No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To preserve competition and viewpoint diversity, the Federal Communications Commission (FCC) has historically restricted the ability of broadcasters to own multiple outlets in a single market. In Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. 303 note, Congress directed the FCC to review these ownership rules every four years to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation [the FCC] determines to be no longer in the public interest." In 2003, the FCC sought to relax certain ownership rules that it had determined were no longer necessary in light of dramatically changed market conditions. In a series of three appeals spanning the past 17 years, however, the same divided panel of the United States Court of Appeals for the Third Circuit has repeatedly vacated the FCC's attempts to reform its ownership rules. The effect of those decisions has been to maintain in effect decades-old FCC ownership restrictions that the agency believes to be outmoded. In the decision below, the panel majority vacated the FCC's revised ownership rules and other regulatory changes solely on the ground that the agency had not adequately analyzed the potential effect of the regulatory changes on female and minority ownership of broadcast stations. The question presented is as follows:

Whether the court of appeals erred in vacating as arbitrary and capricious the FCC orders under review, which, among other things, relaxed the agency's cross-ownership restrictions to accommodate changed market conditions.

PARTIES TO THE PROCEEDING

Petitioners were respondents in the court of appeals. They are the Federal Communications Commission and the United States.

Respondents were petitioners and intervenors in the court of appeals.[1] They are: Benton Institute for Broadband and Society, Bonneville International Corporation, Common Cause, Connoisseur Media LLC, Cox Media Group LLC, Free Press, Fox Corporation, Independent Television Group, Media Alliance, Media Council Hawaii, Media Mobilizing Project, Multicultural Media, Telecom and Internet Council, National Association of Black-Owned Broadcasters, National Association of Broadcast Employees and Technicians-Communications Workers of America, National Association of Broadcasters, National Organization for Women Foundation, News Corporation, News Media Alliance, Nexstar Broadcasting, Inc., Office of Communication Inc. of the United Church of Christ, Prometheus Radio Project, Scranton Times L.P., and Sinclair Broadcast Group Inc.

RELATED PROCEEDING

United States Court of Appeals (3d Cir.):

> *Prometheus Radio Project* v. *FCC*, Nos. 17-1107, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943, & 18-3335 (Sept. 23, 2019) (petition for reh'g denied, Nov. 20, 2019).

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[1] Certain respondents appeared in more than one capacity in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 939 F.3d 567. The orders of the Federal Communications Commission under review are reported at 31 FCC Rcd 9864 (excerpted at App., *infra*, 57a-152a), 32 FCC Rcd 9802 (excerpted at App., *infra*, 153a-242a), and 33 FCC Rcd 7911 (excerpted at App., *infra*, 243a-272a).

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2019 (App., *infra*, 280a-282a). The court

of appeals entered an amended judgment on September 27, 2019 (App., *infra*, 283a-285a). Petitions for rehearing were denied on November 20, 2019 (App., *infra*, 277a-279a). On February 12, 2020, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 19, 2020. On March 11, 2020, Justice Alito further extended the time to and including April 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. 303 note, provides:

> The [Federal Communications] Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. 161] 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.

Other relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 286a-293a.

STATEMENT

Congress has vested the Federal Communications Commission (FCC or Commission) with broad authority to regulate broadcast markets in the public interest. Pursuant to this authority, the FCC has historically acted to preserve competition and viewpoint diversity by restricting the ability of broadcasters to own multiple outlets in a single market. In Section 202(h) of the Telecommunications Act of 1996, as amended, Congress

has directed the FCC to review its ownership rules every four years to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." 47 U.S.C. 303 note.

This case concerns the FCC's repeated efforts over a period of 17 years—thwarted by a series of decisions by the same divided panel of the United States Court of Appeals for the Third Circuit—to loosen ownership restrictions that the agency has determined are no longer necessary in light of dramatic changes to the media landscape. In the decision below, the panel majority did not question the agency's findings that the rules' original competition and viewpoint-diversity rationales no longer justified their retention. It nevertheless vacated the revised rules solely on the ground that the agency had not adequately analyzed the rules' likely effect on female and minority ownership of broadcast stations.

1. For more than 85 years, the Commission has exercised its wide-ranging statutory authority to regulate broadcasters in the public interest, both in issuing individual licenses and in promulgating rules. See 47 U.S.C. 303(f); 47 U.S.C. 309(a). Before the Internet existed, when the media marketplace was dominated by a small number of print and broadcast sources of information, the FCC exercised this authority to limit common ownership of multiple media outlets in a single market. For example, the Commission limited the number of broadcast stations a single entity could own, see *National Broad. Co.* v. *United States*, 319 U.S. 190 (1943); *United States* v. *Storer Broad. Co.*, 351 U.S. 192 (1956), and banned common ownership of a daily newspaper and

broadcast station, see *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (*NCCB*). These restrictions were designed to prevent undue economic concentration and to preserve viewpoint diversity. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 382-386 (3d Cir. 2004), as amended (June 3, 2016) (*Prometheus I*), cert. denied, 545 U.S. 1123 (2005).

The Telecommunications Act of 1996 (Act), Pub. L. No. 104-104, 110 Stat. 56, established "a pro-competitive, de-regulatory national policy framework" that Congress viewed as better suited to the rapidly evolving communications market. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). Consistent with this framework, Section 202(h) of the Act directs the FCC to review its ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition." 47 U.S.C. 303 note.[2] If the Commission determines that any of these rules are "no longer in the public interest," it "shall repeal or modify" them. *Ibid.* "The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace.'" *Prometheus I*, 373 F.3d at 391 (quoting *In re The 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (2003)).

Section 202(h) requires the Commission to evaluate the continuing need for existing ownership rules in light

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[2] The Act originally required biennial review but was later amended to mandate quadrennial review. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, Tit. VI, § 629(3), 118 Stat. 100.

of both "competition" and the "public interest." 47 U.S.C. 303 note. In applying the public-interest criterion, the FCC has historically considered the values of localism and five different types of diversity: "viewpoint, outlet, program, source, and minority and female ownership diversity." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd 13,620, 13,627 (2003) (*2002 Review*); see *id.* at 13,627-13,645. Of the five, the Commission has regarded viewpoint diversity as "paramount," "because the free flow of ideas under-girds and sustains our system of government." *Id.* at 13,631.

2. In 2002, in conducting its Section 202(h) review, the FCC confronted a media landscape in which "[t]here [were] far more types of media available," "far more outlets per-type of media," and "far more news and public interest programming options available to the public * * * than ever before." *2002 Review*, 18 FCC Rcd at 13,667. In light of this changed environment, the Commission determined that wide-ranging regulatory reforms were needed. Among other things, the FCC eliminated its ban (originally adopted in 1975) on common ownership of daily newspapers and broadcast stations in a single market. *Id.* at 13,748; see *In re Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broad. Stations*, 50 FCC 2d 1046, 1075, amended on reconsideration, 53 FCC 2d 589 (1975) (*Multiple Ownership*). The Commission found that the ban was no longer necessary to promote competition or viewpoint diversity given the proliferation of new media sources, *2002 Review*, 18 FCC Rcd at 13,748-13,754, 13,760-13,767, and that the efficiencies resulting from cross-ownership could promote localism, *id.* at 13,753-13,760. The FCC replaced the blanket ban with

new, market-specific limits. *Id.* at 13,775. The Commission also repealed the Failed Station Solicitation Rule, which had required certain owners of failed television stations to attempt to secure out-of-market buyers for their stations before selling to in-market buyers. *Id.* at 13,708.

A divided three-judge panel of the Third Circuit vacated and remanded the FCC's order in substantial part. *Prometheus I*, *supra*. The panel unanimously held that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." 373 F.3d at 398; see *id.* at 398-400. Two judges concluded, however, that the FCC had not adequately justified the specific substitute limits the agency had selected. *Id.* at 402-411. The panel also vacated and remanded the FCC's repeal of the Failed Station Solicitation Rule, on the ground that the Commission had failed to "mention anything about the effect this change would have on potential minority station owners." *Id.* at 420.[3] The panel retained jurisdiction over the remand proceedings. *Id.* at 435.

Chief Judge Scirica dissented in part, concluding that the panel majority had impermissibly "second-guess[ed]" the FCC's "reasoned policy judgments." *Prometheus I*, 373 F.3d at 435. He viewed the majority as failing to accord proper deference to the Commission's "predictive judgments," particularly "[g]iven the dynamic nature of the industry." *Id.* at 439. He viewed

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[3] The panel noted that the FCC had "deferred consideration" of a number of "other proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting." *Prometheus I*, 373 F.3d at 421 n.59. It directed the Commission to address those proposals on remand. *Ibid.*

it as more "prudent" to permit the new rules to take effect, "monitor the resulting impact on the media marketplace, and allow the Commission to refine or modify its approach in its next quadrennial review." *Ibid.* Chief Judge Scirica warned that the court was "[s]hort-circuiting the statutory review process," thereby "depriv[ing] both the Commission and Congress [of] the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace." *Id.* at 438.[4]

3. In its 2006 Section 202(h) review, the Commission noted the continued evolution of media markets. *In re 2006 Quadrennial Regulatory Review*, 23 FCC Rcd 2010, 2022 (2008). In light of these changes, the FCC again sought to "relax the 32-year-old newspaper/broadcast cross-ownership ban" in favor of a case-by-case approach guided by presumptions and a four-factor test. *Id.* at 2030; see *id.* at 2018-2019. The Commission observed that "[t]he steep reduction in newspaper circulation in recent years has triggered a cascade of negative impacts," and that regulatory changes were appropriate so that cross-ownership restrictions would "not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local

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[4] Several entities filed petitions for writs of certiorari, which this Court denied. 545 U.S. 1123 (2005). The government filed a conditional cross-petition that urged the Court to allow the FCC to attempt to address the Third Circuit's concerns in the first instance on remand. See Gov't Conditional Cross-Petition at 3, *Prometheus I*, *supra* (No. 04-1168). The government also argued, however, that if one or more petitions were granted, the Court should also take up the question whether the court of appeals, in vacating and remanding various aspects of the revised rules, had improperly substituted its own judgment for that of the Commission. *Id.* at 13.

news available to consumers via newspaper and broadcast outlets." *Id.* at 2026, 2030. The FCC further explained that the proliferation of media sources also meant that certain "combinations no longer pose[d] the same threat to diversity that they once did." *Id.* at 2032; see *id.* at 2031-2032.

In a separate order designed to promote broadcast-ownership diversity, including ownership by women and minorities, the FCC adopted various measures to increase opportunities for "eligible entities," which it defined to include certain small businesses. See *In re Promoting Diversification of Ownership in the Broad. Servs.*, 23 FCC Rcd 5922, 5925 (2008); see *id.* at 5925-5927. The Commission sought comment on whether it should adopt an expressly race-conscious definition of "eligible entit[y]," noting that any such definition would need to satisfy strict scrutiny. *Id.* at 5950.

