shared services agreements ("SSAs"), or local news service ("LNS") agreements. The agency has long recognized that such agreements lack the hallmarks of "control" that should give rise to attribution and that such agreements allow broadcasters to provide more local news and public service programming, thereby serving the public interest.[50] There is no reason now to overturn decades of precedent.

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[48] *Id.*

[49] *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6397 (1992).

[50] *See, e.g.*, *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12612 (¶ 122) (1999) (stating that it would "look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology," including JSAs); *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, 12834-35 (¶ 60) (1997) (noting efficiencies and public interest benefits of agreements between broadcasters); *Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1515 (1986) (affirming that joint sales arrangements provide "real social benefits" by allowing licensees to "take advantage of economies of scale").

Moreover, the recent enactment of legislation that would permit stations to relinquish all or a portion of their spectrum to be auctioned for broadband use provides an additional reason for preserving broadcasters' flexibility and declining to regulate either network affiliations or cooperative arrangements.[51] If the auction process ultimately diminishes the number of full-power television stations located in a market, dual affiliations involving D-2 channels may be necessary to ensure that viewers have access to all of the major television networks. Further, the flexibility that cooperative and cost-sharing agreements provide will be essential to allow the marketplace to meet the public's demand for content that might otherwise be rendered unavailable when a station chooses to submit its spectrum for auction. At this critical juncture in its history, broadcasting deserves greater latitude to innovate and respond to the market, not less.

## V. <u>THE DUAL NETWORK RULE SHOULD BE REPEALED.</u>

The *NPRM* proposes to retain the dual network rule as necessary to promote competition and localism,[52] a proposal which also should be abandoned. Quite simply, a decision to retain the rule cannot be squared with the current state of the media marketplace, which the Commission recognizes has undergone "significant changes," including "continue[d] . . . grow[th]" in "the number and popularity of non-broadcast sources for video programming" which provide entertainment, news, and sports programming on a 24/7 basis.[53] Although the FCC states that it believes the rule remains necessary because the four largest broadcast networks are "unique,"[54] the distinctions

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[51] *See* Middle Class Tax Relief and Job Creation Act of 2012, H.R. 3630, 112th Cong. (2012).

[52] *NPRM*, ¶ 137.

[53] *Id.*

[54] *Id.*

upon which its analysis rests fail to justify retention of the rule and have been significantly undermined by factual developments. Specifically, in recent years cable networks have shifted their lineups to include far more entertainment programs of the sort that previously would have aired mainly on broadcast networks. In fact, some, such as the USA Network and TNT, borrow heavily from the broadcast network model. And others, both basic and premium cable networks with respect to entertainment programming, have generated tremendous growth in the number and variety of original scripted dramas—such as HBO's "Boardwalk Empire," AMC's "Mad Men," TNT's "The Closer," and Lifetime's "Army Wives"—and sitcoms—such as FX's "It's Always Sunny in Philadelphia" and TV Land's "Hot in Cleveland"—that now appear on cable networks. Numerous cable networks also devote their entire schedules to providing national and/or local news, including CNN, Fox News, MSNBC, CNBC, Bloomberg, Washington D.C.'s News Channel 8, and New York City's NY1 News. In addition, cable networks are now airing a far greater variety of sports programming than ever before.

Under the FCC's regulatory scheme, one entity can own an unlimited number of these cable networks—be they the most-watched or not in their universe—but cannot own even two of the four broadcast networks named in the dual network rule, even if those networks are not the most-watched. Similarly, upon what basis can the Commission continue to restrict ownership of even the third and fourth largest broadcast television networks in the face of its decision last year to allow Comcast—the nation's largest cable company and, among other things, operator of five national cable networks—to combine with the NBC Television Network?[55] There is no rational basis

[55] *See General Electric Company, Transferor, NBC Universal, Inc., and Comcast Corporation, Transferee,* 26 FCC Rcd 48 (2011).

for singling out broadcast networks for disparate treatment while their multimedia competitors remain free to take advantage of the efficiencies that flow from common ownership.

## VI. THE COMMISSION SHOULD ELIMINATE OR, AT LEAST, RELAX THE LOCAL RADIO OWNERSHIP RULE.

The Commission also tentatively decides to leave unchanged its local radio ownership rule,[56] which is, to the contrary, long overdue for revision. The Commission's proposal to retain the rule based on competition, localism, and diversity is anomalous in light of its express prior conclusion that the rule did not materially advance the latter two ends.[57] In fact, the rule is not necessary to promote either of these interests or the related goal of competition.

Here again, the explosion of alternatives to radio and the ever-expanding nature of the contemporary audio programming marketplace has eviscerated any competition- or diversity-based justification for restricting local radio ownership. Today, radio competes with a plethora of new media, many of which did not exist or were in their infancy when the agency last revised the rule. To say that the rule remains necessary to promote competition in these market circumstances simply makes no sense. By maintaining outmoded restrictions on the number of over-the-air stations that can be owned in a local market, the Commission's current regulatory regime also singles out radio alone for

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[56] *NPRM*, ¶¶ 61-62.

[57] *2002 Biennial Review Order*, 18 FCC Rcd at 13738 (¶ 304) (stating that there was "little to indicate that the local radio ownership rule significantly advances our interest in localism"); *id.* at 13739 (¶¶ 305, 306) (stating, as to "viewpoint diversity," that "it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information" and failing to state that it was basing the decision to retain the local radio rule on viewpoint diversity concerns); *id.* at 13742 (¶ 315) (stating that it could "not conclude that radio ownership concentration has any effect on format diversity," and thus that it would "not rely on [such diversity] to justify the local radio ownership rule").

regulation. Restricting a single entity from owning more than eight stations in the largest markets—when a single satellite radio licensee can operate a system with hundreds of channels that serve every market in the country—is unjustifiable.[58] In addition, and as noted above, the Commission states its view that radio stations are less significant than television stations or newspapers in terms of providing viewpoint diversity and local news.[59] These marketplace characteristics and findings are fundamentally inconsistent with a conclusion that the local radio ownership rule is necessary to promote diversity or localism.

If the Commission nevertheless determines that it should continue to restrict local radio ownership, it should eliminate the "subcaps" on ownership of AM and FM stations. The subcaps were historically premised upon supposed technological and marketplace disparities between AM and FM stations which have been eradicated by the increasing competitiveness of AM stations and the advent and increasing utilization of digital radio technology. As the record compiled in response to the initial Notice of Inquiry in this proceeding conclusively demonstrated, the subcaps have long been unsustainable, are even more so now, and cannot lawfully be maintained as an aspect of any local radio ownership rule that might be left in place.[60]

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[58] *See Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd 12348 (2008).

[59] *See supra* Section III.

[60] *See, e.g.*, Comments of Clear Channel Communications Inc., MB Docket No. 09-182, at 37-45 and Appendix D (filed July 12, 2010). CBS hereby incorporates by reference the discussion of the AM/FM subcaps in Clear Channel's comments in response to the Notice of Inquiry, including Appendix D thereto. *See also* Comments of M. Kent Frandsen, MB Docket No. 09-182, at 2, 5-6 (July 12, 2010); Comments of Monterey Licenses, LLC, MB Docket No. 09-182, at 2, 5-6 (July 12, 2010); Comments of Arso Radio Corporation, at 5 (June 21, 2010); Reply Comments of Clear Channel Communications, Inc., MB Docket No. 09-182, at 4-5 (July 26, 2010); Reply Comments of Alpha Broadcasting, LLC; Asterisk Communications, Inc.; Backyard Broadcasting, LLC; Beasley Broadcast Group, Inc.; Benedetti Media

## VII. CONCLUSION

For these reasons, Section 202(h) and the First Amendment require the FCC to eliminate the radio/television cross-ownership rule. The same concerns strongly militate for the repeal or substantial relaxation of the local television ownership rule, the dual network rule, and the local radio ownership rule. If the Commission nevertheless decides to retain the local television ownership rule, it should decline to increase the rule's restrictiveness by regulating dual top-four network affiliations or holding additional types of sharing agreements to be attributable.

Respectfully submitted,

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March 5, 2012

Group, LLC; Black Crow Media Group, LLC, Debtor-In-Possession; Cumulus Licensing LLC; Cumulus Media Partners, LLC; Forever Broadcasting, LLC; Forever Communications, LLC; IW Limited Liability Company; Keymarket Communications, LLC; Long Island Broadcasting, Inc.; Mapleton Communications, LLC; Media Services Group; Mid-Island Broadcasting Limited Partnership; Monticello Media, LLC; MSG Radio, Inc.; New Northwest Broadcasters, LLC; Three Eagles Communications, Inc.; and West Virginia Radio Corporation, MB Docket No. 09-182 (July 26, 2010); Reply Comments of CBS Corporation, MB Docket No. 06-121, at 13-15 (Jan. 16, 2007); Comments of Multicultural Radio Broadcasting, Inc., MB Docket No. 06-121 (Dec. 10, 2007).

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July 26, 2010

Marlene H. Dortch
Secretary
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RE: MB Docket No. 09-182
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

Dear Ms. Dortch:

Following the Commission's 2006 quadrennial review, CBS, along with several other broadcasters, sought judicial relief from the Commission's decision to leave the broadcast ownership rules largely intact. That case is now pending in the Third Circuit Court of Appeals, and the FCC just last week filed its response brief. CBS attaches here its opening brief in the court case, filed this past May, because it summarizes our position most succinctly for this record.

Should you have any questions concerning this submission, please do not hesitate to contact me.

Respectfully submitted,

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Enclosure

**ORAL ARGUMENT NOT YET SCHEDULED**

**Nos. 08-3078, et al.**

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

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

v.

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

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

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# BRIEF FOR PETITIONERS CBS CORPORATION AND CBS BROADCASTING INC.

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May 17, 2010

# CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1, the undersigned counsel respectfully submits this corporate disclosure statement for Petitioners CBS Corporation and CBS Broadcasting Inc. ("CBS"):

CBS Corporation is a publicly traded company and has no publicly owned parent corporation. National Amusements, Inc., a privately held company, owns the majority of the voting stock of CBS Corporation through a wholly owned subsidiary. With respect to ownership of the stock of CBS Corporation in the amount of 10% or more, CBS Corporation is only aware of the following information based upon filings made pursuant to Section 13(d) or Section 13(g) of the Securities and Exchange Act of 1934: according to Schedule 13G filed by AXA Financial, Inc., a large asset management firm, on February 12, 2010, AXA Financial, Inc. reports that a majority-owned subsidiary holds greater than 10% of CBS Corporation's Class B non-voting common stock in customer accounts for third party clients. CBS Broadcasting Inc. is an indirect wholly-owned subsidiary of CBS Corporation.

