No. 11-______

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

December 5, 2011

QUESTION PRESENTED

Whether the Third Circuit correctly upheld and retained future jurisdiction over media broadcast ownership rules promulgated by the Federal Communications Commission, where the D.C. Circuit previously held that the very local television ownership rule approved by the Third Circuit was arbitrary and capricious and not necessary in the public interest.

LIST OF PARTIES

Petitioner is the National Association of Broadcasting ("NAB").

Respondents who were petitioners in the lower court are Tribune Company, Fox Television Stations, Inc., Sinclair Broadcast Group, Inc., Bonneville International Corp., The Scranton Times, L.P., Morris Communications Company, LLC, Clear Channel Communications, Inc., Newspaper Association of America, Prometheus Radio Project, Media Alliance, Free Press, Cox Enterprises, Inc., Belo Corp., Gannett Company, Inc., CBS Corp., Office of Communications of the United Church of Christ, Inc., CBS Broadcasting, Inc., Media General Inc., Coalition of Smaller Market Television Stations, and Raycom Media Inc.

Respondents who were respondents in the lower court are the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that the National Association of Broadcasters has no parent company and issues no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE RULINGS

OTHER AUTHORITIES

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 652 F.3d 431 and reproduced at Pet. App. 1a-84a.[1] The order of the Federal Communications Commission under review is reported at 23 F.C.C.R. 2010 and reproduced at Pet. App. 85a-375a.

JURISDICTION

The Third Circuit entered judgment in this case on July 7, 2011, Pet. App. 2a, and denied petitions for rehearing or rehearing en banc on September 6, 2011, *id.* at 376a-78a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, and the Administrative Procedure Act. The pertinent provisions are reproduced at NAB Pet. App. 1a-7a.

---

[1] To minimize the burdens on the Court and the parties, Petitioner National Association of Broadcasters ("NAB") requested and received permission from the Clerk's Office to cite to the appendix being filed in this case by petitioners Tribune Company, Fox Television Stations, Inc., Sinclair Broadcast Group, Inc., Bonneville International Corp., The Scranton Times, L.P., Morris Communications Company, LLC, Clear Channel Communications, Inc., and Newspaper Association of America. Unless otherwise specifically indicated, all appendix cites in the petition are to that appendix.

INTRODUCTION

This Court's review is required to settle a basic difference of opinion between the Circuits in interpreting the congressional mandate in Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 ("1996 Act"). In the 1996 Act, Congress directed the Federal Communications Commission to relax some of its restrictions on common ownership of local broadcast stations. Congress then ordered the Commission to periodically review its media ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify" those remaining rules that are "no longer in the public interest." NAB Pet. App. 7a.

Reviewing the very first rulemaking proceeding to emerge from that statutory directive, the D.C. Circuit found that the Commission had not gone far enough in implementing a fundamentally deregulatory congressional mandate. The D.C. Circuit held that the Commission had failed to justify its decision to disregard the impact of non-broadcast media on the local television market in issuing a rule restricting common ownership of local television stations. Declaring the rule arbitrary and capricious and violative of § 202(h), the D.C. Circuit remanded to the Commission to adopt only those regulations that were truly "necessary in the public interest."

Notwithstanding the D.C. Circuit's holding, the Commission later readopted *the exact same rule* for local television ownership that the D.C. Circuit had previously disapproved, and the Third Circuit upheld that rule. In doing so, the Third Circuit approached the § 202(h) inquiry very differently than the D.C. Circuit had, concluding that the provision had no deregulatory force.

Accordingly, there is now a split of authority between the D.C. Circuit and the Third Circuit. Moreover, because the Third Circuit's rule will govern the television industry nationwide at least until the completion of the next quadrennial review, the Third Circuit has, in effect, overruled the D.C. Circuit, which is the prerogative solely of this Court. The Third Circuit's ruling is unjustifiable, and threatens serious harm to broadcasters – in some cases, putting their very survival in doubt. It also thereby threatens serious harm to the viewing public, which depends on the news and other programming provided by local broadcasters.

This Court's review is necessary to resolve the unseemly split between the Circuits – particularly since the same issues raised here will continue to recur at future quadrennial reviews, and since the Third Circuit has improperly purported to retain jurisdiction over the Commission's next quadrennial-review decision. Given the importance of the media ownership rules, this Court has frequently granted review to provide oversight with respect to those rules. Such oversight is critical in this case as well.

STATEMENT OF THE CASE

A. Background

The Commission's broadcast ownership rules restrict ownership of multiple local television stations or local radio stations, as well as "cross-ownership" of different types of local media outlets. Traditionally, the Commission has justified these rules as promoting competition, diversity, localism, or some combination of these goals. Pet. App. 101a-102a (*In re 2006 Quadrennial Regulatory Review Report and Order and Order on Reconsideration*, 23 F.C.C.R. 2010, ¶ 9 (2008) ("2008 Order")); *see also In re 2002 Biennial Regulatory Review Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620, ¶¶ 17-79 (2003) ("2003 Order").

In the Telecommunications Act of 1996, Congress directly addressed – and, in some cases, altered – the Commission's existing ownership rules. Congress instructed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its restrictions on ownership of multiple television stations in the same market. NAB Pet. App. 5a. Congress also prescribed specific numerical limits on common ownership of same-market radio stations – limits that eased the Commission's restrictions, allowing beneficial combinations that strengthened a struggling industry. *See id.* at 3a-4a. Finally, in recognition of the increased competition that broadcasters faced from other sources of news and entertainment, Congress required the Commission to conduct biennial reviews of *all* the broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition," and directed the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* at 7a.