On review, the same divided Third Circuit panel again vacated the Commission's regulatory changes in significant part. *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 470 (2011) (*Prometheus II*), cert. denied, 567 U.S. 951 (2012). The majority invalidated the FCC's repeal of the blanket newspaper/broadcast cross-ownership ban on the ground that the agency had not provided adequate notice and opportunity for comment. *Id.* at 445-454. The court also invalidated the "eligible entity" definition as arbitrary and capricious, concluding that the FCC had failed to "explain how the eligible entity definition adopted would increase broadcast ownership by minorities and women." *Id.* at 469-470. The court ordered the Commission to consider a race-based definition on remand. *Id.* at 471 & n.42. The court retained jurisdiction over the remanded issues. *Id.* at 472.

Judge Scirica again dissented in part. *Prometheus II*, 652 F.3d at 472-475. He would have held that the agency had complied with notice-and-comment requirements, and he criticized the majority for "preserv[ing] an outdated and twice-abandoned ban" on newspaper/broadcast cross-ownership. *Id.* at 472; see *id.* at 472-473. Judge Scirica also dissented from the majority's decision to retain jurisdiction over the remand proceedings. *Id.* at 473.[5]

4. a. In 2016, after consolidating its 2010 and 2014 quadrennial reviews,[6] the FCC again sought to loosen the newspaper/broadcast cross-ownership restrictions, while leaving its other ownership rules largely intact. See 31 FCC Rcd 9864 (2016 Order) (excerpted at App., *infra*, 57a-152a); see also *id.* at 9913. In response to the panel's earlier remand, the agency also analyzed the possibility of adopting a race- or gender-specific "eligible entity" definition, but it concluded that the record evidence did not satisfy the exacting constitutional standards for adopting such an approach. App., *infra*, 115a-152a. The FCC instead reinstituted the revenue-based definition from its prior order. *Id.* at 76a-77a. Rather than justify this definition on the ground that it would promote female and minority ownership, how-

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[5] Various entities filed petitions for writs of certiorari, which this Court denied. 567 U.S. 951 (2012).

[6] In 2015, interested parties petitioned for review, arguing (among other things) that the Commission had unreasonably delayed in adopting a new definition of "eligible entity." *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 37 (3d Cir. 2016). The same panel agreed and remanded with an order for the FCC to act promptly, again emphasizing the Commission's "obligation to promote ownership by minorities and women." *Id.* at 48; see *id.* at 37. The panel retained jurisdiction over the remanded issues. *Id.* at 60.

ever, the agency explained that the definition was indisputably well-tailored to promote media ownership by small businesses and new entrants—a different, but also worthy, diversity goal. *Id.* at 98a-99a, 101a-111a. The agency predicted that the definition would further both competition and viewpoint diversity. *Id.* at 102a.

On reconsideration motions filed by various parties, the Commission determined that changed market conditions justified a broader overhaul of its ownership rules. See 32 FCC Rcd 9802 (Reconsideration Order) (excerpted at App., *infra*, 153a-242a). Among other things, the agency repealed its newspaper/broadcast cross-ownership rule (as well as a similar rule limiting radio and television cross-ownership) and modified the rules limiting ownership of multiple television stations in a single market. App., *infra*, 156a-157a. The agency cited extensive changes to the media landscape, including the substantially increased number of broadcast voices; the newspaper industry's continued decline; radio's diminished importance in contributing to viewpoint diversity; and the explosive growth of nontraditional media outlets, such as independent, online news outlets and cable and satellite programming. *Id.* at 168a-186a, 204a-213a, 216a-223a. The agency explained that each of these developments had reduced the likelihood that consolidation would lead to diminished viewpoint diversity, and had increased the potential for certain combinations to generate economic efficiencies and help preserve traditional media outlets. See, *e.g.*, *id.* at 159a.

The FCC also addressed the potential impact of its regulatory changes on minority and female ownership. Examining the record developed "[a]fter seeking public comment on this topic a number of times," App., *infra*, 195a, and recognizing the limitations of existing data,

see, *e.g.*, *id.* at 72a-73a, the FCC concluded that prior relaxations of media ownership restrictions had not led to an overall decline in minority-owned stations, *id.* at 197a-198a, 214a-215a. The Commission further observed that no commenter had produced meaningful evidence showing a likely negative impact on minority and female ownership, *id.* at 195a-198a, 214a-215a, 235a-236a, and that "two organizations representing minority media owners" had sought "relief from the [newspaper/broadcast cross-ownership] rule's restrictions," *id.* at 195a. The Commission ultimately concluded that the changes would not likely have an adverse effect, and that the existing rules could "no longer be justified based on the unsubstantiated hope that [they] will promote minority and female ownership." *Id.* at 236a; see *id.* at 195a-196a, 214a-215a.

In a separate order, the FCC established a new "incubator program" to further promote its ownership-diversity goals by pairing aspiring broadcast-station owners with established broadcasters. 33 FCC Rcd 7911 (Incubator Order) (excerpted at App., *infra*, 243a-272a); see App., *infra*, 244a-245a. The FCC declined to adopt race- or gender-based eligibility criteria for the program for the same reasons it had given in the 2016 Order. *Id.* at 264a. Instead, it adopted criteria based on applicant size, designed to foster entry into the broadcasting sector by entrepreneurs and small businesses. *Id.* at 252a-256a. The Commission noted that related eligibility criteria had previously "increased successful participation of small businesses owned by women and minorities" in broadcast-license auctions, and it predicted similar effects for the incubator program. *Id.* at 260a; see *id.* at 257a-262a.

b. On petitions for review, the same divided panel again vacated the Commission's regulatory action in significant part. App., *infra*, 1a-56a. The majority did not challenge the agency's core findings that market developments had rendered the existing ownership rules unnecessary (and even affirmatively harmful) with respect to competition and viewpoint diversity. Instead, it held that the FCC's determination that the revised rules would "have minimal effect on female and minority ownership" was "not adequately supported by the record." *Id.* at 27a.

In support of that holding, the court cited the absence of any historical data pertaining specifically to the effect of prior rule changes on female ownership. App., *infra*, 30a. It deemed the historical data pertaining to minority ownership insufficiently precise, and it criticized the agency for not performing a more sophisticated statistical analysis. *Id.* at 30a-32a. The court acknowledged that "[t]he APA imposes no general obligation on agencies to produce empirical evidence." *Id.* at 33a (quoting *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) (brackets in original)). The court found that principle inapplicable here, however, on the ground that "the reasoned explanation given by the Commission rested on faulty and insubstantial data." *Ibid.*

The court of appeals vacated both the Reconsideration Order and the Incubator Order in full, as well as the 2016 Order's definition of "eligible entity." App., *infra*, 34a. The court directed that "[o]n remand the Commission must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women

and minorities, whether through new empirical research or an in-depth theoretical analysis." *Ibid.* It further held that, "[i]f [the FCC] finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so." *Ibid.* The panel retained jurisdiction over the remanded issues. *Id.* at 38a.

Judge Scirica again dissented in part. App., *infra*, 39a-56a. He observed that "[n]o party identifies any reason to question the FCC's key competitive findings and judgments." *Id.* at 48a. As to the new rules' likely effects on ownership of broadcast stations by women and minorities, he concluded that the agency had reasonably determined—"based on its understanding of the broadcast markets, the evidence in the record, and the only data submitted—that repeal of the [pre-existing] rules was unlikely to harm ownership diversity." *Id.* at 50a. He emphasized "that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," *id.* at 48a (quoting *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)), and that "complete factual support in the record for the Commission's judgment or prediction is not possible or required," *id.* at 51a (quoting *NCCB*, 436 U.S. at 814). In his view, "[t]he FCC's lack of some data relevant to one of [multiple] considerations should not outweigh its reasonable predictive judgments, particularly in the absence of any contrary information, such that its entire policy update is held up." *Id.* at 52a. Judge Scirica stated that he "would allow the rules to take effect and direct the FCC to evaluate their effects on women- and minority-broadcast ownership in its 2018 quadrennial review." *Id.* at 40a.

The government and various intervenors filed petitions for rehearing and rehearing en banc, which the court of appeals denied. App., *infra*, 277a-279a.[7]

REASONS FOR GRANTING THE PETITION

For the past 17 years, the same divided Third Circuit panel has repeatedly prevented the Commission from fulfilling Section 202(h)'s mandate that the agency "shall" repeal or modify any ownership rule it determines is no longer "necessary in the public interest as the result of competition." 47 U.S.C. 303 note. The court's decisions have frozen in place decades-old ownership restrictions that have long outlived their competitive usefulness in light of dramatic upheavals in the media markets. In the decision below, the panel majority did not challenge the agency's core findings. It instead vacated a host of significant rule changes based solely on the panel's conclusion that the FCC had not adequately analyzed a single non-statutory factor that the agency has traditionally considered as a subsidiary element in its public-interest analysis. The panel's reasoning flouted bedrock administrative-law principles that require judicial deference to agency policy choices, as well as this Court's repeated FCC-specific admonitions that courts must respect the Commission's reasonable judgments about what measures will best serve the public interest. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

The panel's repeated vacaturs and remands, and its retention of jurisdiction over subsequent appeals, have had far-reaching consequences for domestic broadcast

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[7] Judge Scirica enjoys senior status and thus was ineligible to vote on the petitions for rehearing en banc. See App., *infra*, 279a.

markets and for the Commission's ability to regulate effectively going forward. The panel's rulings have saddled broadcast markets nationwide with outdated rules that the FCC has repeatedly concluded—and that the panel has acknowledged—are preventing struggling traditional outlets from entering transactions that would allow them to retain economic vitality. See *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 51-52 (3d Cir. 2016) (*Prometheus III*). The panel's vacaturs have also had the perverse consequence of preventing the agency from studying the effects of its revised ownership rules on women and minorities, thereby gathering the very data the panel insists are necessary for informed rulemaking. And the decision below—which treats predicted impacts on female and minority ownership as a necessary threshold consideration for every ownership rulemaking the Commission undertakes—will distort future quadrennial reviews. The absence of a circuit conflict does not counsel against review, as the panel's consistent retention of jurisdiction, including in the decision below, has effectively thwarted review of the FCC's quadrennial ownership proceedings by any other court of appeals.

A. The Decision Below Is Wrong

Bedrock administrative-law principles require courts to defer to agencies' reasoned policy choices and predictive judgments. Such deference is particularly appropriate when courts evaluate the FCC's exercise of its statutory authority to advance the "public interest." The Orders under review easily satisfy these standards, and the panel majority's contrary conclusion is flawed on multiple levels.

1. a. The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes courts to set aside

agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid.* (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Instead, an agency rule typically will be deemed arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

The arbitrary-and-capricious standard gives agencies substantial leeway to draw inferences from incomplete evidence and to make reasonable policy judgments in the face of empirical uncertainty. "The APA imposes no general obligation on agencies to produce empirical evidence," *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.), and "[i]t is not infrequent that the available data do not settle a regulatory issue," *State Farm*, 463 U.S. at 52.