/s/ James R. Bayes
James R. Bayes

Dated: May 17, 2010

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## JURISDICTIONAL STATEMENT

CBS Corporation and CBS Broadcasting Inc. ("CBS") adopt the Jurisdictional Statement from the Brief of the National Association of Broadcasters ("NAB Brief"). In addition, CBS Broadcasting Inc. timely filed a petition for review on March 5, 2008, in the D.C. Circuit, which had jurisdiction under 28 U.S.C. §§ 2342(1) and 2344 and 47 U.S.C. § 402(a). On April 17, 2008, CBS filed a Motion to Amend Petition for Review and Case Caption along with an amended petition for review in that Court because the petition for review filed on March 5, 2008 inadvertently omitted CBS Corporation as an additional Petitioner. In an abundance of caution, CBS Corporation separately timely filed a petition for review in the D.C. Circuit on April 17, 2008.

## STATEMENT OF ISSUES

In addition to adopting the Statement of Issues Presented in the NAB Brief and the Brief of Clear Channel Communications, Inc. ("Clear Channel Brief"), CBS raises the following issues on appeal:

Whether the FCC violated Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) ("1996 Act"), acted arbitrarily and capriciously under Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and/or violated the First Amendment, by:

1. reimposing the radio/television cross-ownership limits that the Commission previously had repealed, even though those limits are no longer

necessary or useful in the public interest and even though the reimposition of those limits was inconsistent with the Commission's own findings;[1]

2. reinstating its local television ownership rule, which sets arbitrary numerical limits that are no longer necessary or useful in the public interest, including prohibiting, even in the largest markets, combinations of three stations or ownership of any two of the top four-ranked stations regardless of their market share;[2] and/or

[1] *See* Comments of CBS Corporation, MB Docket No. 06-121, at 4-6 (Oct. 23, 2006) ("CBS Comments") (JA____-____); Reply Comments of CBS Corporation, MB Docket No. 06-121, at 15-20 (Oct. 23, 2006) ("CBS Reply Comments") (JA____-____); Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, at 80-90 (Oct. 23, 2006) ("Clear Channel Comments") (JA____-____); Comments of National Association of Broadcasters, MB Docket No. 06-121, at 120-24 (Oct. 23, 2006) ("NAB Comments") (JA____-____); *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order on Reconsideration, FCC 07-216, MB Docket No. 06-121, ¶ 82 (Feb. 4, 2008) ("*2008 Order*") (JA____).

[2] *See* CBS Comments at 3-10; Comments of KVMD Licensee Co., Inc., MB Docket No. 06-121, at 6 (Oct. 23, 2006) ("KVMD Comments") (JA____-____); Comments of Hearst-Argyle Television, Inc., MB Docket No. 06-121, at 3, 33-46 (Oct. 23, 2006) ("Hearst-Argyle Comments") (JA____-____); Reply Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 06-121 (Jan. 16, 2007) ("NBC Reply Comments") (JA____-____); NAB Comments at 103-04 (JA____-____); Sinclair Comments at 12, 35 (JA____); Reply Comments of Sinclair, MB Docket No. 06-121, at 3-5 (Jan. 16, 2007) ("Sinclair Reply Comments") (JA____-____); *2008 Order* ¶¶ 102-03 (JA____-____).

3. failing to repeal the dual network rule despite the Commission's acknowledgement of transformation of the media market since the rule's inception.[3]

## STATEMENT OF THE CASE

CBS adopts the Statement of the Case from the NAB Brief. In addition, CBS states that in the *2008 Order* the Commission retained the so-called "dual network rule," 47 C.F.R. § 73.658(g), which has the effect of prohibiting a single entity from owning more than one of the ABC, CBS, Fox, or NBC television broadcast networks.

## STATEMENT OF FACTS

In addition to adopting the Statements of Facts in the NAB Brief and the Clear Channel Brief, CBS states as follows:

Despite transformative developments in the media marketplace, the Commission's broadcast ownership rules have remained essentially unchanged for more than a decade. The FCC's response to this Court's Order to Show Cause entered Dec. 17, 2009, coupled with the recent initiation of yet another periodic review, suggests that, but for this Court's intervention, the Commission's

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[3] *See* CBS Reply Comments at 19-20 (incorporating Comments of Fox Entertainment Group, et al., MB Docket No. 02-277 (Jan. 2, 2003) ("Joint Network Comments") and Reply Comments of Fox Entertainment Group , et al., MB Docket No. 02-277 (Feb. 3, 2004) ("Joint Network Reply Comments")) (JA____-____); Comments of Fox Entm'nt Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 06-121, at 18-25 (Oct. 23, 2006) ("Fox Comments") (JA____-____); *2008 Order* ¶¶ 139-141 (JA____-____).

seemingly endless inquiries would continue unabated. This Court's determination to move forward will bring closure to ten years of unproductive inquiry by the Commission, and provide much-needed certainty to an industry determined to continue to serve its audiences despite considerable challenges and new and vibrant competitors on an almost daily basis.

***Radio/Television Cross-Ownership Rule.*** Nearly seven years ago, the Commission concluded after lengthy analysis that its "diversity and competition goals will be adequately protected by the local [television and radio] ownership rules," and thus there was no need for separate radio/television cross-ownership limits to protect diversity or competition. *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13620, 13768 (¶ 371) (2003) ("*2003 Order*"). On appeal, the Commission's decision to eliminate its restrictions on radio/television cross-ownership was not challenged. During the 2006 Quadrennial Review, several commenters argued that the radio/television cross-ownership restrictions were unnecessary because the local ownership rules—coupled with the increasingly diverse, competitive media market—provide sufficient protection for the public interest. *See, e.g.*, CBS Comments at 4-6 (JA____-____); CBS Reply Comments at 15-20 (JA____-____); Clear Channel Comments at 80-90 (JA____-____); NAB Comments at 120-24 (JA____-____).

In the *2008 Order*, the Commission noted that "[t]he media marketplace today is profoundly different" than it was when the broadcast ownership rules were first adopted, beginning in the 1940s, and that "[m]any of the media outlets now vigorously competing for audiences simply did not exist" then. *2008 Order* ¶ 24 (JA____). In evaluating the continuing validity of the newspaper/broadcast cross-ownership rule, the Commission cited the "ample evidence in the record" showing that "marketplace conditions have indeed changed" since the agency adopted that rule in 1975. *Id*. at ¶ 19 (JA____); *see also id*. at ¶ 21 ("The data before us now show that the media environment has changed considerably over the past three decades.") (JA____). Notably, the Commission emphasized that "dramatic changes have occurred over several decades with respect to the number and types of media 'voices' competing for the public's attention." *Id*. at ¶ 24 (JA____). The agency explained that this "increase in media voices" has brought about "a marked fragmentation of audience share as viewers, listeners and readers gravitate toward new sources of information and entertainment." *Id*.

In its review of the radio/television cross-ownership rule, the Commission turned a blind eye both to those factual findings and its prior decision to repeal the rule. In evaluating the rule, the Commission failed to account for the transformation of the media market since the 1970s that it recognized in the context of the newspaper/broadcast cross-ownership rule and did not explain why its prior rationale for eliminating the rule was no longer valid. The FCC claimed that its repeal of the rule in 2003 was "based in large part" on its simultaneous adoption of the cross-media limits. *2008 Order* ¶ 82 (JA____). This Court in *Prometheus* remanded to the Commission to further consider certain aspects of those limits, including the weight assigned to the Internet as a media outlet, the assumption of equal market shares, and the manner by which the limits were derived from the Commission's "diversity index" metric. 373 F.3d at 403.

Rather than attempt to provide a reasoned explanation for those specific decisions, the FCC abandoned its diversity index as well as the cross-media limits. *Id.* at ¶ 17 (JA____). The Commission then concluded that "[n]ow that the court has invalidated the cross-media limits, we must adopt diversity protection provisions to act in their place." *Id.* at ¶ 82 (JA____). Without further reasoning, the Commission reinstated its radio/television cross-ownership rule "to maintain the status quo." *Id.* at ¶¶ 82, 84 (JA____-____).

The FCC reached this result notwithstanding its unequivocal finding, based on an extensive record, that radio plays a lesser role than television as a source for local news and information and therefore is a less significant source of viewpoint diversity. *See id.* at ¶ 73 (stating that "radio is not as influential a voice as television") (JA____); *id.* at ¶ 80 n.259 (concluding "radio is a significantly less important source of news and information than newspapers and television stations") (JA____); *id.* at ¶ 84 n.279 (explaining that "[t]he record shows . . . that newspapers and television are 'far and away the most important source' of news and information, with radio a distant third") (JA____). It was for this reason that the Commission defined "major media voices" with respect to the newspaper/broadcast cross-ownership rule to include only "full-power commercial and noncommercial television stations and major newspapers." *Id.* at ¶ 57 (JA____). In reaching this conclusion, the FCC pointed to extensive record evidence which enjoys "near unanimous support for the position that consumers continue to predominantly get their local news from daily newspapers and broadcast television." *See id.* ¶ 57 and n.187 (JA____, JA____). In fact, the Commission acknowledged record evidence indicating that radio is no more popular as a source of local news than weekly newspapers, *see id.* at ¶ 57 and n.187 (JA____, JA____), to which no cross-ownership restrictions apply at all.

Despite its conclusion that radio is less influential with respect to diversity than television, the reinstated radio/television cross-ownership rule treats radio and television stations as equivalent in large markets. The rule effectively allows an owner to exchange one television station for only one radio station. In those markets in which twenty independent voices would remain post-merger, media combinations may include either two television stations and six radio stations, one television station and seven radio stations, or no television stations and eight radio stations. *Id.* at n.259 (citing 47 C.F.R. § 73.3555(c)) (JA____). Where ten such independent voices would remain, the rule allows purchase of no more than two television stations and four radio stations. *Id.*

***Local Television Ownership Rule.*** The local television ownership rule, *inter alia*, prohibits in any market a combination of three television stations ("triopolies") or a combination of two of the top four television stations in a market. *Id.* ¶ 87. As discussed in the NAB Brief, the Commission readopted this rule, which was remanded in 2002 by the D.C. Circuit as arbitrary and capricious. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002).

<u>Triopolies.</u> In its *2003 Order*, the Commission concluded that triopolies in large markets would not threaten localism, competition, or diversity. *2003 Order* ¶ 133. In particular, the FCC concluded, based on extensive analysis, that under Section 202(h) it was *required* to revise its local television ownership rule to allow triopolies in the largest markets because the rule was "overly restrictive and not necessary to protect competition." *Id.* at ¶ 150. The Commission explained that the rule inhibited competition by prohibiting "some consumer welfare enhancing combinations," *id.* at ¶ 153, and "efficiency enhancing mergers in the largest markets," *id.* at ¶ 140, combinations which would "likely result in the delivery of programming preferred by viewers," *id.* at ¶ 150.