B. The Commission's Initial Regulatory Review And The D.C. Circuit's *Sinclair* Decision

Acting pursuant to Congress's instructions, the Commission revised its local television ownership (or "duopoly") rule in 1999. *See In re Review of the Commission's Regulations Governing Television Broadcasting*, *Report and Order*, 14 F.C.C.R. 12,903 (1999) ("1999 Order"). For several decades prior to that order, the Commission had barred an entity from owning more than one television station in a viewing market. 2003 Order ¶ 135. Under the revised rule, a single entity could own two stations with overlapping signal contours in the same "designated market area" ("DMA") if at least one of the stations was not among the four highest-ranked in the market *and* at least eight independently owned "voices" would remain in the market post-merger – the so-called "top-four/eight-voices" test. 1999 Order ¶ 8.[2]

The Commission defined "voices" differently with respect to the local television rule than it did with respect to other media ownership rules adopted in

[2] DMAs are county-based geographic areas designated by Nielsen Media Research based on television viewership patterns. A station's rank is "determined using the station's most recent all-day audience share, as measured by Nielsen." 2003 Order ¶ 186.

the same order. For purposes of assessing the permissibility of common ownership of local television stations, the Commission counted only full-power television stations as "voices." *Id.* But for purposes of a separate radio-television cross-ownership rule, under which the Commission permitted common ownership of a television station and a specified number of radio stations in the same market so long as a certain number of "independent voices" remained post-merger, *id.* ¶ 9, the Commission defined "voices" more broadly, to include in-market, independently owned television stations, radio stations, and daily newspapers, as well as wired cable service. *Id.* ¶ 10.

Reviewing the 1999 Order, the D.C. Circuit held that the Commission had acted arbitrarily by counting only local television stations as "voices" for purposes of the duopoly rule's eight-voices requirement. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162-65 (D.C. Cir. 2002). "Having found for purposes of [radio-television] cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market,'" the court reasoned, "the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local [television] ownership rule." *Id.* at 164 (quoting 1999 Order ¶ 107). Although the Commission had justified its decision by stating that it was "unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television," 1999 Order ¶ 69, the court rejected this "wait-and-see approach" as inconsistent with the Commission's mandate to "repeal or modify" any ownership rule not "necessary in the public interest." 284 F.3d at 164 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002)) (internal quotation marks omitted). The court therefore remanded the local television rule to the Commission for further consideration. *Id.*

Judge Sentelle would have vacated the duopoly rule altogether. As he noted, "the 1996 Act 'directs the Commission to undertake significant and far-reaching revisions to its broadcast media ownership rules'" and "requires that the FCC '*shall* determine whether any of such rules are necessary in the public interest as the result of competition,' and that the FCC '*shall* repeal or modify any regulation it determines to be no longer in the public interest.'" *Id.* at 171 (Sentelle, J., dissenting in part) (emphasis in original). But the Commission simply "assumed the need for the rule, and then attempted to justify it" – review that was "hardly 'especially searching.'" *Id.* (quotation marks omitted). Accordingly, in Judge Sentelle's view, "the Commission . . . failed to justify affirmatively the need for any duopoly rule, with or without an eight voices exception." *Id.* at 171-72.

C. The Commission's 2003 Order And The Third Circuit's *Prometheus I* Decision

The Commission's reconsideration of the local television ownership rule on remand from the D.C. Circuit took place in the context of its 2002 Biennial Review, which culminated in the 2003 Order. In that order, the Commission replaced its 1999 duopoly rule with a rule permitting greater common ownership of local television stations. The new rule permitted (i) two commercial television stations in markets with 17 or fewer full-power stations and (ii) three such stations in all other markets. 2003 Order ¶ 134. Unlike the 1999 rule, the new rule did not include an "eight-voices" requirement, though it did retain the "top-four" prohibition. *See id.*

In adopting this new rule, the Commission concluded that common ownership of multiple television stations in a market conferred significant benefits on the public. Such ownership, the Commission found, can create efficiencies that strengthen local stations and allow them to provide more and better local news and other local programming. *Id.* ¶ 164. And the restrictions associated with an eight-voices requirement, which inhibits the realization of these kinds of efficiencies, were not necessary to protect the Commission's goals of competition or diversity. As to competition, the Commission explained that "in light of the myriad sources of competition to local television broadcast stations" there was adequate "assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences." *Id.* ¶ 133. As to diversity, the Commission once again relied on non-television media sources, stating that these sources "contribute to viewpoint diversity in local markets" so that the 1999 rule "is not necessary to achieve our diversity goal." *Id.* ¶ 171.

The 2003 Order also addressed the Commission's other ownership rules. Among other things, the Commission eliminated its separate limits on radio-television cross-ownership, as well as its ban on cross-ownership of a daily newspaper and a same-market broadcast station. *Id.* ¶¶ 368-369, 371. In place of these rules, the Commission adopted a single set of "cross-media limits," which provided a unified framework governing cross-ownership of television stations, radio stations, and newspapers.