In that circumstance, an agency must "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Ibid.* If the agency "justif[ies]" that policy conclusion "with a reasoned explanation," it is entitled to deference. *Stilwell*, 569 F.3d at 519; see *State Farm*, 463 U.S. at 52 (agency action is not "arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion").

b. Deference is particularly appropriate when courts evaluate the Commission's policy judgments about what broadcasting regulations will best serve the public interest. See 47 U.S.C. 303 & note; 47 U.S.C. 309(a).[8] In *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (*NBC*), plaintiffs challenged FCC rules that regulated contractual arrangements between networks and local broadcasting stations. *Id.* at 224. In rejecting that challenge, the Court observed that "[i]t is not for us to say that the 'public interest' will be furthered or retarded by the" regulations, and that "[o]ur duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." *Ibid.* The Court further explained that "the wisdom of any action [the Commission] took would have to be tested by experience," and that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.* at 225.

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[8] The meaning of "public interest" is the same whether the Commission is promulgating a new rule or repealing an existing rule under Section 202(h). See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 394 n.17 (3d Cir. 2004), as amended (June 3, 2016), cert. denied, 545 U.S. 1123 (2005).

In *NCCB*, *supra*, the Court rejected challenges to FCC regulations that (a) prospectively limited combinations between newspapers and broadcast stations and (b) required limited divestiture of existing combinations. 436 U.S. at 779. Responding to the argument that "the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints," the Court explained that, "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally." *Id.* at 796. The Court observed that "evidence of specific abuses by common owners is difficult to compile," and that "'the possible benefits of competition do not lend themselves to detailed forecast.'" *Id.* at 797 (quoting *FCC* v. *RCA Commc'ns, Inc.*, 346 U.S. 86, 96-97 (1953)). It concluded that, "[i]n these circumstances, the Commission was entitled to rely on its judgment, based on experience." *Ibid.*

The Court in *NCCB* also reversed the court of appeals' vacatur of the limited divestiture requirements. 436 U.S. at 792, 803. The court of appeals had concluded that the prospective diversification rules required the agency to "presume" that broad divestiture would serve the public interest. *Id.* at 810. This Court disagreed, explaining that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance," and that nothing "require[d] the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances." *Ibid.* As to the court of appeals' conclusion that "the rulemaking record did not adequately 'disclose the extent to which divestiture would actually threaten' the competing policies relied

upon by the Commission," *id.* at 813 (citation omitted), the Court noted that the "factual determinations" "involved in the Commission's decision * * * were primarily of a judgmental or predictive nature," *ibid.* "In such circumstances," the Court concluded, "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *Id.* at 814 (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

In *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981), this Court rejected a challenge to an FCC policy pertaining to programming diversity. *Id.* at 585. Emphasizing "that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," *id.* at 596, the Court observed that "diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act." *Ibid.* Although the Court "approved of the Commission's goal of promoting diversity in radio programming," it noted that the FCC was "vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it." *Id.* at 600. The Court ultimately concluded that the challenged policy "reflect[ed] a reasonable accommodation" of competing interests. *Id.* at 596.

2. Under these principles, the Orders at issue here should easily survive review. The FCC solicited extensive public input, reviewed voluminous record materials, and adopted policies that reasonably accommodated competing interests—taking account of both the record and the agency's own extensive experience. In the 2016

Order, the Commission examined potential race- or gender-conscious definitions of "eligible entity" and concluded that any such definition likely could not satisfy constitutional requirements. App., *infra*, 120a; see *id.* at 120a-122a. To avoid this issue and advance the separate, but equally valid, goal of promoting small businesses and new entrants, the agency adopted a revenue-based definition. *Id.* at 101a-111a.

In the subsequent Reconsideration Order, the Commission relaxed its cross-ownership restrictions after amassing extensive, undisputed record evidence regarding the changed media landscape, including the dramatic increase in broadcasting voices; the diminished significance of newspaper and radio; and the explosive growth of nontraditional media outlets. App., *infra*, 168a-186a, 204a-213a. The FCC also considered the impact its revisions might have on minority and female ownership.[9] Examining the record it had developed "[a]fter seeking public comment on this topic a number of times," *id.* at 195a, the Commission recognized certain limitations in the available data, see *id.* at 72a-73a, but noted that no commenter had produced meaningful evidence showing a likely adverse effect, *id.* at 197a-198a, 214a-215a, 235a-236a. Exercising its reasonable policy judgment in the face of empirical uncertainty, the Commission concluded that the existing cross-ownership restrictions could "no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership." *Id.* at 236a; see *id.* at 215a.

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[9] In assessing the impact on female and minority ownership, the Reconsideration Order drew on analysis contained in prior orders. See, *e.g.*, App., *infra*, 195a. This petition therefore cites prior orders as well in discussing the record evidence on this topic.

Finally, in the Incubator Order, the Commission instituted a program to encourage new market entrants by mitigating the primary barriers—"lack of access to capital" and the need for "operational, managerial, and technical support"—to station ownership by new and diverse entities. App., *infra*, 255a. The program's eligibility criteria, centering on participant size and revenue, reflect the agency's reasonable judgments concerning the program's appropriate beneficiaries. *Id.* at 252a-272a.

In each of the Orders, the FCC thus "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[s] including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington*, 371 U.S. at 168). Because the Commission addressed the relevant "issue[s] seriously and carefully, providing reasons in support of its position and responding to the principal alternative[s] advanced," its judgment merits deference. *Electric Power Supply*, 136 S. Ct. at 784.

3. In reaching a contrary conclusion, the court of appeals took issue with virtually none of the Commission's policy judgments or its underlying reasoning or evidence. Instead, the court identified a single public-interest consideration—the potential effect of the regulatory changes on female and minority ownership of broadcast stations—and invalidated all three Orders in relevant part based on the FCC's purported failure to adequately analyze this consideration. That approach was misconceived.

a. The court's exclusive focus on gender and racial diversity reflects a misapprehension of the statutory scheme and the substantial discretion it grants the FCC

in regulating broadcast markets. Section 202(h) requires the FCC to review existing ownership regulations quadrennially to determine "whether any of such rules are necessary in the public interest as the result of competition." 47 U.S.C. 303 note. Neither the court of appeals nor any party "identifie[d] any reason to question the FCC's key competitive findings and judgments" that the ownership rules were both obsolete and potentially harmful. App., *infra*, 48a (Scirica, J., concurring in part and dissenting in part). Instead, the panel treated minority and female ownership as a threshold, dispositive consideration in all FCC quadrennial-review proceedings. *Id.* at 34a (Majority Opinion) (holding that "the Commission must ascertain on record evidence the likely effect of any rule changes it proposes * * * on ownership by women and minorities"). In so doing, the court effectively displaced the Commission's traditional approach to regulating in the public interest, which emphasizes competition and viewpoint diversity while also taking into account a broad range of additional considerations, including localism and other types of diversity. See p. 5, *supra*.

That result cannot be squared with the statute or this Court's precedent. Section 202(h) does not even mention gender and racial diversity, which the FCC historically has treated as simply one part of a multifactor inquiry to assess and promote the public interest. The FCC's authority to regulate in the public interest includes "broad discretion in determining how much weight should be given to" subsidiary goals like gender and racial diversity "and what policies should be pursued in promoting" those goals. *WNCN*, 450 U.S. at 600. There is no requirement that every FCC rule advance each of the agency's public-policy objectives. By

according "controlling weight" to a single discretionary consideration, *NCCB*, 436 U.S. at 810, the court below "substitute[d] its judgment" about what would best serve the public interest "for that of the agency." *Id.* at 803 (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971)). It thereby disregarded the fundamental principle that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission." *Id.* at 810.[10]

b. The panel majority also erred in concluding that the FCC had not adequately explained the rationales for its Orders. See *State Farm*, 463 U.S. at 43. While acknowledging that an agency need only "justify its rule with a reasoned explanation" and is not subject to any "general obligation * * * to produce empirical evidence," App., *infra*, 33a (quoting *Stilwell*, 569 F.3d at 519), the court vacated the Orders as purportedly "rest[ing] on faulty and insubstantial data" pertaining to female and minority ownership, *ibid.* The court remanded with instructions that the agency conduct "new empirical research" or an unspecified "in-depth theoretical analysis." *Id.* at 34a.

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[10] The Commission has chosen to promote female and minority participation in broadcasting in numerous other ways, including the incubator program; non-discrimination rules; the AM radio revitalization initiative; efforts to facilitate capital investment; support of tax-incentive legislation; a systematic study of the Hispanic television marketplace; and conferences and workshops. See p. 11, *supra*; 31 FCC Rcd 9864, 9962-9970; see also *NAACP* v. *FCC*, 682 F.2d 993, 1003-1004 (D.C. Cir. 1982) ("The Commission has not improperly exercised its discretion by relying on these tools, rather than the Top-Fifty Policy, to advance minority goals."), abrogated on other grounds by *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

That reasoning reflects a fundamental misunderstanding of the principles that govern judicial review of agency action. The APA does not require perfect data, especially on points ancillary to an agency's primary task. Instead, when "the available data do not settle a regulatory issue," an agency may "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52. This Court has observed, in the specific context of the FCC's public-interest determinations, that "complete factual support in the record for the Commission's judgment or prediction is not possible or required." *NCCB*, 436 U.S. at 814.

The panel primarily faulted the agency for failing to cite any evidence regarding the effects that the proposed rule changes would have on "gender diversity." App., *infra*, 30a. But as the FCC explained in the 2016 Order, see *id.* at 72a-73a, no such evidence has been identified. The only available historical data do not include statistics specific to female (as opposed to minority) ownership, *ibid.*, and "any attempt to conduct an empirical study of the relationship between cross-ownership restrictions and minority and female ownership would face obstacles that likely would make such study impractical and unreliable," *In re 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371, 4460 n.595 (2014) (*2014 Review*). Moreover, despite multiple requests for "comment on both study design and the likely connection" between the ownership rules and female and minority ownership, App., *infra*, 45a (Scirica, J., concurring in part and dissenting in part); see, *e.g.*, *2014 Review*, 29 FCC Rcd at 4454-4460, 4469-4471; *In re 2010 Quadrennial Regulatory Review*, 26 FCC Rcd

17,489, 17,496, 17,522 (2011), "[n]o commenter introduced evidence that contradicted the FCC's prediction that changing the rules would unlikely affect ownership diversity," App., *infra*, 45a (Scirica, J., concurring in part and dissenting in part); see also *id.* at 195a-196a, 214a-215a, 235a-236a.

As in *NCCB*, where the relevant evidence was "difficult to compile" and the effects of the proposed rules did "'not lend themselves to detailed forecast,'" the agency here "was entitled to rely on its judgment, based on experience." 436 U.S. at 797 (citation omitted). Drawing on comparable minority-ownership data and considering the evidence in its totality, the FCC made a predictive judgment that the proposed changes would not reduce female ownership levels. See *State Farm*, 463 U.S. at 52 (holding that the challenged agency action was not "arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion"). In light of that prediction and the far-reaching and undisputed competitive benefits of repeal, the FCC concluded that speculation concerning potential effects on female ownership could not justify retention of the existing ownership rules. See App., *infra*, 167a-168a, 195a-196a, 215a, 217a-218a, 235a-236a.