On appeal, this Court did not question the Commission's decision to allow triopolies. Rather, the Court faulted the FCC for not recognizing that "it is possible that [a] triopoly could have a lower combined market share than any or all of the duopolies" in a market. *Prometheus*, 373 F.3d at 418-19.

During the 2006 Quadrennial Review, commenters argued that the need for regulatory relief identified in the *2003 Order* persisted in light of increasing competition in the media marketplace, both from broadcast and non-broadcast media. *See* KVMD Comments at 6 (JA____-____); Hearst-Argyle Comments at 38 (JA____-____). Evidence was presented that no harms resulted from an existing triopoly that was in place as a result of a temporary waiver of the rule. NBC Reply Comments (JA____-____).

Nevertheless, in its *2008 Order*, the Commission reimposed the local television ownership rule that it had unequivocally declared was "overly restrictive" for not allowing triopolies, *2003 Order* ¶ 150 (JA____), claiming that the rule was intended "primarily to foster competition among local television stations," *2008 Order* ¶¶ 102-03 (JA____).

<u>Top-Four Restriction.</u> In *Prometheus*, this Court upheld the Commission's decision in the *2003 Order* to prohibit combinations among the top four-rated television stations in a market. 373 F.3d at 416-18. The Court determined that the Commission's restriction was supported by "ample evidence in the record" that there was a "'cushion' of audience share percentage points between the fourth and fifth-ranked stations in most markets." *Id.* at 418.

During the 2006 Quadrennial Review, however, commenters submitted evidence that the Commission's fact-bound determination that the top-four restriction protected competition had been rendered obsolete by developments in the media marketplace. *See* Hearst-Argyle Comments at 3 (JA____); Sinclair Comments at 12 (JA____). Commenters presented data showing that the "cushion" between the fourth- and fifth-ranked stations was actually smaller than the "cushion" between the second- and third-ranked stations, and between the third- and fourth-ranked stations. Hearst-Argyle Comments at 39; NAB Comments at 104. At the same time, several commenters drew attention to developments showing that broadcasters faced competition from non-broadcast media that could no longer be ignored and demonstrated that there was no evidence to support the claim that combinations among two of the top four stations would harm competition. *See, e.g.*, CBS Comments at 3-10; NAB Comments at 103-04 (JA____-____); Sinclair Comments at 35 (JA____); Sinclair Reply Comments at 3-5 (JA____-____); Hearst-Argyle Comments at 33-46 (JA____-____).

In its *2008 Order*, the Commission concluded that "the top four prohibition remains necessary to prevent deleterious levels of concentration." *2008 Order* ¶ 102 (JA____). Underpinning the FCC's determination was its finding that "a significant 'cushion' of audience share percentage points continues to separate the top four stations from the fifth-ranked stations." *Id.* The Commission reached this conclusion without citing any data or considering any of the numerous comments that demonstrated that the top-four restriction could no longer be empirically supported.

***Dual Network Rule.*** The *2003 Order* also retained the Commission's longstanding dual network rule, which effectively prohibits a merger among any of the ABC, CBS, Fox, or NBC broadcast networks. *2003 Order* ¶ 621.[4] Because the Commission has no authority to regulate networks directly, its dual network rule does so indirectly by prohibiting televisions stations from affiliating with a person or entity that owns two or more of these four networks. *Id.* ¶ 139 (citing 47 C.F.R. § 73.658(g)). During the 2006 Quadrennial Review, CBS and Fox renewed their arguments that the rule could no longer be sustained, particularly in light of the vast array of video programming now available to consumers. *See* CBS Reply Comments at 19-20 (incorporating Joint Network Comments and Joint Network Reply Comments) (JA____-____); Fox Comments at 18-25 (JA____-____).

Nonetheless, the Commission refused to repeal or modify in any way the dual network rule, relying entirely on the reasoning in the *2003 Order* to conclude that the rule "remains necessary in the public interest as a result of competition and localism." *2008 Order* ¶¶ 139-40 (JA____). The Commission simply stated that neither Fox nor CBS "has provided evidence convincing us that a departure from our 200[3] decision to retain the rule in its current form is warranted." *Id.* at ¶ 141. The *2008 Order* summarily dismissed Fox's argument that antitrust law was sufficient to protect against competitive harms. *Id.* at 141 n.451. Similarly, the

[4] Retention of the rule was not challenged on appeal.

FCC brushed aside the concerns raised by CBS that the dual network rule no longer made sense in light of the explosion of video programming. *Id.*

## STATEMENT OF RELATED CASES AND PROCEEDINGS

CBS adopts the Statement of Related Cases and Proceedings from the NAB Brief.

## STANDARD OF REVIEW

CBS adopts the Standard of Review from the NAB Brief and the Clear Channel Brief.

## SUMMARY OF THE ARGUMENT

The broadcast media ownership rules imposed in the Commission's *2008 Order* fail to meet the heightened burden imposed under Section 202(h). The Commission reimposed the very radio/television cross-ownership limits that it had determined in its *2003 Order* were *unnecessary* and that it was *required* to repeal, reinstated a local television ownership rule that sets the very same arbitrary numerical limits rejected eight years ago by the D.C. Circuit, and refused to repeal or modify the dual network rule based on circular reasoning. Each of these rules suffers from internal inconsistencies and fundamental logical flaws. Furthermore, the Commission failed to consider the implications of the record evidence demonstrating a highly competitive, diverse market in which traditional broadcast media compete for fragmented audiences with one another and also with mature non-broadcast media. In addition to its shortcomings under Section 202(h), the *2008 Order* is arbitrary and capricious and violates the First Amendment.

*First*, the Commission reversed course and reimposed the same radio/television cross-ownership limits it had repealed in its *2003 Order*, despite its prior conclusion that Section 202(h) *mandated* their repeal. This change of course was unwarranted given that repeal of the limits was not questioned on appeal of the *2003 Order* and the record in the proceeding on review showed that the media market had grown even more competitive and diverse in the intervening years. The Commission mischaracterized and improperly departed from its prior reasoning that there was no need for separate radio/television cross-ownership limits because the local ownership rules adequately protected its diversity and competition goals. Further, the Commission simply reverted to the specific limits that existed before the *2003 Order* without *any* reasoning whatsoever other than a stated desire to maintain the status quo, failing to explain why the status quo should be maintained in the face of market transformation. The Commission's reasoning suffers from numerous internal inconsistencies; most notably, the re-adopted limits disfavor radio by arbitrarily treating radio and television stations as equivalent despite repeated FCC findings that radio is a less significant source of viewpoint diversity than television.

*Second*, the local television ownership rule readopted in the *2008 Order* sets arbitrary numerical limits that this Court previously found unsubstantiated and that still find no support in the record. In *Prometheus*, this Court admonished the Commission for failing to recognize that a three-station combination could have a lesser competitive impact than certain two-station combinations. As with its radio/television cross-ownership limits, the Commission reversed course without adequate explanation. Notwithstanding this Court's criticism, the FCC failed even to acknowledge the extensive analysis in its prior decision supporting the determination that it was *required* to allow combinations of three television stations in the largest, most diverse markets, and ignored comments arguing that the three-station prohibition was overly restrictive. The Commission also ignored extensive new record evidence undermining the rationale for prohibiting combinations among a market's top-four stations. Instead, the Commission simply readopted the local television ownership rule as it had existed prior to 2003, including the triopoly prohibition and the top-four restriction.

*Third*, the Commission retained its dual network rule based on nothing more than conclusory statements that neither meaningfully responded to comments in opposition to the rule nor considered the implications of the sea change in the media marketplace that entirely undermined the Commission's prior rationale. Having singled out the major broadcast networks *by name* for disparate treatment, it was arbitrary for the Commission to do no more than assert that these particular networks are somehow "unique."

*Finally*, in light of the radical transformation of the media market, none of these content-based speech restrictions can be sustained under the First Amendment. The broadcast media ownership rules are subject to heightened scrutiny because they discriminate both between speakers in the communications marketplace—applying only to broadcasters and not to their non-broadcast competitors—and among speakers within particular media. And the content-based preferences embodied in the rules, ostensibly to promote localism and diversity, simply have no place in the current vibrant, competitive market in which there is no shortage of media outlets.

In sum, the *2008 Order* neither demonstrated that any of the Commission's media ownership rules remain in the public interest nor provided any reasoned basis for the FCC's decision, and the rules cannot stand. The Commission failed to explain—and at times even to acknowledge—its departure from key aspects of its *2003 Order* that were not questioned on appeal. The *2008 Order* is rife with internal inconsistencies and, at bottom, does not account for the competitive developments the agency is charged to consider in its periodic review of media ownership rules and under ordinary principles of administrative law. Given the Commission's persistent inability to adopt reasoned media ownership rules and because the rules violate the First Amendment, this Court now must vacate the rules.

## ARGUMENT

In addition to the arguments made herein, CBS adopts in whole the arguments made in the NAB Brief, the Clear Channel Brief, and the brief of the Newspaper Association of America, et al. ("NAA Brief"), challenging the local television ownership rule, the local radio ownership rule, and the newspaper/broadcast cross-ownership rule.

### I. THE FCC'S REIMPOSITION OF THE ANTIQUATED RADIO/TELEVISION CROSS-OWNERSHIP LIMITS IS UNLAWFUL.

Despite a robust record that the Commission itself recognized as establishing an increasingly vibrant and competitive media market, the FCC's *2008 Order* reimposed the very same radio/television cross-ownership rule that it concluded seven years ago was no longer in the public interest in light of market developments. The Commission failed to adequately explain how a rule that it determined to be obsolete in 2003 could now serve the public interest when competition in the media marketplace has, as the record below showed, vastly increased since then. In addition, the rule is not based on any logical rationale, sets limits that are inconsistent with the Commission's own findings, and disfavors radio without justification.

The radio/television cross-ownership rule cannot withstand judicial review because the FCC failed—and, in fact, did not even attempt—to meet the heightened burden imposed by Section 202(h). *See Fox Television Stations, Inc. v.*

*FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *modified on reh'g* 293 F.3d 537 (D.C. Cir. 2002) (explaining that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules"). Even under existing circuit precedent, the Commission violated Section 202(h) by failing either to show that the radio/television cross-ownership rule "remain[s] useful in the public interest" or to "support its decision with a reasoned analysis." *Prometheus*, 373 F.3d at 395. In addition, the decision to revive the radio/television cross-ownership rule is arbitrary and capricious and violates the APA because the rule is utterly illogical in the face of increased competition and diversity, and sets arbitrary numerical limits that are inconsistent with other FCC findings in the *2008 Order*.