Various parties filed petitions for review in various courts of appeals. Pursuant to the judicial lottery procedures set forth in 28 U.S.C. § 2112, the petitions were consolidated in the Court of Appeals for the Third Circuit. The Third Circuit then rejected a motion to transfer the consolidated cases to the D.C. Circuit, even though the order under review was issued in part in response to the D.C. Circuit's decision in *Sinclair*. No. 03-3388 (3d Cir. Sept. 15, 2003) (Order). The Third Circuit stayed all of the new rules in the Commission's order pending judicial review – thus leaving in effect the ownership rules as they existed prior to the 2003 Order. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004) ("*Prometheus I*").

In 2004, the Third Circuit reviewed the new rules on their merits, upholding certain of the Commission's actions while deeming others to be arbitrary and capricious. With respect to the duopoly rule, the court upheld the Commission's determination that common ownership can create efficiencies that "translate[] into improved local news and public interest programming." *Id.* at 415-16. The court also upheld the Commission's determination that "media other than broadcast television contribute to viewpoint diversity." *Id.* at 414. But the court found flaws in the agency's methodology for arriving at its numerical ownership limits, and therefore remanded those limits for further consideration. *Id.* at 419-20.

Addressing cross-ownership, the court concluded that the Commission had inadequately justified the specific cross-media limits chosen, and remanded for further consideration. *Id.* at 402-11. But the court approved the Commission's general decision to lift the newspaper-broadcast cross-ownership ban, agreeing that "diverse viewpoints from other media sources in local markets (such as cable and the Internet) compensate for viewpoints lost to newspaper/broadcast combinations." *Id.* at 400.

Finally, the court stated that the panel that issued the decision would retain jurisdiction over the Commission's actions on remand. *Id.* at 435. NAB and others filed petitions for certiorari, which this Court denied. Thus, the case returned to the Commission. During the period when the Commission engaged in further consideration of aspects of the 2003 Order, the Third Circuit kept its stay in place, so that parties continued to be bound by the rules in effect prior to the 2003 Order. *Id.*

D. The Commission's 2008 Order

The Commission addressed the issues resulting from the *Prometheus I* remand in the context of its

2006 Quadrennial Review, which culminated in the 2008 Order.[3]

1. Using as its baseline the rules that pre-dated the 2003 Order (because *Prometheus I* had stayed the rules set forth in the 2003 Order itself), the 2008 Order retained unchanged the 1999 local television ownership rule – the *very rule* that the D.C. Circuit had held arbitrary and capricious. Under that rule, a single entity may own two television stations with overlapping signal contours in the same DMA only if at least one of those stations is not rated among the DMA's top four and at least eight independent full-power television stations would remain in the DMA post-merger. *See* Pet. App. 207a. That rule effectively prohibits common ownership altogether in 154 markets – nearly three-quarters of the markets in the nation – as those markets contain fewer than nine stations. J.A. 5885.[4] And the rule has now been in effect for over a decade, despite the D.C. Circuit's decision.

The Commission's 2008 Order recognized that common ownership of local television stations has real benefits. For instance, the Commission "recognize[d] that owning a second in-market station can result in substantial savings in overhead and

---

[3] In 2004, Congress amended the 1996 Act to make the Commission's review obligation quadrennial rather than biennial. *See* Consolidated Appropriations Act of 2004 § 629, Pub. L. No. 108-199, 118 Stat. 3, 99-100.

[4] "J.A." refers to the appendix filed on behalf of all Appellants/Petitioners during the most recent proceedings in the Third Circuit.

management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a larger number of operating units and to better compete with non-broadcast content providers for advertising dollars." Pet. App. 216a. It also conceded that "these potential significant benefits of duopolies . . . outweigh commenters' speculative claims that duopolies harm diversity and competition." *Id.*; *see also id.* at 219a (finding that the duopoly rule was "not necessary to foster diversity"). Finally, the Commission acknowledged that in the 2003 Order it had concluded that the present duopoly rule was *not* necessary to protect competition, in light of "'the competitive impact of other video programming outlets' on local broadcasters." *Id.* at 220a (quoting 2003 Order ¶¶ 133, 140); *see also id.* at 222a (acknowledging that Commission had determined in 2003 Order that "the efficiencies to be gained by relaxing the [duopoly] rule could result in a higher quantity and quality of local news and public affairs programming").

Nevertheless, the Commission concluded that the rule *now* was necessary to "promote[] competition for viewers and advertisers within local television markets." *Id.* at 215a. It baldly asserted: "Because we are retaining the rule primarily to foster competition among local television stations, our determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets." *Id.* at 220a. At no point did the Commission explain why its goal was to foster competition only among local television stations, rather than among video or media outlets more broadly.

Specifically addressing the decision to continue to count only full-power television stations among the necessary eight voices, the Commission acknowledged that "other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets." *Id.* at 219a. Yet the Commission justified excluding those voices from consideration on the ground that its "primary goal in preserving the rule is to foster *competition* among local television stations," and not to promote *diversity*, which the Commission identified as the primary purpose of the cross-ownership rules. *Id.* (emphasis added); *see also id.* at 217a (stating that "a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace").