That approach was especially reasonable because the FCC had previously established that the original rationales for the repealed cross-ownership rules—namely, preserving competition and promoting viewpoint diversity, see, *e.g.*, *Multiple Ownership*, 50 FCC 2d at 1074—no longer apply. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004), as amended (June 3, 2016) (upholding FCC's determination that newspaper/broadcast cross-ownership ban was no longer in the public interest), cert. denied, 545

U.S. 1123 (2005). If the Commission had not previously adopted any cross-ownership restrictions, and private parties urged the agency to promulgate such restrictions now as means of promoting minority and female ownership of broadcast stations, the burden clearly would be on the proponents of such rules to identify evidence that the proposed restrictions would have the desired effect. It is similarly reasonable to expect commenting parties who advance new rationales for existing rules to support their positions with evidence.

The court of appeals also criticized the agency for using disparate data sets in comparing minority ownership rates before and after the last round of ownership deregulation. App., *infra*, 31a. But the FCC recognized that "combining older data with more recent data * * * introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace." *Id.* at 66a n.211. It simply found that problem unavoidable because, "in the absence of a continuous, unified data source, the Commission must rely on the available data." *Ibid.* The panel did not contest that, despite "solicit[ing] evidence on this issue during the notice-and-comment period, [the Commission] did not receive any information of higher quality than the" existing data sets. *Id.* at 33a. Nor did it identify any plausible way for the agency to obtain more granular or accurate information about the precise effects of historical rule changes. And "[e]ven if the FCC could obtain improved data on these decades-old regulatory changes, that information offers only modest predictive value for the consequences of the FCC's current rules regarding modernization." *Id.* at 51a (Scirica, J., concurring in part and dissenting in part).

The court of appeals also faulted the FCC for not performing a more sophisticated statistical analysis of the available minority-ownership data. App., *infra*, 31a-32a. That criticism is self-defeating since if (as the panel held) the data are incomplete, a more precise statistical analysis would have been futile. "[B]oth cross-ownership and minority and female ownership levels show very little variation [over time], making empirical study of the relationship between these multiple variables extremely difficult." *2014 Review*, 29 FCC Rcd at 4460 n.595. In the absence of more robust data sets, a regression analysis could not "extrapolate with any degree of confidence the effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels, and any attempt to do so would be misleading." *Ibid.*

c. Finally, the court of appeals compounded its analytic errors with a dramatically overbroad remedy. Although the majority limited its analysis to the data and reasoning that underlay the ownership-rule changes in the Reconsideration Order, App., *infra*, 27a, it vacated both the Reconsideration and Incubator Orders *in full*, as well as the "eligible entity" definition from the 2016 Order, *id.* at 34a. Vacatur was plainly unjustified as to portions of the Orders that respondents did not challenge. See, *e.g.*, 32 FCC Rcd 9802, 9841, 9846 (pertaining to embedded local radio markets and joint services attribution). And even as to other portions of the Orders that respondents *did* challenge, the court's reasoning concerning the ownership rules could not justify vacatur of unrelated rule changes premised on different analysis and data.

In particular, the court's reasoning does not cast doubt on the 2016 Order's definition of "eligible entity"

and the Incubator Order's eligibility criteria. In vacating these rules, the court of appeals stated without elaboration that "[o]n remand the Commission must ascertain on record evidence the likely effect of * * * whatever 'eligible entity' definition it adopts on ownership by women and minorities," and that "[i]f it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so." App., *infra*, 34a. These instructions reflect a disregard of the record. The agency specifically designed its "eligible entity" definition to promote small-business market participation, *not* minority and female ownership. See *id.* at 101a, 107a. Nothing in the statute suggests that every FCC rulemaking must promote female and minority ownership of broadcast stations. See pp. 22-23, *supra*. The agency further explained at length why an explicitly race- or gender-conscious standard likely would not satisfy constitutional scrutiny. App., *infra*, 120a-133a, 136a-152a. In adopting the eligibility criteria for the incubator program, the agency similarly sought to promote new market entrants, while also citing data suggesting that a related standard had previously increased minority and female participation. *Id.* at 252a-256a, 257a-262a.

B. This Case Warrants The Court's Review

Congress established the quadrennial-review process to ensure that the Commission's ownership rules remain in sync with market realities. For 17 years, however, the panel below has prevented the FCC from repealing outdated rules that even the panel recognized no longer serve their original purposes. The decision below will have pernicious effects on broadcast markets, and it will prevent the Commission from collecting

data regarding the effects of its proposed rule changes on minorities and women. And because the court retained jurisdiction over any future challenges to whatever action the FCC takes on remand, the misconceptions reflected in the ruling below can be expected to distort future quadrennial reviews as well.

1. "The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace.'" *Prometheus I*, 373 F.3d at 391 (quoting *In re The 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (2003) (*2003 Report*)). Section 202(h) reflects Congress's "[r]ecogni[tion] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules," and it "require[s] the Commission to 'monitor the effect of competition and make appropriate adjustments' to its regulations." *Ibid.* (quoting *2003 Report*, 18 FCC Rcd at 4727) (ellipses omitted). This "iterative process" was intended to enable the FCC to learn from "experience" by taking "a fresh look at its rules every four years" and reassessing "how its rules function in the marketplace." App., *infra*, 48a (Scirica, J., concurring in part and dissenting in part). The frequency of the required reviews is critical. If the agency waits too long between rule appraisals, the dynamic media marketplace—which has undergone unprecedented changes in recent decades—will quickly outpace the existing regulatory structure.

2. The panel's rulings have thwarted the proper functioning of this process, with far-reaching real-world effects. Most significantly, the panel has frozen in place ownership rules that have indisputably outlived their

competitive usefulness. As the Commission has explained in painstaking detail, "technological innovation and fundamental changes to the media marketplace have eroded many of the assumptions underlying the ownership rules." App., *infra*, 43a (Scirica, J., concurring in part and dissenting in part) (citing, *e.g.*, *id.* at 172a-173a, 177a, 194a-195a, 210a-211a, 220a-223a); see pp. 5, 10, *supra* (describing changed market conditions). Indeed, in its initial 2004 decision in this long-running litigation, the panel concluded that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership [is] no longer in the public interest." *Prometheus I*, 373 F.3d at 398; see also *id.* at 387. That 1975 rule nevertheless remains in effect today, despite two further FCC efforts to repeal it. See *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 472 (3d Cir. 2011), cert. denied, 567 U.S. 951 (2012) (Scirica, J., concurring in part, dissenting in part) ("The decision to vacate and remand the 2008 newspaper/broadcast cross-ownership rule * * * preserves an outdated and twice-abandoned ban."); App., *infra*, 34a (majority vacating attempted repeal for third time). And with respect to the FCC's relaxation of the other ownership rules, "[n]o party identifies any reason to question the FCC's key competitive findings and judgments." *Id.* at 48a (Scirica, J., concurring in part and dissenting in part).

Retention of these outdated rules has inflicted, and will continue to inflict, competitive harm on broadcast markets. In particular, the ownership rules may "prevent[] local news outlets from achieving efficiencies by combining resources," which is critical as "the dominance of traditional news outlets diminishes" due to competition from cable and online sources. App., *infra*,

173a, 180a; see, *e.g.*, *id.* at 185a ("In light of the well-documented and continuing struggles of the newspaper industry, the efficiencies produced by newspaper/broadcast combinations are more important than ever."); *id.* at 43a-44a (Scirica, J., concurring in part and dissenting in part). The continued existence of the newspaper/broadcast cross-ownership ban "come[s] at significant expense to parties that would" otherwise be able "to engage in profitable combinations." *Prometheus III*, 824 F.3d at 52. And because the Orders under review apply to the television, radio, and newspaper industries *nationwide*, the resulting competitive harm is potentially very substantial.

The panel's rulings have also hindered the Commission's ability to gather relevant data and modify its regulations accordingly. In the decision below, the panel sharply criticized the FCC for lacking precise historical data regarding the effect of earlier rule changes on female and minority ownership. App., *infra*, 30a-31a. But it is unclear how the FCC could collect fine-grained information concerning the effects of decades-old regulatory changes, and the panel's own rulings prevented the agency from collecting data regarding the actual effects of the rule changes that the agency had sought to implement in earlier quadrennial reviews. Where, as here, the Commission confronts an "issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony" or data, "a month of experience will be worth a year of hearings." *American Airlines, Inc.* v. *Civil Aeronautics Bd.*, 359 F.2d 624, 633 (D.C. Cir.) (en banc), cert. denied, 385 U.S. 843 (1966); see *NBC*, 319 U.S. at 225 ("Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.") (citation omitted).

If the panel had allowed the agency's revised cross-ownership rules to take effect, the Commission would now be in a far better position to assess the effects of those rules on female and minority ownership.

Permitting the Commission to "assess how its rules function in the marketplace" is particularly appropriate given the "iterative" quality of the quadrennial-review process. App., *infra*, 48a (Scirica, J., concurring in part and dissenting in part). This process "assumes the FCC can gain experience with its policies." *Ibid.* As Judge Scirica cautioned in 2004, the panel majority has "[s]hort-circuit[ed] the statutory review process," thus "depriv[ing] both the Commission and Congress [of] the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace." *Prometheus I*, 373 F.3d at 438 (dissenting in part, concurring in part). In this context, when the agency makes a reasonable prediction based on available evidence, the proper disposition is to permit the new rules to take effect, "monitor the resulting impact on the media marketplace, and allow the Commission to refine or modify its approach in its next quadrennial review." *Id.* at 439 (Scirica, J., dissenting in part, concurring in part).

3. Absent this Court's intervention, the panel's decision will also distort future quadrennial reviews. The decision below effectively requires that, before modifying any ownership rule, the Commission must determine with some unstated degree of precision the effect of the contemplated change on female and minority ownership. App., *infra*, 34a. That requirement is both onerous and unjustified, and it would cripple the Commission's ability to keep pace with market developments. And by "again retain[ing] jurisdiction over the

remanded issues," *id.* at 38a, the panel retained the authority to determine, after the remand proceedings are completed, whether the agency has adequately performed the mandated inquiry.

The panel ordered the Commission on remand to conduct "new empirical research" or an unspecified "in-depth theoretical analysis." App., *infra*, 34a. But the FCC has repeatedly requested comment on the issue of female and minority ownership and has conducted its own analysis, and there are no obvious additional steps it can take to satisfy this burden—particularly since the panel's ruling prevents it from implementing the revised rules and then studying their actual effects on female and minority ownership. And while the panel ordered the Commission either to adopt a definition of "eligible entit[y]" and eligibility criteria that "meaningfully advance ownership diversity," or to "explain why it could not adopt an alternate definition that would do so," *ibid.*, the panel did not identify *any* defects in the Commission's extensive reasoning on that precise point.