### A. The Commission's About-Face from its Well-Reasoned Repeal of the Radio/Television Cross-Ownership Limits Fails as a Matter of Logic and Cannot be Justified in Light of the Robust Record Evidence of an Even More Competitive and Diverse Market than in 2003.

The agency's proffered reasoning for changing course and reinstating radio/television cross-ownership limits makes no sense. The FCC failed to offer any sufficient explanation for reinstating a rule that it had concluded in 2003 was unnecessary, particularly in light of the agency's recognition that the record showed that the media market had grown even more competitive and diverse since then.

### 1. *Reinstatement of the Radio/Television Cross-Ownership Limits Fails as a Matter of Logic*.

The Commission turned a blind eye in its *2008 Order* to the reasoning supporting its prior decision to repeal the radio/television cross-ownership rule—a decision which was not questioned on appeal—and failed to provide any logical explanation for reimposing the rule. The FCC's passing reference to its departure from precedent entirely mischaracterizes its prior rationale and simply reverts to the previous rule without any explanation apart from a desire "to maintain the status quo." *2008 Order* ¶ 82. This decision cannot withstand review under any reading of Section 202(h). *See Prometheus*, 373 F.3d at 395 (requiring rules to be supported with "reasoned analysis"). In addition, the agency's action is arbitrary and capricious in violation of Section 706 of the APA; an agency reversing course "must show that there are good reasons for the new policy," and "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); *see also id.* at 1824 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.").

*First*, although the *2003 Order* acknowledged the adoption of cross-media limits as an *additional* reason for eliminating the rule, the FCC's basic rationale for elimination was that its separate local ownership rules "protect and promote competition in the local television and radio markets, and as a result, will also protect and preserve viewpoint diversity." *2003 Order* ¶ 389; *see also id.* ¶ 371 ("We find that our diversity and competition goals will be adequately protected by the local ownership rules we adopt herein."). Under this reasoning, it defies logic to claim that the previously repealed radio/television cross-ownership restriction is necessary now that the Commission has reverted to a more restrictive local television ownership rule and retained the same local radio ownership rule. *Compare 2008 Order* ¶¶ 87, 110 (JA____) *with 2003 Order* ¶¶ 134. The Commission's abandonment of the cross-media limits in no way undermines the sound reasoning in the *2003 Order* that the radio/television cross-ownership rule is unnecessary in view of the existence of the separate rules directly addressing local television and radio station ownership. CBS respectfully submits that the retention of those rules was unlawful, *see supra* Section II; NAB Brief; Clear Channel Brief; nonetheless, even without them it is clear that the Commission lacks any substantive reason for readopting the radio/television cross-ownership rule.

*Second*, having arbitrarily determined that radio/television cross-ownership restrictions are necessary, the *2008 Order* simply reverts to the prior rule without any justification other than "to maintain the status quo." *2008 Order* ¶ 84 (JA____). By simply "gloss[ing] over" its prior decision finding the rule unnecessary, the FCC "cross[ed] the line from the tolerably terse to the intolerably mute." *PG&E Gas Transmission, Nw. Corp. v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852

(D.C.Cir.1970)). The Commission did not offer a tenable explanation why the status quo should be maintained, let alone provide an adequate basis for departing from its well-reasoned precedent and reverting to a rule it had previously abandoned.

*Third*, the radio/television cross-ownership rule suffers from infirmities similar to the cable/broadcast cross-ownership rule that the D.C. Circuit vacated eight years ago as "a hopeless cause." *Fox Television Stations, Inc.*, 280 F.3d at 1048. The D.C. Circuit described the Commission's reasons for justifying the cable/broadcast cross-ownership rule—to protect competition and diversity—as "at best flimsy." *Id.* at 1053. In particular, the D.C. Circuit explained that the FCC's diversity rationale for the cable/broadcast cross-ownership rule was "woefully inadequate" because the Commission had failed to account for significant changed facts, and was inconsistent with a previous Commission ruling "that common ownership of two broadcast stations in the same local market need not unduly compromise diversity." *Id.* at 1052.

Here, too, the Commission failed to account for the revolution in the media marketplace in reinstating the radio/television broadcast cross-ownership rule. Nor did the FCC explain its departure from the *2003 Order*'s determination that the rule was unnecessary to preserve diversity. Further, as in *Fox*, 280 F.3d at 1051-52, the FCC has not cited any evidence that common ownership of radio and television stations harms diversity.

Moreover, after the *Fox* decision, a cable operator may, in *any* market—including the smallest market in the country—operate a cable system, program the great majority of its own cable channels, *and* own a television station or the maximum number of radio stations permitted under the independent local radio ownership rule. It would be absurd for the Commission's vague and empirically unsupported diversity rationale to fail so "woefully," *id.* at 1052, to justify the cable/broadcast cross-ownership rule, and yet provide sufficient support for reinstitution of the much more restrictive radio/broadcast cross-ownership rule.

*Fourth*, the rule is arbitrary because even though it sets different cross-ownership limits based on the number of independent voices in a market, it fails to meaningfully differentiate among markets. An agency's "failure to take account of circumstances that appear to warrant different treatment for different parties" constitutes arbitrary and capricious action. *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citations omitted). The radio/television cross-ownership rule varies its restrictions based on whether there would be at least twenty, at least ten, or fewer than ten independent voices remaining in the market following a merger. *See 2008 Order* ¶ 80 n. 259 (JA____). The FCC itself acknowledged, however, that the vast majority of markets have more than twenty independent voices. *See, e.g., id.* at ¶ 56 (noting that even those markets ranked 50-210 include an average of 31.2 independently owned television stations, radio stations, and major newspapers) (JA____); *see also* Hearst-Argyle Comments at 48 (citing an average of 39 independent voices per DMA as a "conservative" voice count for all 210 DMAs) (JA____); Compendium of Reply Research Studies of Consumers Union, Consumer Federation of America, and Free Press, MB Docket No. 06-121, at 65-66 (Jan. 16, 2007) (acknowledging an average of 14 independent voices in each market attributable to radio alone) (JA____). Because the vast majority of markets have more than twenty independent voices, the lines drawn by the Commission do not actually make any pertinent distinctions.

2. *Reinstatement of The Rule Cannot Be Squared With the Record Evidence Establishing that the Media Market Has Grown Even More Competitive and Diverse Since 2003.*

In 2003, the Commission determined that the radio/television cross-ownership limits were unnecessary to protect competition, diversity, or localism. *2003 Order* ¶ 371. Although the record before the Commission in 2008 showed that in the years since the FCC repealed the limits the media market has undergone a steady increase in competition and diversity, the FCC reinstated the radio/television cross-ownership limits originally adopted in 1999. *2008 Order* ¶ 82 (JA____). This decision is all the more puzzling since the Commission acknowledged this increased competition and diversity in the media market elsewhere in the *2008 Order*. The Commission's "confusing and inconsistent analysis" cannot be sustained because it "fall[s] below the standard of reasoned decisionmaking." *General Chem. Corp. v. United States*, 817 F.2d 844, 855 (D.C.

Cir. 1987); *see Prometheus*, 373 F.3d at 411 (concluding that the court could "not affirm the seemingly inconsistent manner in which the line was drawn").

Notably, the record before the Commission showed the tremendous growth in the variety of new media alternatives, including advancements in digital technologies that have proliferated in the marketplace. In comments filed in the 2006 Quadrennial Review proceeding, CBS described the "breathtaking" and "accelerating" changes in the media marketplace since the FCC last reviewed its broadcast ownership rules. *See* CBS Comments at 1 (JA____-____). CBS noted, for example, that the number of adult Americans using the Internet rose to more than twice the level of usage that existed five years earlier; that the web pages indexed by Google expanded 537% since 2004; that the "powerful communications phenomenon of the Internet 'blog' ha[d] also arisen since the Commission last considered ownership issues"; that the number of satellite delivered national programming networks increased 37% from just the prior year, while the number of regional networks grew by 46.9%; that the advent of video-on-demand and DVR services increased consumers' ability to consume news and information; that cable news services increased viewership approximately 10% from 2003 to 2005; that satellite radio services expanded by a staggering 1351% in the previous three years; and that an increasing number of people listen to Internet radio, iPods and MP3 players. *Id.* at 8-10 (JA____-____). Other commenters provided similar data on how the media marketplace has become far more diverse and fragmented since 2003. *See, e.g.*, NAA Comments at 23-41 (JA____-____); NAB Comments at 5-22 (JA____-____); Clear Channel Comments at 7-17 (JA____). Thus, properly viewed, the record showed that diversity had continued to increase at a rapid pace since 2003.

The *2003 Order* recognized the emergence of the Internet as a significant technological development "affect[ing] every aspect of media," *see 2003 Order* ¶¶ 117-19, and the record in the 2006 Quadrennial Review evidenced the ever-increasing impact of the Internet on traditional media and its growing importance as an outlet for news and information. The FCC explained that, because of the Internet, "traditional media sources no longer enjoy the same degree of control over the gathering and delivery of news and information" and that "developments since the Commission last reviewed its rules show that the diminishment of mainstream media power over information flow is real." *2008 Order* ¶ 36 & n.121 (JA____, JA____); *see also id*. at ¶ 36 ("Internet use . . . is changing how traditional news media operate, not merely by fracturing their traditional advertising-based business models but also by altering how newspapers and broadcasters gather information, respond to their audiences, and compete for consumer attention.") (JA____).

Not only has the media market become more diverse since 2003, but it also has become increasingly competitive, and, as the Commission recognized, "the marketplace is fragmenting and the revenue needed to maintain traditional media operations appears to be declining." *Id*. ¶ 8 & n.28 (JA____, JA____). With respect to the impact of the changes in the media environment on competition, the agency observed:

> Five years ago, the Commission recognized that digital technologies were beginning to translate into more options for consumers. Since that time, it has become clear that additional consumer choices also bring audience fragmentation. That development, in turn, has consequences for the business models that support the operation of traditional media companies – including, but not limited to, those entities' gathering and disseminating of news and information to their local communities.

*Id.* at ¶ 7 (citations omitted) (JA____).

The Commission more specifically described how the expansion of competitors in the video programming distribution market has resulted in declines in audience share and, consequently, advertising revenues of television broadcasters. The FCC noted that "[a]s cable subscribership continues to grow, and as the total number of non-broadcast networks continues to increase, broadcast television stations' audience share continues to fall." *Id*. at ¶ 7 n.22 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 F.C.C.R. 2503 (2006) ("*Twelfth Annual Report*"), *et al.*) (JA____). Similarly, the Commission explained that "[t]he introduction and increasing adoption of competing MVPD technologies has resulted in the decline in market share of cable operators in recent years." *Id.* (JA____).