As to the benefits of this "competition," the Commission stated conclusorily – without supporting authority, and despite noting evidence that multiple ownership leads to more and superior local programming – that "[c]ompetition . . . provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers," and that local television stations' "incentives to respond to conditions in local markets . . . may be diminished by mergers between stations that reduce competition to anticompetitive levels." *Id.* at 215a. The Commission also asserted that "[c]ompetition among local broadcast stations is . . . necessary to preserve competition for advertising by local businesses that want to advertise their products on television." *Id.* at 216a. The Commission did not explain its basis for concluding that greater common ownership of local television stations undermines these goals. *See id.*

2. The Commission's 2008 Order also retained the version of the radio-television cross-ownership rule in effect since 1999 (which the 2003 Order had eliminated in favor of the later-invalidated cross-media limits). *Id.* at 202a. The rule restricts common ownership of radio and television stations in a single market to varying degrees, depending on the number of independently owned "voices" remaining in the market post-merger. *Id.* at 199a. For purposes of this rule, "voices" continue to include radio stations, television stations, daily newspapers with a certain circulation, and wired cable service. *Id.* Despite having previously justified the rule as promoting both diversity and competition, the Commission now rested solely on the goal of diversity. *See id.*

In addition, in recognition of "dramatic changes" in the media marketplace, *id.* at 120a, the Commission took what it described as "a modest step" toward loosening the ban on cross-ownership of newspapers and broadcast stations. *Id.* at 106a. As to common ownership of a daily newspaper and a television station in the top 20 markets, the Commission adopted a presumption that such a merger is permissible so long as the television station is not among the market's top four and at least eight independent "major media voices" would remain in the market post-merger. *Id.* For purposes of this rule, the Commission defined "major media voices" as "full-power commercial and noncommercial television stations and major newspapers." *Id.* at 162a & n.183. Thus, in addressing different ownership restrictions, the Commission counted media "voices" in three different ways in the same order.

E. The Third Circuit's *Prometheus II* Decision

Numerous parties again filed petitions for review challenging the Commission's 2008 Order, and those cases were initially consolidated in the Ninth Circuit pursuant to the lottery procedure mandated by 28 U.S.C. § 2112. However, some parties calling themselves "Citizen Petitioners," who were seeking increased restrictions on media ownership, sought a transfer to the Third Circuit, citing the panel's prior "retention" of jurisdiction. The cases were transferred to the Third Circuit and assigned again to the same panel that had decided the *Prometheus I* case, which then declined to transfer the cases to the D.C. Circuit.

In the decision as to which NAB seeks this Court's review, that Third Circuit panel upheld the same duopoly rule originally adopted in 1999 and previously rejected by the D.C. Circuit in *Sinclair* as arbitrary and capricious and not in the public interest. Pet. App. at 53a-54a (*Prometheus Radio Project v. FCC*, 652 F.3d 431, 459 (3d Cir. 2011) ("*Prometheus II*")). The court also upheld the

Commission's decision to reinstate the same version of the radio-television cross-ownership rule that was in effect when the D.C. Circuit rendered the *Sinclair* decision. As to the only rule in which the Commission actually engaged in any deregulation – slightly loosening the ban on cross-ownership of a newspaper and even a single broadcasting station – the Third Circuit found that the Commission had violated notice-and-comment requirements. It therefore vacated and remanded "for the Commission to provide adequate notice and an opportunity to comment in the context of its 2010 Quadrennial Review." *Id.* at 79a. The panel then asserted that it would "retain[] jurisdiction over the remanded issues." *Id.*

In explaining its break from the D.C. Circuit on the duopoly rule, the Third Circuit stated that the Commission "offered a new and reasonable rationale for this policy choice – competition," *id.* at 53a, without acknowledging that competition was one of the Commission's stated rationales before the D.C. Circuit as well. The Third Circuit also accepted the Commission's question-begging conclusion that "the rule does not depend on the effect of other video programming because the purpose of the rule is to promote competition among the stations themselves." *Id.* at 54a. Accordingly, the court upheld the Commission's decision to continue counting only independently owned television broadcast stations as "voices" for purposes of the test, despite the fact that the D.C. Circuit had expressly rejected that approach in *Sinclair* and despite the fact that the Commission had defined "voices" in three inconsistent ways in the 2008 Order.

The Third Circuit also concluded that the Commission's 2008 Order reinstating the 1999 duopoly rule should stand even though it "represent[ed] a reversal from [the Commission's] 2003 determination that the rule was no longer necessary," and despite dramatic increases in competition in the media marketplace throughout the 2000s. *Id.* at 50a. The court relied again on the Commission's purported change in rationale from diversity to competition, stating that "to the extent that the FCC decided [in 2003] that the rule was no longer necessary in the public interest because it was not necessary to promote diversity of viewpoint, that is no longer its justification." *Id.* at 51a. The Court rejected the contention that the Commission had simply conflated diversity and competition, stating "that the rule may advance the dual goals of competition and viewpoint diversity does not mean that the FCC's rationale – premised on competition alone – is unreasonable." *Id.*

Chief Judge Scirica dissented from the panel's decision to vacate and remand the cross-ownership rules, stating that he "believe[d] the Federal Communications Commission provided adequate notice and opportunity to comment." *Id.* at 80a. In addition, "because [he] believe[d] potential objections to a new [cross-ownership] rule . . . need not be reviewed by this panel," he also dissented "from the decision to retain jurisdiction over parts of the ongoing 2010 Quadrennial Review." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION CREATES A SPLIT OF AUTHORITY WITH THE D.C. CIRCUIT.