4. In addition to distorting the quadrennial-review process, the Third Circuit panel has deterred other courts of appeals from reviewing the FCC's cross-ownership rules and assessing the role that female and minority ownership should play in the agency's deliberations. The panel has retained jurisdiction over each remand, and petitions for review filed in other circuits have been consistently transferred to the Third Circuit, see, *e.g.*, App., *infra*, 11a. As a result, no other court of appeals has heard any challenge to the FCC's quadrennial-review orders over the last 17 years, or offered its own interpretation of the statutory scheme on the points at issue here. Because the panel below again vacated the Orders and retained jurisdiction over

the remand, *id.* at 37a-38a, no circuit conflict is likely to develop as to the validity either of these Orders or of subsequent orders issued as a result of future quadrennial reviews. This Court's intervention is necessary to restore the Commission's discretion to regulate in the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-1107, 17-1109, 17-1110, 17-1111

PROMETHEUS RADIO PROJECT

*NATIONAL ASSOCIATION OF BROADCASTERS
**COX MEDIA GROUP LLC, INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT, PETITIONERS IN NO. 17-1107

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNSEL AND NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., PETITIONERS IN 17-1109

THE SCRANTON TIMES, L.P., PETITIONERS IN 17-1110

BONNEVILLE INTERNATIONAL CORPORATION, PETITIONERS IN 17-1111

* PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT; BENTON FOUNDATION; COMMON CAUSE; MEDIA ALLIANCE; MEDIA COUNCIL HAWAII; NATIONAL ASSOCIATION OF BROADCASTERS EMPLOYEES AND TECHNICIANS COMMUNICATIONS WORKERS OF AMERICA; NATIONAL ORGANIZATION FOR WOMAN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST INC., INTERVENORS

*(PURSUANT TO THE CLERK'S ORDER DATE 1/18/17)
** (PURSUANT TO THE CLERK'S ORDER DATED 2/7/17)

Nos. 18-1092, 18-1669, 18-1670, 18-1671,
18-2943 & 18-3335

PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT, PETITIONERS (NO. 18-1092, 18-2943)

INDEPENDENT TELEVISION GROUP, PETITIONERS (NO. 18-1669)

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.; NATIONAL ASSOCIATION OF BLACK-OWNED BROADCASTERS, PETITIONERS (NO. 18-1670, 18-3335)

FREE PRESS; OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA; COMMON CAUSE, PETITIONERS (NO. 18-1671)

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

Argued: June 11, 2019
Opinion filed: Sept. 23, 2019

On Petition for Review of An Order
of the Federal Communications Commission
(FCC Nos. FCC-1: FCC-16-107;
FCC-17-156; FCC-18-114)

OPINION OF THE COURT

Before: AMBRO, SCIRICA, and FUENTES, Circuit Judges

AMBRO, Circuit Judge

Here we are again. After our last encounter with the periodic review by the Federal Communications Commission (the "FCC" or the "Commission") of its broadcast ownership rules and diversity initiatives, the Commission has taken a series of actions that, cumulatively, have substantially changed its approach to regulation of broadcast media ownership. First, it issued an order that retained almost all of its existing rules in their current form, effectively abandoning its long-running efforts to change those rules going back to the first round of this litigation. Then it changed course, granting petitions for rehearing and repealing or otherwise scaling back most of those same rules. It also created a new "incubator" program designed to help new entrants into the broadcast industry. The Commission, in short, has been busy. Its actions unsurprisingly aroused opposition from many of the same groups that have battled it over the past fifteen years, and that opposition has brought the parties back to us.

One of these petitioners argues that the FCC did not go far enough, and that the same logic by which it repealed the so-called "eight voices" test of the local television ownership rule (which forbade mergers that would leave fewer than eight independently-owned stations in the market) should also have led it to abolish the "top-four" restriction in the same rule (which forbids mergers among two or more of the four largest stations in a market). We disagree; this was a reasonable exercise of the Commission's policy-making discretion, as we held in the first round of this litigation.

Another group of petitioners argues that the Commission's new incubator program is badly designed, as

its definition of "comparable markets" for the reward waivers was unlawfully adopted and would create perverse incentives. It also argues that the Commission has unreasonably failed to act on a proposal to extend the so-called "cable procurement rules," which promote diversity in the cable television industry, to broadcast media. We disagree: the "comparable markets" definition for the incubator program was also a reasonable exercise of discretion, and the FCC's failure to act on the procurement rules proposal is not unreasonable so far.

We do, however, agree with the last group of petitioners, who argue that the Commission did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the Commission's conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years. In doing so, we decline to grant the requested extraordinary relief of appointing a special master to oversee the FCC's work on remand.

I. Background

To avoid sounding like a broken record, we recount only in brief the history of this case up through our most recent decision. The full account of the entire saga can be found in our earlier opinions. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 382-89 (3d Cir. 2004) ("*Prometheus I*"); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438-44 (3d Cir. 2011) ("*Prometheus II*");

and *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37-39 (3d Cir. 2016) ("*Prometheus III*").

Under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, Pub. L. No. 73-416, 48 Stat. 1064 (1934), the Federal Communications Commission has long maintained a collection of rules governing ownership of broadcast media. By preventing any one entity from owning more than a certain amount of broadcast media, these rules limit consolidation and promote a number of interests, commonly stated as "competition, diversity, and localism." *See*, *e.g.*, *Report and Order and Notice of Proposed Rulemaking—2002 Biennial Regulatory Review*, 18 F.C.C.R. 13620 ¶ 8 (July 2, 2003). By 1996, however, there was growing sentiment that these rules were overly restrictive, and so Congress passed the Telecommunications Act. Pub. L. No. 104-104, 110 Stat. 56 (1996). Section 202(h) of that Act requires the Commission to review the broadcast ownership rules on a regular basis—initially biennial, later amended to quadrennial, *see* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004)—to "determine whether any of such rules are necessary in the public interest as the result of competition." Telecommunications Act, § 202(h). The Commission "shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

Thrice before we have passed on the Commission's performance of its duties under § 202(h), or the lack thereof. In *Prometheus I* we reviewed the results of the 2002 quadrennial review cycle. Then in *Prometheus II* we reviewed the results of the 2006 review cycle, which included the FCC's actions on remand from

Prometheus I, as well as a separate order adopting various policies designed to promote broadcast media ownership by women and racial minorities.

After *Prometheus II* the Commission failed to complete its 2010 review cycle prior to the start of the 2014 cycle, and so in *Prometheus III* we reviewed not final agency action pursuant to § 202(h) but rather, for the most part, agency inaction. Although we found the FCC had unreasonably delayed action on the 2010 and 2014 review cycles, we declined to vacate the broadcast ownership rules in their entirety, but noted such a drastic remedy could become appropriate in the future if the Commission continued dragging its feet. *Id.*, 824 F.3d at 53-54. Relatedly, we remanded a newly adopted rule governing the treatment of joint sales agreements for purposes of the television local ownership rule, reasoning that the FCC could not have a valid basis for promulgating such a rule without first having determined, as required by § 202(h), that the local ownership rule itself should remain in place. *Id.* at 58-60.

We also held that the Commission had unreasonably delayed a determination on the definition of "eligible entities." These are given certain preferences under the ownership rules, *see id.* at 41, and the purpose of these preferences was to encourage ownership by women and minorities. The definition, however, was drawn from the Small Business Administration's definition of small businesses, and focused solely on a company's revenues. In *Prometheus I* we had suggested that, on remand, the FCC should consider adopting a different definition based on the criteria for "socially and economically disadvantaged businesses" ("SDBs"). *See* 373 F.3d at 428

n.70; *see also* 13 C.F.R. § 124.103 (defining socially disadvantaged businesses). The Commission declined to adopt an SDB definition, and in *Prometheus II* we held that the revenue-based definition was arbitrary and capricious because there was no evidence it would advance the goals of increasing ownership by women and minorities. 652 F.3d at 469-71.

But the Commission had not reached a determination one way or the other by *Prometheus III*. Instead it had suggested—in various documents issued after *Prometheus II*, none of which constituted final agency action on the matter—that it would reject a SDB definition, or the similar "overcoming disadvantage preference" ("ODP") proposal, because it did not believe those rules could survive constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See* 824 F.3d at 45-48. It therefore indicated its tentative plan to adopt the same definition we held unlawful in *Prometheus II*, even though it still lacked evidence that this would promote ownership diversity, because promoting ownership by small businesses would be in the public interest regardless. *Id.* at 46.

We held that the Commission "had more than enough time to reach a decision on the eligible entity definition." *Id.* at 48. This led to a remand and an "order [to] the Commission . . . to act promptly to bring the eligible entity definition to a close." *Id.* at 50. It was to "make a final determination as to whether to adopt a new definition;" "[i]f it need[ed] more data to do so, it must get it." *Id.* Finally, we pointed out that we did "not intend to prejudge the outcome" of the FCC's analysis, and that we would review the merits of its eventual

decision once that decision had been made through a final order. *Id.* at 50-51.

Three months after we decided *Prometheus III*, the Commission followed through on its promise to take final action on the 2010 and 2014 review cycles. Its *Second Report and Order, 2014 Quadrennial Regulatory Review*, 31 F.C.C.R. 9864 (2016) (the "*2016 Report & Order*"), retained all of the major broadcast ownership rules—the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, the local radio ownership rule, and the local television ownership rule —in their existing forms. It also adopted, again, a revenue-based definition for eligible entities. It concluded that an SDB or any related race- or gender-conscious definition could not withstand constitutional scrutiny because, even though courts might accept viewpoint diversity as a compelling governmental interest, the evidence did not show a meaningful connection between female or minority ownership and viewpoint diversity. *Id.* ¶ 297. The Commission also declined to adopt an ODP standard, reasoning that it would require individualized assessment that is not compatible with the smooth operation of the FCC's rules, and that such an individualized assessment could run afoul of First Amendment principles. *Id.* ¶ 306. On a related issue, the Commission declined to implement an "incubator program," under which established broadcasters would be encouraged to assist new entrants to break into the industry, that would have employed an ODP standard. Finally, the Commission reviewed a number of other proposals to increase ownership diversity, rejecting most but noting some merit in a proposal to extend the cable procurement rules, which require cable companies to encourage

minority-owned businesses to work with them, to broadcast media. The Commission did not adopt this idea, instead calling for further comment.

A number of industry groups filed a petition for rehearing, and in November 2017 the Commission granted that petition in its *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 F.C.C.R. 9802 (2017) (the "*Reconsideration Order*"). This Order made sweeping changes to the ownership rules. It eliminated altogether the newspaper/broadcast and television/radio cross-ownership rules. It modified the local television ownership rule, rescinding the so-called "eight voices" test but retaining the rule against mergers between two of the top four stations in a given market—albeit now subject to a discretionary waiver provision. And it announced the Commission's intention to adopt an incubator program, although it left the formal implementation of that program to a subsequent order. In this context, the Reconsideration Order called for comment on various aspects of the program, including how to define eligibility and how to encourage participation by established broadcasters.

In August 2018 the Commission issued the *Report and Order—In the Matter of Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, 33 F.C.C.R. 7911 (2018) (the "*Incubator Order*"). That Order established a radio incubator program that would encourage established broadcasters to provide "training, financing, and access to resources" for new entrants in the market. *Id.* ¶ 6. Eligibility to receive this assistance was defined using two criteria: an incubated entity must (1) qualify as a

small business under the Small Business Administration's rules, and (2) qualify as a "new entrant," meaning that it must own no television stations and no more than three radio stations. *Id.* ¶ 8. The eligibility criteria make no overt reference to race, gender, or social disadvantage, but the Commission concluded that using the "new entrant" criterion would help boost ownership by women and minorities, as a bidding preference for new entrants in FCC auctions had that effect. *Id.* ¶ 21.