The Commission recognized that the emergence of new modes of media, including the Internet, has accelerated the competitive transformation of the media marketplace that had already begun in 2003, explaining that "[t]oday, media companies both old and new are working to identify the best use of technology in order to maintain their competitive positions." *Id.* at ¶ 6 (JA____). Indeed, as the agency stated, "[t]he . . . dawning of the Internet as a major distribution channel for content has accelerated this audience fragmentation," and "[a]s new digital technologies are being introduced, audiences continue to splinter, and advertising dollars continue to shift with the changing structure of the marketplace." *Id.* at ¶ 24 (JA____); *see also id.* at ¶ 24 n.83 ("Not only are these new online sources providing information to the public, they are also competing with traditional media for audiences and advertising revenue.") (JA____).

The Commission reimposed the radio/television cross-ownership limits notwithstanding this continued growth in diversity and competition evidenced in the record.

**B. The Radio/Television Cross-Ownership Limits Are Inconsistent With the FCC's Findings and Arbitrarily Disfavor Radio.**

Despite the *2008 Order*'s acknowledgement that circumstances require differential treatment of radio and television, the radio/television cross-ownership limits arbitrarily disfavor radio in large markets by treating radio and television in certain respects as though they were equivalent. Such treatment is flatly inconsistent with the findings in the *2008 Order* itself. As a result, the radio/television cross-ownership rule cannot withstand scrutiny under Section 202(h) or review under the arbitrary and capricious standard of the APA.

The cross-ownership rule adds another layer of restrictions to the local ownership rules that the Commission intends "to provide protection for diversity goals in local markets and thereby serve the public interest." *2008 Order* ¶ 82 (JA____). Yet the FCC repeatedly distinguished radio stations from television stations as having a lesser impact on diversity. *Id.* at ¶¶ 57, 73, 80 n.259, 84 n.279 (JA____, JA____, JA____, JA____). Further, the rule disadvantages radio stations in larger markets by treating television and radio stations as though they have the same weight, allowing both one-for-one substitution of television stations for radio stations, and combinations that include the maximum number of television stations allowed under the local television ownership rule, but none involving the maximum number of radio stations allowed under the local radio ownership rule. *See supra* p.7.

In short, there are striking inconsistencies between the Commission's determination that radio plays a different and lesser role—"a distant third," *id.* at ¶ 84 n.279 (JA____)—and its regulatory treatment of television and radio stations in large markets. These inconsistencies mirror those which this Court made clear could not stand when the ownership rules were last challenged. *Prometheus*, 373 F.3d at 405 (finding that "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational"). By treating television and radio stations equivalently, the Commission has failed "to take account of circumstances that appear to warrant different treatment for different parties." *Petroleum Comm'cns, Inc.*, 22 F.3d at 1172 (citations omitted). Moreover, in view of the FCC's own findings, there can be no "rational connection between the facts found and the choice made" when it treats radio as though it were as significant as television for diversity purposes. *Prometheus*, 373 F.3d at 390 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

* * *

For these reasons, reinstatement of the radio/television cross-ownership limits that the FCC concluded were unnecessary in 2003 cannot be sustained. The Commission's illogical explanation in the face of an acknowledged record showing a more competitive and diverse market falls far short of the reasoned decisionmaking required under the APA and any reading of the deregulatory mandate of Section 202(h).

## II. <u>THE LOCAL TELEVISION OWNERSHIP RULE UNLAWFULLY SETS ARBITRARY NUMERICAL LIMITS.</u>

The Commission's local television ownership rule violates Section 202(h) of the 1996 Act and is arbitrary and capricious under Section 706 of the APA for the reasons set out in the NAB Brief and, further, because the agency failed to justify its numerical limits prohibiting ownership of three television stations in the largest markets and ownership of more than one top four-ranked television station in any market. The *2008 Order* did not even address the argument that triopolies should be allowed, much less explain why they should be prohibited in *all* markets. The FCC also failed to show that the top-four restriction remains useful in the public interest or to provide a reasoned analysis supporting the restriction in light of the record evidence. For the same reasons, the local television ownership rule is arbitrary and capricious in violation of the APA.

In *Prometheus*, this Court found that the numerical limits the Commission had set in the local television ownership rule were inconsistent with the record evidence and patently unreasonable. 373 F.3d at 420 (citing *Sinclair*, 284 F.3d at 162). Here, as explained below, the Commission's line-drawing is even more undisciplined than before, setting numerical limits that appear to have been plucked out of nowhere—or at best from the previous decade—with no more than conclusory statements as justification. *Id.* ("The deference with which we review the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not 'patently unreasonable.'") (citing *Sinclair*, 284 F.3d at 162).

### A. The Commission Arbitrarily Failed Even to Consider Whether Triopolies Should be Allowed in Large Markets, Despite Concluding in 2003 that such Combinations Advance the Public Interest.

The Commission's failure to consider whether to allow common ownership of three same-market stations in large markets violates Section 202(h) and is arbitrary and capricious under the APA. Based on its extensive analysis, the Commission concluded in its *2003 Order* that Section 202(h) *required* its local television ownership rule to be revised to allow triopolies in the largest markets because the rule was "overly restrictive and not necessary to protect competition." *2003 Order* ¶ 153. In reversing course in its *2008 Order*, the Commission did not even address this Court's specific criticism in *Prometheus* that the FCC had erred in not recognizing that "it is possible that [a] triopoly could have a lower combined market share than any or all of the duopolies" in a market. 373 F.3d at 418-19. Further, the FCC failed entirely to address the extensive data that underlay its prior decision, ignored commenters' arguments that such combinations would serve the public interest, and disregarded ample evidence in the record supporting allowance of triopolies in the largest markets.

An agency reversing course "must show that there are good reasons for the new policy" and "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy." *Fox*, 129 S. Ct. at 1811. Here, the Commission provided no more than an *ipse dixit* explanation for its acknowledged reversal of its prior conclusion that "the current local television ownership rule was not necessary to protect competition 'given the competitive impact of other video programming outlets' on local broadcasters." *2008 Order* ¶ 101 (JA____). The Commission simply declared its decision to "now reverse that determination because we find that eliminating the rule could harm competition among broadcast television stations in local markets." *Id.* (JA____).

In support of its backpedaling, the Commission cited only conclusory comments that advocated this approach rather than any new evidence, providing no data to support reversal or even an explanation as to why the agency's prior approach was flawed. This deficient exposition of the Commission's position is particularly troubling given the extensive analysis in the *2003 Order* which showed that competition actually would be enhanced by allowing triopolies. *See 2003 Order* ¶¶ 140-55. As with its radio/television cross-ownership limits, the FCC inappropriately "gloss[ed] over" the extensive analysis that supported its prior decision. *PG&E*, 315 F.3d at 390 (quoting *Greater Boston*, 444 F.2d at 852).

In addition to flying in the face of market realities, the Commission's prohibition of triopolies is arbitrary and capricious because the local television ownership rule irrationally fails to distinguish between small and large markets, limiting combinations of television stations to only two regardless of the size of the market. There is no question that an "agency must provide adequate explanation before it treats similarly situated parties differently . . . But the converse is also true. An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties." *Petroleum Commc'ns, Inc.*, 22 F.3d at 1172 (citations omitted).

Under the FCC's approach to other media combinations, the size and diversity of the market clearly are relevant characteristics that require differential treatment of stations. *See, e.g.*, *2008 Order* ¶¶ 53, 63 (modifying its waiver criteria for newspaper/broadcast combinations to presumptively allow combinations in the largest, most diverse markets and presumptively prohibit such combinations in all other markets) (JA____). In its readoption of the local television ownership rule, however, the Commission failed to even consider that the number of stations that can be owned in a market should depend on these same factors. Instead, the rule allows the ownership of two stations in a market with as few as eight voices, as long as the two stations are not in the top four. In the largest, most diverse markets the very same limit applies, despite there being many more independent voices. By failing even to consider relevant characteristics such as market size and diversity in setting the number of stations that can be owned, the Commission again ran afoul of the requirements of Section 202(h) and the APA.

The prohibition on triopolies also evidences an inconsistent and illogical approach to competition. By considering only the competition broadcasters face from other broadcasters, the Commission fails to recognize the competitive impact of a myriad of other video programming providers, including the Internet and cable. Indeed, the record is replete with examples of broadcasters losing market share and revenue due to the ever-increasing competitive impact of non-broadcast video programming providers. *See, e.g.*, Fox Comments at 20-21 (JA____).

The Commission's own video competition reports issued prior to the *2008 Order* clearly show that the competitive impact of other video programming outlets on local broadcasters has increased significantly since the *2003 Order* was issued.

Broadcast television's audience share has declined markedly since the 1990s. During the 1993-1994 television season, for example, broadcast television stations collectively attained a 74 share of primetime viewing. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Tenth Annual Report, 19 F.C.C.R. 1606, 1669 (¶ 94) (2004) ("*Tenth Annual Report*"). By the 2002-2003 television season, that share had dropped to 49. *Id.* The downward trend has continued unabated: broadcast television accounted for an average 48 share of prime time viewing among all television households for the 2003-04 television season, a 47 share in the 2004-2005 season, and only a 45 share in the 2005-2006 season. *Twelfth Annual Report* ¶ 93; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 F.C.C.R. 542, 593 (¶ 105) (2007) ("*Thirteenth Annual Report*") (JA____- ____). In contrast, those same periods saw a corresponding increase in non-broadcast channels' audience share, from an average 26 share of prime time viewing among all television households in the 1993-1994 television season, to a 52 share in the 2003-2004 season, a 53 share in the 2004-2005 season, and a 55 share in the 2005-2006 season. *Tenth Annual Report* at ¶ 94; *Twelfth Annual Report* at ¶ 93; *Thirteenth Annual Report* at ¶ 105.

Not surprisingly, at the same time, advertising revenue has declined for broadcasters and increased for non-broadcast programming providers. In the span of one year alone, total television broadcast advertising revenues declined 2.4%

from $47.2 billion in 2004 to $46.1 billion in 2005. *Thirteenth Annual Report* at ¶ 106. Non-broadcast programming networks, meanwhile, experienced an 11.4% increase in advertising revenue in 2005. *Id.* The Commission's readoption of an absolute prohibition on triopolies cannot be squared with this evidence of a highly competitive media marketplace in which broadcasters are losing market share to non-broadcast media, which remain virtually unrestrained with regard to forming combinations. In doing so, the FCC cited, ironically, a desire to "foster competition among local television stations." *2008 Order* ¶ 100 (JA____).