In readopting the top-four/eight-voices local television ownership rule, the Third Circuit created a split with the D.C. Circuit, which previously rejected the very same rule as arbitrary and inconsistent with the requirements of "§ 202(h) of the 1996 Act." *Sinclair*, 284 F.3d at 165. This split reflects a fundamental difference in approach between the Circuits on the proper interpretation of the congressional mandate in § 202(h) to "determine whether any . . . [media ownership] rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation . . . no longer in the public interest." NAB Pet. App. 7a.

1. The duopoly rule approved by the Third Circuit here has now been in effect for more than a decade – and it remains as unjustifiable now as it was when the D.C. Circuit rejected it in 2002. The Commission has never explained why market "voices" should be counted in one way when applying the local television ownership rule (which deems only television stations to be "voices") and in a different way when applying the radio-television cross-ownership rule (which deems television stations, radio stations, newspapers, and cable service to be "voices").

In *Sinclair*, the Commission defended its decision to count only broadcast television "voices" when applying the top-four/eight-voices rule as necessary to promote *both* competition and diversity in local television markets. *See* 284 F.3d at 163-65. The D.C. Circuit rejected the Commission's explanation. In particular, the court chided the Commission for "not provid[ing] any justification for counting fewer types of 'voices' in the local [television] ownership rule than it counted in its rule on cross-ownership of radio and television stations." *Id.* at 162; *see also id.* at 164 (noting that the Commission "found for purposes of cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market'" (citation omitted)). On that basis, the D.C. Circuit held that the Commission had acted arbitrarily and had insufficiently justified exclusion of voices other than broadcast television as "necessary in the public interest" under § 202. *Id.* at 165, 169.

In its 2008 Order, however, the Commission readopted the *exact same rules*. Once again, the Commission counted voices other than local broadcast stations for purposes of the radio-television cross-ownership rule, yet failed to count them for purposes of the local television ownership rule. Pet. App. 218a-219a. To justify this flagrant disregard of the D.C. Circuit's mandate, the 2008 Order merely asserted that the cross-ownership rules are "designed to foster viewpoint diversity," while the local television rule is necessary only "to preserve competition among broadcast television stations in local markets." *Id.* In other words, the Commission purported to abandon certain of the rationales it previously had offered to justify its rules.

The Third Circuit accepted this gamesmanship. Restating the Commission's facile explanation without analysis, the court stated that "the rule does not depend on the effect of other video programming because the purpose of the rule is to promote competition among the [local broadcast] stations themselves." *Id.* at 220a. But that explanation is a transparent effort to evade the force of *Sinclair*. The Commission did not justify its rule by showing changed factual circumstances, or by supplying a reasoned explanation that was missing from the administrative record at an earlier stage. Rather, having recognized for decades that both the radio-television cross-ownership rule and the local television rule serve the same interests, the Commission simply attempted to eliminate the arbitrary inconsistency between the rules by peeling off the "competition" label from one and the "diversity" label from the other. That cannot be sufficient to make the 2008 duopoly rule somehow different than the 1999 duopoly rule that has already been adjudged to be arbitrary and inconsistent with § 202(h). *See* NAB Pet. App. 1a-2a.

Thus, there is a direct conflict between the Third Circuit's decision here and the D.C. Circuit's decision in *Sinclair*. The 2008 Order presents exactly the same inconsistency in the definition of "voices" that was the basis of the holding in *Sinclair*, and there is no ground for distinguishing that case from this one. This Court's review is necessary to resolve the conflict.

2. The Third Circuit's decision upholding the duopoly rule reflects an underlying disagreement with the D.C. Circuit about the proper scope of the Commission's review of its media ownership rules under the 1996 Act.

Applying that Act, the D.C. Circuit has established a presumption in favor of deregulation. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), the D.C. Circuit stated that "[i]n the [1996 Act] the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries," and that § 202(h) was intended "to continue the process of deregulation." 280 F.3d at 1033. The court also explained that "the mandate of § 202(h) might . . . be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Id.* at 1044. In *Sinclair*, the D.C. Circuit reiterated that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules," and was "designed to continue the process of deregulation." 284 F.3d at 159 (quotation marks omitted).

In contrast, the Third Circuit has established a presumption in favor of the status quo. Under the Third Circuit's interpretation of § 202(h), the Commission is "obligated" during the quadrennial review process only "to give a rational reason for retaining existing limits as necessary in the public interest." Pet. App. 52a.[5]

---

[5] In concluding that a "rational reason" is all that is required, the Third Circuit purported to rely on the D.C. Circuit's

Moreover, the D.C. Circuit is apparently of the view that a searching examination into the Commission's assertions about "competition" and "anti-competitive effects" is necessary to determine whether the Commission has properly carried out its quadrennial review tasks. *Sinclair*, 284 F.3d at 162-64. The Third Circuit, however, seems content to accept the Commission's assertions in this regard, even where the Commission simply assumes that additional common ownership will lead to increased market power, and does not explain how such common ownership would in fact "reduce competition to anticompetitive levels" – or even how one might determine when "anticompetitive levels" have been reached. Pet. App. 216a. *Compare, e.g.*, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

Those differing views necessarily colored the two Circuits' conflicting decisions as to the propriety of the duopoly rule. This Court should clarify the nature of the Commission's responsibilities in the

---

interpretation of the term "necessary" in § 202(h). Pet. App. 21a n.15 (reading the term "necessary" in § 202(h) "to mean 'convenient,' 'useful,' or 'helpful,' rather than 'indispensable'"); *see also Prometheus I*, 373 F.3d at 393-94. But, in fact, the D.C. Circuit has not interpreted "necessary" in § 202(h) in the way the Third Circuit described. *See Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002). The D.C. Circuit case the Third Circuit cited construed the term "necessary" in a different statutory provision. *See Cellco P'ship v. FCC*, 357 F.3d 88, 90 (D.C. Cir. 2004) (construing "necessary" in 47 U.S.C. § 161, and noting that "[b]ecause of the chameleon-like nature of the term 'necessary,' [its] meaning depends on its statutory context").

quadrennial review process and the extent to which § 202(h) creates a deregulatory requirement.