As an incentive for established broadcasters to participate in the program, the Incubator Order grants the incubating entity a reward waiver for the local radio ownership rules. Among other options, the waiver may be used in any market "comparable" to the one in which incubation occurs. *Id.* ¶ 66-67. This means that it must be in the same market tier for purposes of the local radio rule, and these tiers are defined by the number of stations in a market. One tier runs from zero to 14 stations, another from 15 to 29, a third from 30 to 44, and finally the highest tier includes all markets with 45 or more stations.

Before us are 10 different petitions for review challenging different aspects of the Commission's actions since *Prometheus III*. After the 2016 Report & Order issued in November of that year, Prometheus Radio Project ("Prometheus") and Media Mobilization Project ("MMP") filed a petition for review in our Court. About the same time, three other petitions for review of the 2016 Report & Order were filed in the D.C. Circuit Court of Appeals: one by The Scranton Times, L.P. ("Scranton"); one by Bonneville International Corporation ("Bonneville"); and one jointly by the Multicultural Media, Telecom and Internet Council, Inc. ("MMTC")

and the National Association of Black-Owned Broadcasters ("NABOB"). The cases before the D.C. Circuit were transferred here and the four cases consolidated in January 2017; they were then held in abeyance while the Commission considered the petitions for rehearing.

After the Reconsideration Order issued in November 2017, four additional petitions for review were filed: one by Prometheus and MMP in our Court as well as three in the D.C. Circuit from (1) Independent Television Group ("ITG"), (2) MMTC and NABOB, and (3) a coalition of groups including Free Press, the Office of Communication, Inc. of the United Church of Christ ("UCC"), the National Association of Broadcast Employees and Technicians—Communications Workers of America ("NABET-CWA"), and Common Cause. Once again the D.C. Circuit transferred the petitions before it to our Court, and we consolidated the new wave of cases with the existing petitions.

In February 2018 we stayed all proceedings pending the close of notice and comment on the Incubator Order. Once the final Order issued in August 2018, Prometheus and MMP filed a petition for review in our Court, and MMTC and NABOB filed another in the D.C. Circuit that was transferred here and the cases consolidated.

For purposes of briefing and oral argument, the various petitioners divided into three groups. The first included Prometheus, MMP, Free Press, UCC, NABET-CWA, and Common Cause, who argue that the Commission has not adequately considered how its changes to the broadcast ownership rules will affect ownership by women and racial minorities. We refer to this group as "Citizen Petitioners," consistent with our past practice. *See Prometheus III*, 824 F.3d at 39. A second group,

consisting of MMTC and NABOB, argues that the Incubator Order's definition of "comparable markets" is unlawful and that the Commission has unreasonably withheld action on a proposal to extend cable procurement rules to broadcast media. To distinguish this group, we refer to its members as "Diversity Petitioners." Finally, ITG—standing alone now as the only "Deregulatory Petitioner"—challenges the retention of the "top-four" component of the local television rule (which, to repeat, bans mergers between two or more of the four largest stations in a given market).

The Commission defends its orders in their entirety. Additionally, a group of Intervenors—including both Scranton and Bonneville as well as many of the Deregulatory Petitioners from prior rounds of this litigation—defends the FCC's actions and argues further that Citizen and Diversity Petitioners lack standing.

II. Jurisdiction and Standard of Review

We have jurisdiction to hear these petitions for review of agency action under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As noted above and covered in § III.A below, Intervenors argue, with the support of the Commission, that Citizen and Diversity Petitioners lack standing.

Per § 706(2) of the Administrative Procedure Act ("APA"), we can set aside agency action that is arbitrary or capricious. 5 U.S.C. § 706(2). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Despite this deference, we require the agency to "examine

the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted).

When the FCC conducts a Quadrennial Review under § 202(h), that provision also affects our standard of review, as it requires that "no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis." *Prometheus I*, 373 F.3d at 395. When § 202(h) refers to rules being "necessary," that term means "useful," "convenient," or "helpful." *Id.* at 394.

This case also involves challenges to agency inaction. Section 706(1) of the APA allows us to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under this provision, our "polestar is reasonableness." *Public Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 151 (3d Cir. 2002). We must "balance the importance of the subject matter being regulated with the regulating agency's need to discharge all of its statutory responsibilities under a reasonable timetable." *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998).

> With this balance in mind, unreasonable delay should be measured by the following factors: First, the court should ascertain the length of time that has elapsed since the agency came under a duty to act. Second, the reasonableness of the delay should be judged in the context of the statute authorizing the agency's action. Third, the court should assess the

> consequences of the agency's delay. Fourth, [it] should consider any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.

Id. (internal quotation marks omitted).

III. Analysis

A. Standing

As a threshold matter, Intervenors argue that Citizen and Diversity Petitioners (called "Regulatory Petitioners" for ease of reference in this section) lack standing, and the FCC concurs in that argument. To have standing to sue in federal court under Article III of the Constitution, a plaintiff must have (1) an "injury in fact," meaning "an invasion of a legally protected interest which is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical," that is (2) "fairly traceable to the challenged action of the defendant," and it must (3) be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted).

There are two separate disputes regarding Regulatory Petitioners' standing. First is a procedural question. After Intervenors raised the issue in their merits brief, Regulatory Petitioners submitted declarations to establish standing along with their reply briefs. Intervenors now argue that we should not consider those declarations or the facts asserted within them because materials to establish standing must be submitted instead

with Regulatory Petitioners' opening briefs. Even accepting the declarations, Intervenors still dispute standing.

We disagree on both counts. It is well established that petitioners challenging agency action may supplement the administrative record for the purpose of establishing Article III standing, even though judicial review of agency action is usually limited to the administrative record. As the Tenth Circuit observed in *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012), the Article III standing requirements do not apply to agency proceedings, and thus there is no reason for the facts supporting standing to be a part of the administrative record. It is, moreover, the practice in most of the Circuits that have considered the matter to accept these materials at any stage of the litigation. In *US Magnesium* itself, for example, the Tenth Circuit accepted supplemental materials that were attached to a petitioner's reply brief. *Id.* (Its discussion did not squarely address the timing issue, only whether a court could properly go beyond the administrative record to ascertain standing at all.) The Seventh Circuit has accepted supplemental submissions filed after oral argument. *Texas Indep. Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 971 (7th Cir. 2005). And the Ninth Circuit has expressly held that standing need not be established in an opening brief in cases like this. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997).

Against this, Intervenors marshal two sources of contradictory authority. First is the Supreme Court's statement, in a footnote in *Lujan* itself, that "standing is to be determined at the *commencement* of suit."

504 U.S. at 570 n.5 (emphasis added). This is not on point. That footnote sought only to rebut an argument from Justice Stevens's dissenting opinion that, although the agencies whose actions would harm the petitioners there were not technically parties to the lawsuit, those agencies would not ignore a decision from the Supreme Court interpreting the relevant legal provisions, and thus such a decision would actually redress the petitioners' injuries. The majority rejected this argument because it depended entirely on the contingent fact that the Supreme Court ended up taking the case, which could not have been known at the start of suit. Hence "commencement of suit" indicates only that standing must exist at the beginning of litigation, not that the materials establishing standing must be submitted at that time.

The other authorities cited by Intervenors are cases from the D.C. Circuit. *See*, *e.g.*, *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). But that Circuit has a provision of its local rules expressly requiring the petitioners in any "cases involving direct review . . . of administrative actions" to file materials establishing standing along with their opening brief. *See* D.C. Cir. Rule 28(a)(7). The cases cited by Intervenors all simply applied this rule, which does not apply to proceedings in our court.

It appears that this is a question of first impression in our Circuit. To resolve it, we adopt the view held overtly by the Ninth Circuit and implicitly by the Tenth

and Seventh: parties may submit materials to establish standing at any time in the litigation.[1] This is especially so here, where the same parties have been litigating before us for a decade and a half. It was not unreasonable for Regulatory Petitioners to assume that their qualification to continue in the case was readily apparent. *Cf. Del. Dep't. of Nat'l Res. & Envtl. Control v. EPA*, 785 F.3d 1, 8-9 (D.C. Cir. 2015) (permitting petitioners to submit standing materials with their reply brief despite the contrary requirement of the D.C. Circuit's local rules when they reasonably believed that standing was self-evident).

Turning to the substance of standing, Intervenors argue that Regulatory Petitioners' alleged harm is not sufficiently imminent to establish standing because any mergers under the new rules would require FCC approval and would be subject to judicial review; in effect, Regulatory Petitioners have not produced evidence that the rule changes will lead to additional consolidation. In addition, Intervenors continue, Regulatory Petitioners lack standing because their objections to the rule changes pertain to ownership diversity and not to the § 202(h) purpose of promoting competition. We find none of these arguments persuasive.

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[1] As noted, other courts have gone so far as to accept standing materials submitted after oral argument. *See Texas Indep. Producers and Royalty Owners Ass'n*, 410 F.3d at 971. This could be appropriate where the issue of standing is not raised until oral argument. Although we do not set out a comprehensive rule for all cases, in general materials to establish standing should be submitted promptly once standing is called into question.

The first two arguments share a common theme: although Regulatory Petitioners will be harmed by consolidation within the industry (a fact Intervenors do not appear to contest), it is speculative that the new rules will actually lead to consolidation. The problem is that encouraging consolidation is a primary purpose of the new rules. This is made clear throughout the Reconsideration Order, *see*, *e.g.*, 32 F.C.C.R. at 9811, 9836. The Government cannot adopt a policy expressly designed to have a certain effect and then, when the policy is challenged in court by those who would be harmed by that effect, respond that the policy's consequences are entirely speculative. Intervenors cite *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542-44 (D.C. Cir. 2003), but that case only held that petitioners there, who sought to assert standing simply as audience-members, had to demonstrate that a proposed merger would have some specific baleful effect(s) on the viewing audience, *i.e.*, some degradation of the programming available to that audience. Here Intervenors do not contest that consolidation, if it occurs, will harm the Regulatory Petitioners.

Nor is it material that any future mergers would require FCC approval. The point is that, under the new rules, it will approve mergers that it would have rejected previously, with the rule changes in the Reconsideration Order the key factor causing those grants of approval. *See* Sara Fischer, *The local TV consolidation race is here*, Axios (Aug. 10, 2018), *available at* https://www.axios.com/the-local-tv-consolidation-war-is-here-7c65f3fb-eaab-43c4-9a00-81303867dbee.html ("Many local broadcasters cite one key reason for their consolidation—[t]he FCC's landmark decision last year to roll back old regulations that limited the ability of TV companies to own

properties in the same market."). Intervenors' citation to *Clapper v. Amnesty International, USA*, 568 U.S. 398, 410-11 (2013), is not to the contrary. It involved a "highly attenuated chain of possibilities" that, among other things, would make it difficult to discern whether the challenged law was even the cause-in-fact of the plaintiffs' alleged injuries.[2] The causal chain here is anything but attenuated.

Intervenors' third argument fails for multiple reasons. First, they identify incorrectly the goals of § 202(h) as limited to promoting competition. Instead, as its text makes plain, review under that provision is intended to determine whether each of the ownership rules serves the public interest, broadly conceived, in light of ongoing competitive developments within the industry. *See Prometheus I*, 373 F.3d at 390-95.