Not only is this narrow approach to competition illogical, it is flatly inconsistent with the approach taken by the Commission elsewhere. For example, when considering the relevant product market for the merger of Sirius and XM Satellite Radio, the Commission declined to narrowly limit that market exclusively to satellite radio. *See Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings, Inc. to Sirius Satellite Radio Inc.*, Memorandum Opinion and Order and Report and Order, 23 F.C.C.R. 12348, 12372 (¶ 47) (rel. Aug. 5, 2008); *see also* Press Release, Department of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_at_226.html (affirming that Sirius and XM's competitive market is not limited to satellite radio and includes AM/FM radio, HD Radio, MP3 players, and audio offerings delivered through wireless telephones.). Moreover, the D.C. Circuit vacated the horizontal cable ownership cap after the Commission failed to take a broader approach to the video programming market and account for the competitive impact of Direct Broadcasting Satellite ("DBS") on cable. *Comcast Corp. v. FCC*, 579 F.3d 1, 8, 10 (D.C. Cir. 2009); *see Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1144 (D.C. Cir. 2001) ("*Time Warner II*").

In this case, the FCC was presented with an extensive record supporting its prior conclusion that regulatory relief permitting three-station combinations in the largest markets would advance the public interest by promoting competition and would pose no threat to the agency's other objectives. Yet the Commission arbitrarily failed to "consider[] the relevant information brought to its attention." *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 867 (3d Cir. 1981).

Moreover, echoing the Commission's determination in its *2003 Order*, commenters noted the need for regulatory relief given the highly competitive media marketplace in which broadcast television stations face "fierce competition" from non-broadcast media outlets. KVMD Comments at 6 (citing Comments of National Association of Broadcasters, MB Docket No. 02-277, at 17-18 (Jan. 2, 2003) (traditional broadcasters "are swimming 'in a sea of competition,' as 'DBS and the expansion in cable availability and channel capacity have created an increasingly competitive environment for television broadcasting.'")) (JA____-

____). Indeed, record evidence showed that, as of 2006, more than 94 million television households received video programming from cable, satellite, or another multi-channel video programming distributor ("MVPD"), and nearly 43 million households had access to high-speed DSL or cable-modem services. Hearst-Argyle Comments (JA____). The record also shows that consumers were increasingly substituting cable, cell phones, PDAs, and, in particular, the Internet, for broadcast television to access video content. *Id.* at 13 (JA____).

As a result, in 2006 websites with video content such as YouTube received nearly 20 million visitors each month. *Id.* at 8 (JA____). This "seismic shift" in video competition and non-broadcast media substitution had profound implications for broadcast television—resulting in a precipitous drop in the viewing share of broadcast television during prime time hours from 90% in 1979-1980, to just 50% in 2005-2006. *Id.* at 6 (JA____).

In addition, the Commission ignored record evidence demonstrating that the presence of triopolies in large, diverse markets does not harm the Commission's policy objectives. Despite the presence of a triopoly in the Los Angeles market since 2002,[5] that market has remained one of the *least* concentrated of all media markets in the country. NBC Reply Comments at 4 (JA____). In 2006, the median Los Angeles household not only had access to 137 broadcast and cable

[5] NBC Telemundo's three-station group includes a duopoly (two commonly owned stations) with a third station owned pursuant to a temporary waiver. NBC Reply Comments at 4 (JA____).

channels—an increase of more than 70% since 2002—but 66% of Los Angeles adults also had access to the Internet. *Id.* at 4-5 (JA____). Significantly, the Los Angeles market illustrates the very point this Court made in *Prometheus* with regard to triopolies—that "it is possible that [a] triopoly could have a lower combined market share" than other combinations in a market, 373 F.3d at 418-19. Record evidence was presented showing that several Los Angeles local radio/television combinations were larger than NBC's three-station group in terms of the number of media outlets owned, and that one local television duopoly derived more local ad revenues in 2005 that NBC's triopoly. *Id.* at 6 (JA____). Even though this Court specifically directed the Commission to re-think its rationale and substantial evidence was presented in support, the Commission failed to even consider allowing triopolies in the largest markets.

The FCC also ignored record evidence suggesting that triopolies may advance the public interest by creating efficiencies—of the very type the Commission recognized in its *2003 Order*—that in turn may allow stations to produce more local news. The record showed that common ownership eliminates redundant expenses and increases opportunities for cross-promotion and related programming, which can result in consumer welfare enhancing efficiencies. KVMD Comments at 7 (JA____). These efficiencies not only allow commonly owned television stations to compete more effectively with non-broadcast content providers, but also result in *expanded* local news coverage and the provision of additional programming that is responsive to the needs and interests of local viewers. *Id.* (JA____). As NBC noted, "in a market like Los Angeles that encompasses more than 40,000 square miles and 90 cities, only larger stations can afford the resources necessary to undertake the logistics, personnel, equipment and costs involved in serious news operations." NBC Reply Comments at 8 (JA____). Thus, the FCC neither "examined the relevant data" nor "articulated a satisfactory explanation for its action." *Prometheus*, 373 F.3d at 390 (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

### B. The Prohibition of Mergers Between Top Four-Ranked Television Stations Cannot Be Justified Based on the Record Evidence Submitted Since this Court's Remand.

Despite voluminous record evidence that the Commission's top-four requirement no longer makes sense or serves the public interest, the Commission failed to eliminate the requirement. Even if there may have been some basis for the Commission to have retained the top-four restriction previously, *Prometheus*, 373 F.3d at 418, the restriction was not sustainable on the record before the Commission when the *2008 Order* was issued. An agency is not entitled to refuse to "consider[] the relevant information brought to its attention." *Bethlehem Steel Corp.*, 651 F.2d at 867. Here, by ignoring the record before it and retaining the top-four restriction, the Commission failed to show that the restriction remains "necessary" or even "useful" in the public interest and also acted arbitrarily and capriciously in violation of the APA.

During the 2006 Quadrennial Review, several commenters presented new data to the FCC showing that developments in the media marketplace have rendered the top-four restriction entirely anachronistic. *See, e.g.*, Hearst-Argyle Comments at 3 (JA____); Sinclair Comments at 12 (JA____). In particular, the record showed that the FCC's "cushion" rationale cannot be supported, and there is no support in the record for the Commission's view that the restriction is necessary to protect competition. Based on the record before it, the Commission could not show a "rational connection between the facts found and the choice made" to retain the top-four restriction. *Prometheus*, 373 F.3d at 390 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

*First*, the Commission rationalized its focus on the top *four* stations by asserting that "a significant 'cushion of audience share percentage points continues to separate the top four stations from the fifth-ranked stations." *2008 Order* ¶ 102 (JA____). Thus, the FCC found, stations ranked below the "cushion" could merge with any other stations without harming consumer welfare. *Id.* Whereas a court "must uphold an agency's line-drawing decision when it is supported by the evidence in the record," *Prometheus*, 373 F.3d at 417, "its decisions may not be 'patently unreasonable' or run counter to the evidence before the agency," *id.* at 390 (quoting *Sinclair*, 284 F.3d at 162).

In its *2003 Order*, the Commission supported its top-four restriction on an empirical basis by citing evidence of a "cushion" between the audience shares of the fourth and fifth ranked stations in most markets. *Id.* (citing *2003 Order* ¶ 195). In 2006, however, commenters presented new data demonstrating that "[w]hatever may have been the empirical basis of [the 'cushion'] in 2003, current audience share data (July 2005-May 2006) from all 210 DMAs no longer support it." Hearst-Argyle Comments at 39 (JA____). This data showed that, in 2006, the cushion between the fourth- and fifth-ranked stations in the Top 100 television markets was in fact *smaller* than the cushion between both the second- and third-ranked stations, and the third- and fourth-ranked stations. *Id*. (JA____); *see also* NAB Comments at 104 (JA____). Moreover, the Commission was presented with evidence that, in mid-sized and smaller markets, the audience share disparity is greatest between the first- or second-ranked stations and all other stations. NAB Comments at 103-04 (listing DMAs in markets ranked 51-175 in which one or two stations are clear audience share leaders) (JA____-____). Record evidence showed that this disparity is so great in some cases that even if the third- and fourth-ranked stations were allowed to merge, the merged stations' combined viewing shares would still be less than or equal to the audience share of the top-ranked station in the market. *Id.* The Commission simply ignored the new evidence brought to its attention, *see Bethlehem Steel Corp.*, 651 F.2d at 867, and readopted the top-four restriction, stating generally that a cushion existed as it previously found, without citing any evidence in support, *see 2008 Order* ¶ 195.

*Second*, the Commission's view that the top-four restriction is necessary to protect competition finds no support in the record. No evidence was presented to support the claim that mergers or joint operations of two top-four stations harm competition. Sinclair Comments at 35; *see also* Sinclair Reply Comments at 3-5 (JA____). Rather, a plethora of evidence was submitted demonstrating that the television broadcast market is highly competitive—both among broadcasters and with non-broadcast media—and the top-four restriction no longer serves its purpose. Moreover, the Commission failed to explain why antitrust law—which is aimed at ensuring competition—does not provide adequate protection. *See* Fox Comments at 19-20.

As discussed above, the record is clear that the media landscape changed significantly even in the few short years since the Commission solicited comments pursuant to its 2002 Biennial Review. For example, whereas in 2002 only 22.3 million cable subscribers had access to one or more of the then-existing 23 local or regional cable news channels, in 2006 over 40.6 million cable subscribers had access to one or more of 42 cable news channels. Sinclair Comments at 22-23 (JA____-____). Similarly, between 2000 and 2006, the number of American who were Internet users doubled from approximately 75 million to 150 million. Fox Comments at 6 (JA____). Moreover, the FCC's approach to competition wholly disregards the ever-increasing availability of video programming on the Internet and from other sources. *See, e.g.*, Fox Comments at ii, 32 (JA____, JA____); s*ee* *also* Hearst-Argyle Comments at 42 (proposing an alternative "audience share metric" to the FCC's "voice count" or "top four" matrices and presenting a detailed analysis to demonstrate that, even in Top 10 DMAs, combinations of top-four stations would not greatly increase market concentration) (JA____). Indeed,

> [i]ncreased penetration from cable and satellite providers and a growing number of cable and non-broadcast programming channels has led to a decline in the overall viewing share of broadcast television. From 2002 to 2005, broadcast television stations experienced a four percent decrease in audience share, whereas non-broadcast viewing share increased by this same amount.