II. THIS COURT'S REVIEW IS URGENTLY NEEDED.

A. Judicial Review Of Media Ownership Rules Under The 1996 Act Is Of Critical Importance.

The Commission's media ownership rules have a direct and significant impact on broadcasters and on the public that relies on broadcast news, information, and entertainment. Accordingly, prior to the enactment of the 1996 Act, this Court frequently granted certiorari to review cases involving the Commission's media regulations – including its ownership rules – even in the absence of a circuit split like the one presented in this case. *See, e.g., FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (granting certiorari to review FCC regulations governing permissibility of common ownership of radio or television broadcast station and daily newspaper); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (granting certiorari to review FCC's multiple ownership rules for broadcast stations); *see also, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (granting certiorari to review FCC policies encouraging minority ownership of broadcast stations); *CBS, Inc. v. FCC*, 453 U.S. 367, 371 (1981) (granting certiorari "to consider whether the Federal Communications Commission properly construed" a statute governing broadcast rules); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (granting certiorari to review FCC policy statement regarding public interest in competition among broadcasters); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 360 (1955) (granting certiorari on question relating to radio stations "[i]n view of the importance to the administration of the [Communications] Act"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (same).

The need for such review is even more acute in the wake of the 1996 Act. This Court has recognized that the 1996 Act was "an unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. 844, 857 (1997), and has previously decided a number of questions arising out of the Commission's implementation of the Act. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (reversing a decision of the Eighth Circuit with respect to the 1996 Act that would have interfered with the Act's goal of increasing telecommunications competition); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) (interpreting the 1996 Act's provisions regarding telecommunications rate-setting methodology).

Interpretation of the 1996 Act is of particular importance in the communications-law context. The Act represents Congress's most comprehensive revision of the 1934 Communications Act that forms the basis of the Commission's regulation in this area; it is thus especially critical that this Court ensure that the 1996 Act is properly and uniformly interpreted by the courts and by the Commission.

B. The Third Circuit's Decision Is Unjustifiable And Will Cause Serious Harm To Television Broadcasters And The Public.

1. The Third Circuit's decision on the duopoly rule, which simply restated the Commission's unsupported conclusions, is wrong and should not be allowed to stand. The Third Circuit effectively overruled the D.C. Circuit, which is the prerogative solely of this Court. The Third Circuit also ignored the changes in the competitive landscape that make the duopoly rule arbitrary and violative of Congress's § 202(h) mandate.

First, as to the question of which "voices" to count in deciding whether common ownership will do away with competition for viewers, the Third Circuit was wrong, and the D.C. Circuit was right. There is no reasoned justification for counting "voices" broadly for purposes of the cross-ownership rule and narrowly for purposes of the local television rule. In the 2008 Order, the Commission simply asserted that "given our conclusion that the local television ownership rule is necessary to preserve competition among broadcast television stations in local markets, it is appropriate to limit our voices test to television stations in that rule." Pet. App. 219a. That is a tautology; it fails to explain why the 2008 Order limits the competitive market to local broadcast television stations in the first place.

The Commission pointed to no evidence supporting its premise that local television stations compete only against each other. *See* Pet. App. 215a-222a; *see also* NAB Pet. App. At 1a-2a (court should hold agency action "unlawful" where it is "unsupported by substantial evidence"). Nor does such a premise make sense. The evidence in the record overwhelmingly demonstrated that the failure to consider non-broadcast media as "voices" for purposes of the top-four/eight-voices test is entirely unjustified in light of the state of the media marketplace, which has changed tremendously over the past ten years. Local television stations compete for audiences and advertisers with cable operators, satellite operators, and Internet outlets, and not merely with other television stations. For instance, nearly 30 million more households receive video programming from cable, satellite, or other multichannel video programming distributors today than in 1999, an increase of about 50%. *See, e.g.*, J.A. 3027-31; *see also In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 F.C.C.R. 6005, ¶ 6 (2001); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, ¶ 8 (2009). Neither the Commission nor the Third Circuit acknowledged or addressed the bulk of this evidence.

Instead of counting only broadcast television stations, the Commission should have considered all outlets that compete for advertising and audiences in local markets. Such a methodology for determining "voices" would give a far more accurate picture of how common ownership of two stations would actually affect competition. *See Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 315 (3d Cir. 1986); *see also Sinclair*, 284 F.3d at 165 (explaining that the Commission has the burden to "demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest'"). It would also be far more consistent with the mandate of a Congress that saw competition as such a powerful reason for deregulation. *See* NAB Pet. App. 7a; *supra* pp. 21-23.