In addition, there is no requirement that the harm alleged be closely tied to a challenger's legal argument in order to have Article III standing. Intervenors invoke a second *Rainbow/PUSH Coalition v. FCC* case, 396 F.3d

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[2] *Clapper* involved a challenge to Section 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a, part of the 2008 FISA Amendments. Pub. L. No. 110-261, 122 Stat. 2436 (2008). The chain of possibilities the Court identified ran as follows: "(1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under [§ 702] rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy [§ 702]'s many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts."

1235, 1242-43 (D.C. Cir. 2005), there involving an objection to renewal of a radio station's license because it had allegedly engaged in employment discrimination. Audience members, the D.C. Circuit held, lacked standing to object because the alleged violative conduct at issue had not harmed them at all. This does not support the notion that a party may lack standing, even though it will suffer a concrete and particularized injury, simply because it is the wrong "kind" of injury. That argument sounds not in the requirements of Article III but of "prudential standing," a now-discredited doctrine under which courts would decline to hear cases within their jurisdiction if the plaintiffs' complaint did not fall within the "zone of interests" protected by the law they invoked. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Supreme Court held that this should be understood solely as a matter of statutory construction, *i.e.*, of determining whether a given statutory cause of action extended to a particular plaintiff. Intervenors do not argue, and could not seriously contend, that Regulatory Petitioners do not qualify as "aggrieved parties" for purposes of the APA's general cause of action. *See* 5 U.S.C. § 702.

We emerge from the bramble to hold that Regulatory Petitioners have standing. Thus we proceed to the merits issues before us.

B. Retention of the Top-Four Rule

Deregulatory Petitioner ITG argues that the FCC's decision to retain its "top-four" local television rule, prohibiting the merger of any two of the top four stations in a given market, while rescinding the "eight voices" rule, was arbitrary and capricious. This is an issue we dealt with before, in *Prometheus I*, when we upheld the top-

four restriction against deregulatory challenges. We noted that "we must uphold an agency's line-drawing decision when it is supported by the evidence in the record." *Prometheus I*, 373 F.3d at 417 (citing *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002); *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)). And the Commission had ample record evidence supporting its decision to draw the line at four: it saw a "cushion" of audience share between the fourth- and fifth-ranked stations, reflecting that the top four would be the affiliates of the four major national networks (ABC, CBS, NBC, and Fox); the same cushion was apparent in national viewership figures for the networks themselves; mergers between the third- and fourth-largest stations in each of the ten largest markets would produce a new largest station; and mergers among top-four stations would generally increase the statistical consolidation of the local market by a substantial amount. *Id.* at 418.

Now ITG argues that the FCC "failed to recognize that the same reasons it found supported repeal of the Eight-Voice test also required it to repeal or modify the Top-Four Prohibition." ITG Br. at 20. It first takes issue with the notion of a ratings "cushion" between the top-four and other stations, in part questioning whether the cushion exists and in part asking why it should matter. *Id.* at 28-29. It further contests the FCC's reliance on its conclusion, from the 2002 review cycle, that mergers among top-four stations would generally result in a new largest station, noting that the evidence shows that mergers between the third- and fourth-largest stations would not result in a new largest entity in roughly half of the markets with at least four stations. *Id.* at 29-30. Finally, it argues that the new waiver provision cannot

excuse that, as it sees things, the rule as a whole is not rationally related to the facts. *Id.* at 31-32.

We disagree. None of ITG's arguments meaningfully distinguish our holding in *Prometheus I*. Just as in that case, ITG simply takes issue with the way in which the Commission chose to draw the lines. The basic logic of the top-four rule, as we recognized in 2004, is that while consolidation may offer efficiency gains in general, mergers between the largest stations in a market pose a unique threat to competition. *See Prometheus I*, 373 F.3d at 416. Although there might be other more tailored, and more complex, ways to identify those problematic mergers, the simplest is to declare, as the Commission has done, that mergers between two or more of the largest X stations in a market are not permitted. The choice of X must be somewhat arbitrary: each market's contours will be slightly different, and no single bright-line rule can capture all this complexity. But the television industry does generally feature a distinct top-four, corresponding to the four major national networks, and four is therefore a sensible number to pick. And this is exactly the kind of line-drawing, where any line drawn may not be perfect, to which courts are the most deferential. *See id.* at 417. ITG has much to say about everything this simple rule misses, but that is beside the point. The Commission has the discretion to adopt a blunt instrument such as the top-four rule if it chooses. Indeed we confronted, and rejected, this exact argument—that treating all top-four stations the same wrongly ignored the variation in market structures—in *Prometheus I*. *Id.* at 417-18.

Nor is it improper that the FCC's justification for this rule is the same as it was in the 2002 review cycle.

Section 202(h) requires only that the Commission think about whether its rules remain necessary every four years. It does not imply that the policy justifications for each regulation have a shelf-life of only four years, after which they expire and must be replaced. Nor does § 202(h), or any other authority cited by ITG, require that the Commission always base its decisions on perfectly up-to-date data. In any event, ITG itself cites more recent data presented to the Commission through the administrative process, and this information paints a picture materially identical to what the Commission saw in 2002.

In this context, we reaffirm our conclusion from *Prometheus I* that retention of the top-four rule is amply supported by record evidence and thus is not arbitrary or capricious.[3]

C. "Comparable Markets" Definition

Diversity Petitioners challenge the Incubator Order's definition of comparable markets for radio stations, arguing that it was not properly noticed and in any event was arbitrary and capricious.

Their argument devolves to this. The basic concept of the incubator program uses a waiver of the rules governing local radio ownership as a reward to induce participation by established broadcasters. The Notice of Proposed Rulemaking ("NPRM") sought comment on

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[3] Accordingly, we need not address ITG's argument that the newly added waiver provision, which allows the Commission to permit a merger that would otherwise be barred by the top-four rule if "the reduction in competition is minimal and is outweighed by public interest benefits," *Reconsideration Order* ¶ 82, cannot save an otherwise irrational rule.

the following questions about these reward waivers: "How should the Commission structure the waiver program? For example, should the waiver be limited to the market in which the incubating activity is occurring? Alternatively, should waiver be permissible in any similarly sized market? How would the Commission determine which markets are similar in size?" *Reconsideration Order* ¶ 137. Diversity Petitioners take this to indicate only that the Commission was considering two possibilities: either that the waiver could only be used in the same market where the incubating activity occurred or that it could be used in other markets of similar population. They contend that "size" in this context is most naturally read as referring to population, or some other indicator of market size (such as audience or listenership numbers), as opposed to the number of radio stations in the market. The two responsive comments on this issue, they contend, seem to have reflected this assumption. *See* Diversity Petitioners' Br. at 16-17.

Instead, as noted, the Incubator Order adopted a system of reward waivers that can be used in any "comparable" market, meaning not a market of similar population but one with a similar number of radio stations. This proposal was first described in detail in the draft of the Incubator Order made available before the final order was promulgated. In response, Diversity Petitioners made several *ex parte* communications with the Commission expressing their concern over this definition of "comparable" markets. *Id.* at 21-22. Their letters expressed concern that the proposed rule would allow a broadcaster to incubate in a small rural market and then use its reward waiver in a much larger market, such as New York City, thus getting an outsized return for its

investment. Thus Diversity Petitioners suggested that the rule should disallow using a waiver in another top-tier "comparable" market that is not within five spots of the incubating market in the Nielsen population-based rankings, but the Commission declined to adopt this proposal. *See Incubator Order* ¶ 68.

Diversity Petitioners argue that this was not adequate notice. We have addressed similar claims in both *Prometheus I*, 373 F.3d at 411-412, and *Prometheus II*, 652 F.3d at 449-50. Essentially, "the adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency." *Prometheus I*, 373 F.3d at 411 (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.3d 284, 293 (3d Cir. 1977)). The strongest fact supporting Diversity Petitioners' claim is the swift response by commenters expressing surprise once the eventual definition of comparable markets was made public. Courts will consider the behavior of commenters in assessing whether notice was adequate. *See*, *e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003).

But parsing the language of the Notice of Proposed Rulemaking itself suffices to show that it did provide adequate notice. Specifically, after asking whether the waiver should be applicable in any similarly sized market, the NPRM asked how the Commission would determine which markets are similarly sized. This strongly suggests that the Commission was considering a range of different ways to measure market size, and it undercuts Diversity Petitioners' assertion that the word "size" could only be read to mean population. *See* Diversity Petitioners' Br. at 16 ("The reference to 'size' in the

NPRM is generally understood in the broadcast industry to mean markets that have similar populations.").

Turning to the substance of the comparable markets definition, Diversity Petitioners assert that the FCC's definition will create a perverse incentive for established broadcasters to incubate in markets with low populations but many radio stations (using the example of Wilkes-Barre, Pennsylvania) and then use their waivers in "comparable" markets with much greater populations (*e.g.*, New York City). The Incubator Order responded to this concern by noting that some markets with similar populations have vastly different numbers of stations, and stated that "[i]n crafting our standard, we focused primarily on preventing the potential for ownership consolidation in a market with fewer stations and independent owners than the market in which the incubation relationship added a new entrant." *Incubator Order* ¶ 68. It expected that incubating entities will not necessarily use their waivers only in the largest markets, but rather wherever they face ownership restrictions under the FCC's rules. *Id.* And it noted that some incubating entities might not have relevant ownership interests in other markets of similar population size, such that they would have no flexibility under Diversity Petitioners' proposed rules. *Id.*

Diversity Petitioners posit this as an inadequate response, but we disagree. They are correct that the Commission did not rebut the suggestion that waivers might be used in markets with much higher populations than the ones where incubation is occurring. It explained instead why it did not think this prospect overly frightening. Diversity Petitioners suggest that this dynamic

could reduce the positive influence of the incubator program on ownership diversity, as (they claim) smaller markets like Wilkes-Barre are less diverse. This is not supported by the record: as Intervenors note, many smaller markets are quite racially diverse, *see* Intervenors' Br. at 50, and Diversity Petitioners' rejoinder that these markets contain fewer total people of color than big cities like New York or Los Angeles, Diversity Petitioners' Reply Br. at 17 n.7, is essentially tautological. And we cannot say that the Commission's focus on the potential anti-competitive effects of the waiver program is unreasonable, for the waivers relate specifically to rules designed to promote competition.

We therefore hold that the definition of "comparable markets" in the Incubator Order was adequately noticed and is not arbitrary and capricious.

D. Effect of Rule Changes on Ownership Diversity

Citizen Petitioners argue that the Commission did not adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities. We agree. In *Prometheus III* we stated that the ongoing attempt to bring the 2010 and 2014 review cycles to a close must "include a determination about the effect of the rules on minority and female ownership." 824 F.3d at 54 n.13 (internal quotation marks omitted). Both the 2016 Report & Order and the Reconsideration Order ostensibly included such a determination, and each concluded that the broadcast ownership rules have minimal effect on female and minority ownership. But these conclusions were not adequately supported by the record, and thus they were arbitrary and capricious.