Comments of Granite Broadcasting Corporation, MB Docket 06-121, at 3-4 (Oct. 23, 2006) (JA____-____); *see also* Hearst-Argyle Comments at 6 (noting that the viewing share of broadcast television during prime time hours "has dropped precipitously from 90% in 1979-1980 to 50% in 2005-2006.") (JA____).

The FCC's arbitrarily narrow approach to competition would prohibit the owner of a market's third-ranked television station from acquiring the fourth-ranked television station, regardless of the position of those stations relative to the top-two ranked stations in the market, yet it would allow the dominant local cable operator to acquire the top-rated local television station. *See* NAB Comments at 102 (JA____); *see also* Sinclair Comments at 33-34 (citing examples from the Columbus, Ohio market in which "multimedia powerhouses" are permitted to acquire a top-four ranked station while Sinclair cannot) (JA____). Thus, even if there may have been some basis in the record for the Commission to limit its definition of "competition" to broadcasters-only in the *2003 Order*, the record in the 2006 Quadrennial Review was replete with evidence demonstrating the robust competition faced by television broadcasters from video programming providers and cannot support retention of the top-four restriction based on a broadcaster-only definition of "competition."

The Commission also completely ignored record evidence showing a decline in broadcasters' advertising revenue alongside a corresponding increase for non-broadcast media, a dynamic that must be considered relevant to any reasonable understanding of the competition faced by broadcasters. An agency is required to make its decision "based on a consideration of the relevant factors." *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 297 (3d Cir. 1986) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). As documented in the record, the compound annual growth of local television station advertising revenue was only 2% from 1999 to 2004, compared to 10% for local cable systems. NAB Comments at 30 (JA____); *see also* Comments of Gannett Co., Inc., MB Docket 06-121, at 40 (Oct. 23, 2006) ("Gannett Comments") (noting that cable revenue from local advertising increased 536 percent between 1992 and 2006) (JA____); Sinclair Comments at 27 (stating that local advertising on cable systems amounted to $4 billion and had grown more than 12% per year since 2002 and estimating that in any given market a local cable operator generates at least as much revenue from local advertising as a top four-ranked television station) (JA____).

At the same time, the record showed not only that cable advertising revenue was up, but also that Internet companies were thriving. In the first half of 2006, over $7.9 billion was spent in the United States on Internet advertising, an increase of over 37% compared to the first half of 2005. Gannett Comments at 40 (JA____). There can be no serious question that in assessing the state of competition faced by television broadcasters, the Commission fell far short of its duty by failing to consider the relevant factors, *Natural Res. Def. Council, Inc.*, 790 F.2d at 297, and ignoring the relevant evidence presented, *Bethlehem Steel Corp.*, 651 F.2d at 302. Thus, the top-four restriction cannot be sustained based on the Commission's purported aim to protect competition.

Finally, the Commission's retention of the top-four requirement is arbitrary because it fails to look broadly at the video programming market and, therefore, is inconsistent with the approach the FCC has been ordered to take and that it has taken in other recent cases to determine the breadth of the relevant market. As discussed above, *see supra* Section II.A, the D.C. Circuit mandated that competition be more broadly construed to account for competition from DBS in setting a cable horizontal ownership cap. *Comcast v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). And in allowing the Sirius/XM merger, the Commission declined to define Sirius/XM's competitive product market as solely satellite radio. *See*

*Sirius/XM Merger Order* ¶ 47. The import of the Commission's decision was to implicitly acknowledge that terrestrial radio, internet radio, and satellite radio are all part of the same market competing for radio listeners. Likewise, it was arbitrary for the Commission to fail to recognize that television broadcasters compete with a plethora of video programming providers, not merely other television broadcasters.

* * *

Accordingly, readoption of the prohibition on triopolies and retention of the top-four restriction cannot satisfy the demands of Section 202(h) under any reading of its deregulatory mandate and is arbitrary and capricious in violation of the APA.

## III. <u>THE DUAL NETWORK RULE IS UNLAWFUL.</u>

The FCC asserted, without any meaningful explanation, that retention of its dual network rule is "necessary in the public interest to promote competition and localism." *2008 Order* ¶ 141 (JA____). Mere conclusory statements in support of the rule, however, cannot substitute for the required reasoned analysis. Here, the Commission's scant reasoning cannot satisfy the demands of Section 202(h), however construed, and retention of the rule also constitutes arbitrary and capricious action.

### A. The FCC's Stated Basis for the Dual Network Rule Is Nothing More Than a Tautology.

As the Commission acknowledged, CBS argued that "the variety of broadcast and cable networks available to viewers makes the [dual network] rule no longer necessary in the public interest." *2008 Order* ¶ 141 n.451 (JA____). In response, rather than account for the revolution in the media marketplace that has resulted in an explosion in video programming for consumers and its implications for the dual network rule, the Commission stated without further analysis that it "continue[s] to believe that the four largest broadcast networks serve a unique role in the electronic media and note[s] that no other networks, cable or broadcast, reach nearly as large an audience as they do." *Id.* (JA____). The Commission's conclusory rejoinder evidences its inability to show that the rule "remain[s] useful in the public interest" in light of marketplace changes and fails to provide a "reasoned analysis" as required. *Prometheus*, 373 F.3d at 395; *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 (holding that agency action was arbitrary and capricious under the APA because the agency failed to provide the "requisite 'reasoned analysis'").

*First*, the Commission has failed to identify the characteristics that make the four named networks unique in any significant way or to explain why the networks' supposed "uniqueness" should result in a regulatory disadvantage vis-à-vis the plethora of cable networks and other programming suppliers with which they compete. Accordingly, the Commission's conclusory assertion falls far short of the required "reasoned analysis." *Id.*

*Second*, the mere fact that the four targeted broadcast networks currently garner greater audience share than other broadcast and cable networks does not adequately explain why these networks should be specifically singled out. "An agency must provide an adequate explanation to justify treating similarly situated parties differently" and its action is arbitrary and capricious if it "fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record." *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005). In contrast to the dual network rule, which prohibits ownership of two of the four named broadcast networks, no rule limits the number of cable networks that a cable operator may own. Similarly, there is no rule in place to prevent the nation's largest cable provider from purchasing the nation's largest broadcast network—indeed, the D.C. Circuit vacated the Commission's cable/broadcast cross-ownership rule because it was "hopeless cause," *Fox*, 280 F.3d at 1048. Yet under the dual network rule even the third and fourth ranked broadcast networks cannot combine, despite their much smaller size and audience reach compared to cable operators. The Commission provided no explanation for this disparity in treatment between a network and cable operator, and there is none.

*Third*, the Commission's reasoning cannot be upheld because the agency failed to confront the significant, relevant market changes that have taken place, and consequently its decision could not have been "based on a consideration of the relevant factors." *Natural Res. Def. Council, Inc.*, 790 F.2d at 297 (quoting *Bowman Transp., Inc.*, 419 U.S. at 285). It cannot seriously be disputed that the "variety of broadcast and cable networks from which viewers today can choose," CBS Reply Comments at 19 (JA____), is relevant to consideration of whether the dual network rule remains useful in the public interest. Because the Commission did not consider the impact of these highly relevant market changes, the dual network rule cannot withstand scrutiny. *See, e.g.*, *Comcast*, 579 F.3d at 8 (vacating national cable ownership cap where FCC failed to account for market changes, including growing competition among video providers and the "dramatic increase both in the number of cable networks and in the programming available to subscribers"); *Fox*, 280 F.3d at 1052 (vacating cable/broadcast cross-ownership rule where Commission failed to consider "the increase in the number of competing television stations").

*Fourth*, the Commission's assertion that the rule is necessary to protect competition makes no sense in view of the FCC's assessment of the media market in the *2008 Order* as "dynamic" and one in which media companies are having to struggle to "maintain their competitive positions." *2008 Order* ¶ 6 (JA____); *see supra* Section I.A.2; *infra* Section III.B. The Commission acted arbitrarily by not even attempting to reconcile its contrary statements regarding competition in the media market. *See Prometheus*, 373 F.3d at 411 (explaining that the "failure to provide any explanation for [a] glaring inconsistency is without doubt arbitrary and capricious"); *Air Line Pilots Ass'n v. FAA*, 3 F.3d 449, 453-54 (D.C. Cir. 1993) (holding "fundamental inconsistencies" in agency's rationale rendered its decision arbitrary and capricious); *Gen. Chem. Corp.*, 817 F.2d at 857 (concluding that agency's "internally inconsistent and inadequately explained" analysis was arbitrary and capricious).

### B. The Record Evidence Showed that the Revolution in the Media Marketplace Undermines Any Justification for the Dual Network Rule.

Not only did the Commission fail to provide the required reasoned explanation for readopting the dual network rule, but the robust record before the Commission evidenced radical changes in the media market that have undercut any rationale for retaining the dual network rule. *See* Fox Comments at 17 (JA____). The Commission's refusal to repeal or modify the dual network rule contravenes this substantial record evidence and thus is arbitrary and capricious for this additional reason. *See Natural Res. Def. Council, Inc.*, 790 F.2d at 302 (concluding agency action was arbitrary and capricious where its claim was "blatantly contradicted by a wealth of evidence in the record").

The broadcast ownership rules were originally adopted eons ago in "media years," and the dual network rule has become conspicuously outdated and ill-suited for today's media marketplace. *See* CBS Comments (JA____-____); CBS Reply Comments at 19-20 (JA____). As the Supreme Court observed long before the recent media revolution, "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS v.*

*Democratic Nat'l Comm.*, 412 U.S. 94, 102, (1973) (quoted in *Comcast*, 579 F.3d at 9).

In particular, the dual network rule makes no sense today—and does not serve the public interest—given the variety of broadcast and cable networks from which viewers can now choose. Despite acknowledging the vast changes in the media marketplace, the Commission failed even to consider how these changes have undermined its stated basis for the dual network rule. *See Natural Res. Def. Council, Inc.*, 790 F.2d at 297 (stating that an agency make its decision "based on a consideration of the relevant factors") (citation omitted).

As the Commission recognized in its *2003 Order*, the media marketplace has been so transformed in such a short period of time that a single generation ago "only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations and the seeds of the Internet were just being planted in the Department of Defense project." CBS Comments at 7 (quoting *2003 Order* ¶ 3). According to the FCC in 2003, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." *2003 Order* ¶ 367.