Second, even apart from the question of how voices should have been counted, the Third Circuit should have struck down the duopoly rule under § 202(h) and the Administrative Procedure Act as unnecessary in light of increased competition. In *Prometheus I*, the Third Circuit upheld the Commission's decision to jettison the top-four/eight-voices rule in favor of a less restrictive one on the ground that common ownership would result in "consumer welfare enhancing efficiencies" that would "translate[] into improved local news and public interest programming." 373 F.3d at 415-16 & n.45. But in *Prometheus II*, the Third Circuit reversed itself, accepting the Commission's unsupported assertion that it had now discovered that "eliminating the rule could harm competition among broadcast television stations in local markets." Pet. App. 220a. The Circuit found that the Commission "did not ignore the 'explosion' of media outlets in the industry; it simply concluded that, despite these changes, the rule remained 'necessary in the public interest to protect competition for viewers and in local television advertising markets.'" *Id.* at 51a. Such a "conclusory assertion that the rule is . . . necessary" is wholly "insufficient to allay the doubts that the FCC itself previously raised." *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 885 (D.C. Cir. 1999).

Strikingly, *Prometheus II* never explained why *Prometheus I* had been wrong to conclude that increased common ownership leads to welfare-enhancing efficiencies that are in the public interest. Indeed, the Third Circuit discussed no evidence at all – empirical or otherwise – supporting the Commission's new conclusion that the top-four/eight-voices rule was necessary to promote competition. This absence of reasoned justification for the change is particularly egregious given the record evidence before the Commission, which strongly confirmed the agency's prior conclusion that the rule actually undermines the goal of competition. *See infra* pp. 29-31.

2. The Third Circuit's decision upholding the duopoly rule – in the face of both the D.C. Circuit's *Sinclair* decision and the dramatic changes in the media marketplace over the past decade – threatens serious harm to the television broadcasting industry and, ultimately, to the public. And because the Third Circuit was selected to review all challenges to the Commission's revised media ownership rules, *see* 28 U.S.C. § 2112(a), its decision effectively overrules the D.C. Circuit and has nationwide effect – at least until the next quadrennial review is completed, a process that will take years. *See id.* § 2342(1). Indeed, the Commission only recently circulated among the Commissioners a rulemaking notice for the 2010 quadrennial review and, to date, has not yet

adopted or issued that notice. *See* 31 *Commc'ns Daily* 1 (Nov. 9, 2011).

By preventing local television stations from forming more efficient ownership structures, the duopoly rule threatens many local stations' viability. *See, e.g.*, J.A. 2944-57, 5884-85, 5933-44. The current duopoly rule has now been in effect since 1999 – but neither the level of competition nor the condition of the economy has remained static since then. As a result of changes in the media and economic landscapes, lower-rated stations (including network affiliates) face deteriorating financial conditions that threaten their news and other local operations. *See* J.A. 2949-53, 5802-12 (analysis of stations' declining financial position in medium and small markets). Indeed, "[a]verage [local television] station revenue has dropped by almost half in just the past nine years," when adjusted for inflation.[6] These problems can be ameliorated by same-market combinations between a financially struggling station and a more financially stable one, which create efficiencies in operation. *See, e.g.,* J.A. 2954-

---

[6] Deborah Potter, Katerina-Eva Matsa, and Amy Mitchell, Pew Project for Excellence in Journalism, *The State of the News Media 2011: An Annual Report on American Journalism, Local TV: Good News After the Fall* (2011). Broadcast station revenues fell dramatically during 2008 and 2009, and although revenue rebounded to a degree in 2010, analysts have projected that neither television nor radio advertising revenues will, even by 2019, recover to the level enjoyed by broadcast stations in 2006. *See* Robin Flynn, SNL Kagan, *TV Station Ad Revenue Projections* (May 26, 2010) and *Radio Station Revenue Projections Update* (May 27, 2010), *available at* http://www.snl.com.

55; J.A. 5787-801 (study demonstrating that acquired stations in duopolies increased revenue and audience shares). Yet the Commission's order prevents such efficiencies from being realized.[7]

By harming local television stations all over the country, the duopoly rule also directly harms the public. When a station struggles financially or ceases to operate, it loses its ability to provide the news and public affairs programming on which members of the public rely. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189-90 (1997) (recognizing importance of "preserving the benefits of free, over-the-air local broadcast television" (quotation marks omitted)). But placing stations under common ownership, resulting in an improvement in financial stability, leads to *improved* local programming – both in quality and in quantity – of the kind that is critical to viewers, as the record before the Commission demonstrated. *See, e.g.,* J.A. 4047-189 (Media Ownership Study) (finding that co-

---

[7] Notably, the financial struggles of local television broadcasters are most acute, and the duopoly rule is most harmful, in smaller markets. In 154 of the country's 210 local television markets, the top-four/eight-voices rule prohibits *any* common ownership at all, because those markets have fewer than nine stations. *See* J.A. 5885. Thus, when the Commission rejected the eight-voices restriction in 2003, its determination that the rule was anti-competitive rested largely on the effect on stations in small and medium-sized markets. 2003 Order ¶¶ 140, 201 ("owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets"); *id.* ¶ 227; *see also* *Prometheus I*, 373 F.3d at 416 ("the Commission's [2003] local television rule is protective of small-market stations").

ownership of same-market stations "has a large, positive, statistically significant impact on the quantity of news programming").

The Third Circuit's decision will thus have profound implications for the very survival of television broadcasters across the country and, as a result, for the nature and quality of news, local affairs, and other programming offered to the viewing public. In light of these implications, the question presented here warrants review by this Court.

C. These Issues Will Continue To Recur.

This Court's guidance is also necessary at this juncture because of the periodic review provisions governing the media ownership rules. The Third Circuit has established a nationwide rule for the time being[8] – but issues regarding the proper interpretation of the congressional mandate in the 1996 Act and the Commission's responsibilities under that Act will recur at the next quadrennial review, and will continue to recur periodically thereafter. The split of authority between the Circuits must be resolved both so that the Commission has proper guidance on its responsibilities under the Act, and so that parties are not encouraged to "game" the lottery system under 28 U.S.C. § 2112 – for instance, by filing

---

[8] Notably, however, challenges to the Commission's application of its media ownership rules in the context of *specific* mergers must always be appealed to the D.C. Circuit. *See* 47 U.S.C. § 402.

petitions for review in as many circuits as possible other than the D.C. Circuit – when it is again time to seek judicial review of a Commission order on the media-ownership rules. *Cf. GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (the lottery procedure of 28 U.S.C. § 2112 "is in place 'to avoid confusion and duplication by the courts' and 'to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions'" (quoting *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 766-67 (3d Cir. 1979)).

In addition, the Third Circuit's improper attempt to retain jurisdiction over the entirety of the media ownership proceedings heightens the need for this Court's review. Under the mandated statutory procedures, when an agency conducts a rulemaking proceeding based upon a new administrative "record," the resulting order should give rise to a new and separate review proceeding. 28 U.S.C. § 2112(a). In such a proceeding involving the Commission, 47 U.S.C. § 402(a) and the Hobbs Act secure to litigants the option to choose their venue – either their home circuit or the D.C. Circuit – and establish the lottery procedure in the case of filings in multiple circuits. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342; 28 U.S.C. § 2112. It is not appropriate for any court of appeals – and certainly not any specific panel – to attempt to short-circuit these congressionally prescribed procedures and thwart the venue-selection mechanisms by asserting jurisdiction over future agency proceedings that have not even occurred yet. *Am. Pub. Gas Ass'n v. FPC*, 555 F.2d 852, 857-58 (D.C. Cir. 1976) (per curiam) (familiarity with the legal background of a case is not a ground for transfer under § 2112 because it implies "a concept of specialized circuits and panels for certain types of cases" that has been rejected); *Pub. Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972).[9]

Such an act by the Third Circuit is especially troublesome in the context of § 202 and the media ownership rules. Congress has established a carefully calibrated process of iterative, deregulatory reviews of those rules, and no court of appeals should be permitted to transform Congress's design into a single, endless, and inconclusive remand proceeding. Here, for example, on May 25, 2010 (while the decision at issue was still pending in the Third Circuit), the Commission issued its Notice of Inquiry seeking comment for the 2010 quadrennial review, but the participants were still bound by the rules issued as part of the 1998 review. That was so because the rules from the 2002 review had been stayed by the Third Circuit, and those from the 2006 review were still pending before that court as a result of its 2004 opinion retaining jurisdiction over

---

[9] In the decision at issue here, the Third Circuit panel ostensibly claimed future jurisdiction over only "the remanded issues" with respect to the newspaper-broadcast cross-ownership rule. But the panel also specifically ordered the Commission to consider the remanded issues *in the context of* its 2010 quadrennial proceeding, thus effectively requiring that the agency order on remand and the agency quadrennial review order be one and the same. Pet. App. 79a; *see also id.* at 80a (dissenting opinion arguing that "potential objections to a new [newspaper] rule" should not necessarily "be reviewed by [the Third Circuit] panel").

further proceedings. That state of affairs is not consistent with the congressional requirement of regular, iterative reviews set forth in § 202(h).

For these reasons, the Third Circuit panel's attempted retention of jurisdiction does not in any way obviate the need for this Court's review and resolution of the split between the Third Circuit and the D.C. Circuit. Indeed, it provides a further reason for this Court to step in, so as to clarify the proper interpretation of the 1996 Act and to ensure that local broadcasters – and the viewing public that they serve – are not harmed by an arbitrary rule that violates § 202(h).

CONCLUSION

For the foregoing reasons, NAB respectfully requests that the petition for certiorari be granted.[10]

---

[10] Other parties have also petitioned for review of the Third Circuit's decision, raising issues regarding the constitutionality of the Commission's media ownership rules as well as problems with respect to specific rules (including issues involving the restrictions on newspaper/broadcast cross-ownership). Given that all of the issues arising from the Third Circuit's decision regarding the media ownership proceedings are closely related, if the Court grants one or more of those petitions, it should also grant review here. In the alternative, Petitioner respectfully requests that the Court hold the instant petition pending disposition of those other petitions.

Respectfully submitted,

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 200036
(202) 429-5430

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

APPENDIX

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706

§ 706. Scope of review

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.

Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.--The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.--

(1) APPLICABLE CAPS.--The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that--

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.--Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.--

(1) NATIONAL OWNERSHIP LIMITATIONS.--The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) LOCAL OWNERSHIP LIMITATIONS.--The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.--With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.--The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of--

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section

73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.--

(1) ELIMINATION OF RESTRICTIONS.--The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.--The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.--Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

(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.