CBS noted in its comments—nearly four years ago—that there has been a sea change in the media marketplace, including the staggering growth of the

Internet, video programming, and satellite radio services, all of which have continued to grow in influence. CBS Comments at 8-11 (JA____-____). The trends first analyzed in the *2003 Order* have taken hold, with the Commission pointing out in its *2008 Order* the now-common knowledge that "[t]he online medium in particular is well-recognized as another platform for the delivery of audio, video and written content." *2008 Order* ¶¶ 6-7 (JA____-____). The FCC also explained that new technologies have translated into greater consumer choices creating audience fragmentation and challenging traditional media business models. *Id.* In this media environment, the Commission pointed out that media companies must work to "maintain their competitive positions." *Id.* at ¶ 6 (JA____).

In view of the vibrant media market in which, as the Commission has recognized, audiences are being fragmented and the position of traditional media is threatened, the FCC has failed to identify an existing problem that justifies the dual network rule. "[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (citation omitted); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006). Here, the Commission not only has failed to identify a problem in need of a solution, but affirmatively pointed to key aspects of the competitive nature of the media market which undermine entirely any claim that there is such a problem.

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

The Commission's broadcast media ownership rules are subject to strict scrutiny under the First Amendment, which they cannot survive. Further, the rules must be struck down regardless of the level of scrutiny applied.

### A. Market and Technological Developments Have Rendered the Scarcity Rationale Untenable.

Neither the radio/television cross-ownership rule, the television local ownership rule, nor the dual network rule can be sustained under the First Amendment. Whatever its historical validity, the "scarcity" rationale of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), relied on to justify a lower standard of protection under the First Amendment for broadcasters' speech, has been eviscerated by market and technological developments. The Supreme Court explicitly noted in *League of Women Voters* that the doctrine would expire when "technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Nonetheless, this Court rejected the First Amendment challenge brought against the Commission's cross-media limits in *Prometheus*, declining to revisit the scarcity rationale, 373 F.3d at 401-02.

CBS respectfully submits that there was ample reason to apply a higher level of First Amendment scrutiny to the broadcast ownership restrictions in 2003, and there is even greater reason today for applying such scrutiny. Since *Prometheus* was decided, the media marketplace has undergone radical transformation, now offering a plethora of media choices including a mature online medium that has taken hold as a new platform for delivery of content, such that the scarcity rationale is no longer factually or theoretically viable. *See* CBS Reply Comments at 19-20 (JA____-____); Joint Network Comments MB Docket No. 02-277, at 9-10 (Jan. 2, 2003) (JA____-____); Joint Network Reply Comments, MB Docket No. 02-277, at (Feb. 3, 2003) (JA____-____); Comments of Tribune Co., MB Docket No. 06-121, at 83-92 (Oct. 23, 2006) (JA____-____); *see also supra* Sections I.A.2 and II.III.B. Further, even if the scarcity rationale made any sense in today's marketplace, it logically could not be applied to the dual network rule because the rule does not prohibit ownership of more than one station in the same local market, and therefore does absolutely nothing to mitigate the effect of any scarcity that might be found to exist. *See* Joint Network Comments, MB Docket No. 02-277, at 9-10, 47-48 (Jan. 2, 2003) (JA____-____).

### B. Strict Scrutiny Applies to the Speech Restrictions Imposed on Broadcasters.

These rules both "discriminate among media" and "among different speakers within a single medium," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) ("*Turner I*"), either of which demands the application of strict scrutiny. Each of these rules singles out broadcasters among the many speakers in the vibrant media market for differential treatment in comparison to non-broadcast competitors, none of which is subject to similar speech limitations. The radio/television cross-ownership rule singles out the broadcast medium and neither applies to widespread non-broadcast video programming, including cable and DBS, nor to the burgeoning satellite radio medium. The local television ownership rule similarly singles out television broadcasters while ignoring entirely cable, DBS, and other video programming competitors. Moreover, the top-four restriction, operating similarly to the dual network rule but on a market-by-market basis, singles out a particular subset of television broadcasters for differential treatment. The dual network rule may be the most egregious in calling out *four* particular entities within the television broadcast medium *by name* to be saddled with a disparate regulatory burden. *2008 Order* ¶ 139.

Each of these rules is animated by the Commission's stated desire to manipulate the content of broadcast programming. As the Supreme Court has made clear, "the most exacting scrutiny" must be applied to such "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner I*, 512 U.S. at 642. The FCC has made clear its aim to shape content through the radio/television cross-ownership limits, which directly aim to "ensure a diversity of editorial content." *2008 Order* ¶ 84 (JA____). The Commission intends that the local television ownership rule will lead to an increase in what it considers "more innovative programming" and "programming responsive to *local* needs and interests" by *Id.* at ¶ 99 (emphasis added). Similarly, the dual network rule is designed to shape speech content by preserving "affiliates' influence on network programming," which the Commission believes will result in the increased dissemination of *local* information. *Id.* at ¶¶ 139-140 (JA____-____). By attempting to control the particular allocation of the types of broadcast content, and indeed by concerning itself with editorial content and acting to increase the amount of local content, the Commission has engaged in content-based regulation.

There is no serious question that none of these content-based speech restrictions can survive the application of strict scrutiny because they are not "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The FCC did not attempt to make this showing with respect to any of the challenged rules, nor could it.

### C. The Commission's Speech Restrictions Also Would Not Survive a Lower Level of Scrutiny.

Neither could these rules survive any of the prongs of the test for intermediate scrutiny, which applies to all regulations that "interfer[e] with petitioners' speech rights by restricting the number of viewers to whom they can speak." *Time Warner II*, 240 F.3d at 1129.

*First*, none of these rules can withstand intermediate scrutiny because they do not advance the asserted government interests. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). As discussed above, *see supra* Sections I.A.2 and III.B, the record before the Commission showed a highly competitive and diverse media market which would not be adversely affected by elimination of any of these rules. Thus, the radio/television cross-ownership rule does not advance the government's interest in diversity, and neither the dual network rule nor the local television ownership rule advances the government's interest in competition. Rather, as discussed above, the record before the Commission demonstrated that these rules thwart the public interest in competition by impeding efficient combinations. *See supra* pp.8, 38. Neither does the dual network rule in any way advance the FCC's interest in localism because it does not prohibit ownership of more than one station in the same local market. *See supra* p.11.

*Second*, given the transformation of the media marketplace showing a highly competitive, diverse media market in which broadcasters compete with one another as well as non-broadcast media, *see supra* Sections Section I.A.2 and III.III.B, there is no evidence that any of these rules address a "real, not merely conjectural harm." *Time Warner II*, 240 F.3d at 1130.

*Third*, each of these rules violates the First Amendment by burdening substantially more speech than necessary to further the government's asserted interests, *Turner II*, 520 U.S. at 189. Because the radio/television cross-ownership rule addresses concerns that the Commission itself recognized are "adequately protected by the local ownership rules," *2003 Order* ¶ 371, the rule burdens speech unnecessarily. Nothing in the *2008 Order* suggests otherwise. Neither is there any question that the local television cross-ownership rule burdens more speech than necessary. Among other things, the Commission did not even consider less restrictive measures—not even those that it had previously determined were in the public interest, such as allowing triopolies in the largest, most diverse markets. *See supra* Section II.A. And because the top-four restriction is empirically unsound, *see supra* Section II.B, the speech burden it imposes is entirely unfounded. The dual network rule takes a sledge hammer to protected speech to further the Commission's aims rather than relying on the precision tools already available. Because there are markets in which an affiliate of a network other than the four named networks is among the top four stations in the market,[6] the local television ownership rule, whatever its infirmities, addresses the Commission's purported localism concerns with a market-by-market approach in contrast to the dual network rule's broad, indirect swipe at localism.

Further, contrary to the Commission's assertions, *2008 Order* ¶ 141 n.451 (JA____), both the dual network rule and the local television ownership rule burden far more speech than necessary because antitrust laws already address any concerns raised by the FCC related to competition and do so on a case-by-case basis addressing actual harm rather than sweeping broadly to squelch speech, *see* Fox Comments at 25 (JA____). It is also clear that each of these rules sweeps too broadly in that the Commission did not even consider obvious alternatives which

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[6] For example, based on February 2009 Nielsen data, Univision boasted the top-ranked station in the Los Angeles market. Press Release, Univision Communications, Inc., Univision has its best broadcast season ever, (May 21, 2009), at http://corporate.univision.com/corp/en/pr/Miami_21052009-1.html (last visited May 17, 2010).

might advance its purported interests while burdening less speech. For example, the FCC did not even mention why the local television ownership rule's restriction on mergers of the top stations in a market could not be limited to the top two or three stations. Neither did the Commission even consider limiting application of the dual network rule to the top two or three networks rather than the top four.

Finally, in light of the vast record evidence demonstrating competition in the media market and for all the reasons discussed above, none of these rules can satisfy even rational basis review under the First Amendment because they restrict free speech rights and are not rationally related to any countervailing substantial government interest. *See Prometheus*, 373 F.3d at 402 (citing *NCCB*, 436 U.S. at 799-800).

## V. <u>CONCLUSION</u>

For these reasons, the radio/television cross ownership-rule, the local television ownership rule, the dual network rule, the newspaper/broadcast cross-ownership rule, and the local radio ownership rule should be vacated,[7] or at a minimum reversed and remanded for further consideration by the Commission.

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[7] Here, vacatur is appropriate because (1) the "seriousness of the [rules'] deficiencies" leaves no room for "doubt whether the agency chose correctly," *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993); (2) vacatur is not "likely to be unduly disruptive of the agency's regulatory program," because all of the entities subject to the broadcast media ownership rules "will remain subject to, and competition will be safeguarded by, the generally applicable antitrust laws," *Comcast*, 579 F.3d at 9; and (3) the Commission has made clear that it cannot justify these rules, particularly the numerical limits in the local television ownership rule which this Court remanded seven years ago,

Respectfully submitted,

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*Prometheus*, 373 F.3d at 435. Moreover, relief from unlawful agency action would be rendered elusive if the Commission is allowed to continue its pattern of addressing judicial orders in its next scheduled ownership review.

# STATUTES AND REGULATIONS

## 5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## Pub. L. No. 104-104, 110 Stat. 56, § 202(h)

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

## CERTIFICATION PURSUANT TO L.A.R. 46.1

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

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

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and L.A.R. 31.1(c), counsel for CBS Corporation and CBS Broadcasting Inc. certifies that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief for Petitioners complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 13,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

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

/s/ James R. Bayes
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## CERTIFICATE OF SERVICE

I, James R. Bayes, hereby certify that on May 17, 2010, the foregoing Brief for CBS Corporation and CBS Broadcasting Inc. was filed electronically using the Third Circuit's electronic filing system. I further certify that I caused a true and accurate copy of the foregoing document to be served on the following persons electronically via the Notice of Activity generated by this Court's Case Management / Electronic Case Filing system or by electronic mail upon consent, as appropriate:

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