The 2016 Report & Order retained all of the existing ownership rules, but it also addressed a proposal to tighten the local television and radio ownership rules as a means of promoting ownership diversity. The Commission rejected this proposal because it found no evidence that reducing consolidation would have that effect based on the following evidence. The National Telecommunications and Information Administration ("NTIA") had collected data regarding the number of minority-owned stations in the late 1990s. About a decade later, the FCC itself began collecting this data through a survey using what is called "Form 323." *See Prometheus III*, 824 F.3d at 44 (discussing the use of Form 323 to gather data about minority ownership). It did so with the express purpose of generating better data about ways to increase ownership by women and minorities. *Id.*

What the 2016 Report & Order did was to compare the NTIA data from the late 1990s, around the time that the local ownership rules were first relaxed, with the subsequent Form 323 data. It saw the same pattern for television and for radio: an initial decrease in minority-owned stations after the rules became more flexible to permit more consolidation, followed by a long-term increase. The NTIA showed 312 minority-owned radio stations in 1995, just before the local radio rule was relaxed, followed by 284 in 1996-97, 305 in 1998, and 426 in 1999-2000. Form 323 data, meanwhile, showed 644 such stations in 2009, 756 in 2011, and 768 in 2013. *See 2016 Report & Order* ¶ 126-28. Turning to television, NTIA data showed 32 minority-owned stations in 1998—just before the local television rule was relaxed—and 23 stations in 1999-2000, while Form 323 data

showed 60 stations in 2009, 70 in 2011, and 83 in 2013. *Id.* ¶ 77.

Because the trendlines did not show that relaxing these rules had played a major role in restricting ownership diversity, the Commission thought that reversing the process (that is, tightening local radio and television ownership rules) would also be unlikely to have a major effect. *Id.* ¶ 126. At the same time it did not think that further loosening the rules would be an effective means of promoting diversity, as the data did not suggest that the increase from the late 1990s through the 2009-13 period had been *caused* by the relaxed rules. *See id.* ¶ 78, 128. The Order stated that the Commission remained "mindful of the potential impact of consolidation . . . on ownership opportunities for . . . minority- and women-owned businesses, and we will continue to consider the implications in the context of future quadrennial reviews." *Id.* ¶ 128. The 2016 Report & Order also cited this same data to suggest that its modest revisions to the cross-ownership rules would not be likely to have a major influence on ownership diversity. *Id.* ¶ 196 n.586.

The Reconsideration Order, by contrast, did make major changes to the ownership rules, and it invoked the same evidence as the 2016 Report & Order to conclude that this would not meaningfully affect ownership diversity. Thus it stated, as to the cross-ownership rules, that "record evidence demonstrates that previous relaxations of other ownership rules have not resulted in an overall decline in minority and female ownership of broadcast stations, and we see no evidence to suggest that eliminating the [Newspaper/Broadcast Cross-Ownership] Rule will produce a different result and precipitate such

a decline." *Reconsideration Order*, ¶ 46. As to the local television rule, the Order concluded that "the record does not support a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels;" thus the modifications "are not likely to harm minority and female ownership." *Id.* ¶ 83.

Problems abound with the FCC's analysis. Most glaring is that, although we instructed it to consider the effect of any rule changes on female as well as minority ownership, the Commission cited no evidence whatsoever regarding gender diversity. It does not contest this. *See* Respondent's Br. at 40 n.14. Instead it notes that "no data on female ownership was available" and argues that it "reasonably relied on the data that was available and was not required to fund new studies." *Id.* Elsewhere, however, the Commission purports to have complied with our instructions to consider both racial and gender diversity, repeatedly framing its conclusion in terms that encompass both areas. *See*, *e.g.*, *id.* at 33-36. The trouble is that any ostensible conclusion as to female ownership was not based on *any* record evidence we can discern. Courts will find agency action arbitrary and capricious where the agency "entirely fail[s] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and that is effectively what happened here. The only "consideration" the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand.

Even just focusing on the evidence with regard to ownership by racial minorities, however, the FCC's

analysis is so insubstantial that it would receive a failing grade in any introductory statistics class. One basic problem is the way the Commission treats the NTIA and Form 323 data as comparable, even though these two data sets were created using entirely different methodologies. For example, we do not know how many minority-owned stations the Form 323 survey would have found in 1999, or how many the NTIA's methods would have found in 2009. Indeed the NTIA data is known to be substantially incomplete, and the large increase in minority-owned radio stations it showed between 1998 and 1999-2000 is thought to have been caused by largely improved methodology rather than an actual increase in the number of minority-owned stations. *2016 Report & Order* ¶ 126. Attempting to draw a trendline between the NTIA data and the Form 323 data is plainly an exercise in comparing apples to oranges, and the Commission does not seem to have recognized that problem or taken any effort to fix it.

Even if we could treat the use of these two data sets as reliable, the FCC's statistical conclusions are woefully simplistic. They compare only the absolute number of minority-owned stations at different times, and make no effort to control for possible confounding variables. The simplest of these would be the total number of stations in existence. We do not know, for example, whether the *percentage* of stations that are minority-owned went up or down from 1999 to 2009.

And even if we only look at the total number of minority-owned stations, the FCC did not actually make any estimate of the effect of deregulation in the 1990s. Instead it noted only that, whatever this effect was, deregulation was not enough to prevent an overall increase

during the following decade. The Commission made no attempt to assess the counterfactual scenario: how many minority-owned stations there would have been in 2009 had there been no deregulation.

An analogy helps illustrate this point: if an economy that has been growing at an annual 2% rate suffers a serious depression in which it shrinks by 10%, and then resumes growing at the same 2% rate, a decade later it will likely be bigger than it was on the eve of the depression. But this does not mean that the depression had no effect on the size of the economy. Nothing in the FCC's analysis rules out, or even addresses, the possibility that the 1990s deregulation caused such a one-time "depression" of minority ownership even if it did not reverse the long-term increase in minority-owned stations.

The Commission does not really contest any of these deficiencies in its data or its analysis. Instead it argues that they are irrelevant. It notes, first of all, that ownership diversity is just one of many competing policy goals it must balance when adjusting its regulations. Respondent's Br. at 32-33. Thus, the Reconsideration Order noted that the Commission should not retain a rule that unduly burdened the competitive practices of all broadcasters "based on the unsubstantiated hope that these restrictions will promote minority and female ownership." *Reconsideration Order* ¶ 65. It cites to broad support for eliminating the newspaper/broadcast cross-ownership rules, including from minority media owners, as evidence that doing so would not have an adverse effect on minority ownership. Respondent's Br. at 34. And it asserts that, while the data used was not

perfect, it was the only evidence available as to the effects of earlier rounds of deregulation on ownership diversity. *Id.* at 40. The Commission solicited evidence on this issue during the notice-and-comment period, and it did not receive any information of higher quality than the NTIA/Form 323 data. Thus it argues it had no affirmative burden to produce additional evidence or to fund new studies itself. *Id.* at 47 (citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)).

We are not persuaded. It is true that "[t]he APA imposes no general obligation on agencies to produce empirical evidence," only to "justify its rule with a reasoned explanation." *Stilwell*, 569 F.3d at 519. But in this case the reasoned explanation given by the Commission rested on faulty and insubstantial data. In *Stilwell* the agency had proceeded based on its "long experience" supervising the regulated industry and had support from the commenters. *Id.* Here, the Commission has not relied on its general expertise, and, outside of the modifications to the newspaper/broadcast cross-ownership rule, it does not rely on support from commenters. It has not offered any theoretical models or analysis of what the likely effect of consolidation on ownership diversity would be. Instead it has confined its reasoning to an insubstantial statistical analysis of unreliable data—and, again, has not offered even that much as to the effect of its rules on female ownership.

Finally, it is true that promoting ownership diversity is but one of the policy goals the FCC must consider. But this only highlights that it is something the Commission must consider. It is, as *State Farm* says, "an important aspect of the problem." 463 U.S. at 43.

The Commission might well be within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity) if it gave a meaningful evaluation of that effect and then explained why it believed the trade-off was justified for other policy reasons. But it has not done so. Instead it has proceeded on the basis that consolidation will not harm ownership diversity. This may be so; perhaps a more sophisticated analysis would strengthen, not weaken, the FCC's position. But based on the evidence and reasoning the Commission has given us, we simply cannot say one way or the other. This violated the Commission's obligations under the APA and our remand instructions, and we "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order. On remand the Commission must ascertain on record evidence the likely effect of any rule changes it proposes and whatever "eligible entity" definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the Commission

must provide a substantial basis and justification for its actions whatever it ultimately decides.

E. Delay in Adopting Procurement Rules

Finally, Diversity Petitioners argue that the Commission has unreasonably delayed action on their proposal to extend the cable procurement rules to broadcast media. These rules require cable companies to encourage minority- and female-owned businesses to do business with them. *See* 47 C.F.R. § 76.75(e). A proposal to apply similar rules to broadcast media companies was one of the proposals we instructed the Commission to consider on remand all the way back in *Prometheus I*. *See* 373 F.3d at 421 n.59. In *Prometheus III*, the same Diversity Petitioners argued the FCC had unlawfully refused to address these proposals. We declined to pass on this challenge, noting that the Chairman of the FCC had committed to addressing these proposals in what eventually became the 2016 Report & Order, and thus the challenge was premature. *See* 824 F.3d at 50 n.11. At the same time we "note[d] our expectation that the Commission will meet its proffered deadline." The 2016 Report & Order ultimately found that there was "merit in exploring" whether to adopt this proposal, and stated that it would "evaluate the feasibility" of doing so. *2016 Report & Order* ¶ 330. **[J.A. at 169]** The Notice of Proposed Rulemaking for the 2018 cycle sought comment on a number of aspects of this proposal, including its constitutionality. *See 2018 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, Notice of Proposed Rulemaking*, 84 F.R. 6741, 6752 (Feb. 28, 2019)

As set out at length in *Prometheus III*, when reviewing a claim of unreasonable agency delay we evaluate four factors: first, the length of time since the agency came under a duty to act; second, the context of the statute authorizing the agency's action; third, the consequences of the agency's delay; and, finally, any claim of administrative error, inconvenience, or practical difficulty carrying out the obligation, especially in light of limited resources. *See* 824 F.3d at 39-40 (quoting *Oil, Chem. & Atomic Workers Union*, 145 F.3d at 123).

The Commission argues it has not unreasonably delayed action because the record as of the 2016 Report & Order did not support adopting the proposal—largely because the commenters did not offer any substantial supporting materials for it. *See* Respondent's Br. at 89. We agree. This is not like the eligible entity issue in *Prometheus III*, where the FCC had failed to act for well over a decade. At most, the agency's failure to act began with the 2016 Report & Order three years ago. And the consequence of the Commission's failure to act at that time was evidently to keep the proposal alive, rather than rejecting it outright for lack of support. Given all of this, not to mention that the NPRM for the 2018 cycle has sought further comment on this proposal, we do not at this time find unreasonable delay by the Commission.

That being said, we do anticipate that the Commission will take final action on this proposal one way or another when it resolves the 2018 review cycle, at which time its decision will be subject to judicial review. If it does not do so, we may reach a different conclusion as to the reasonableness of that additional delay.

F. Conclusion

Citizens and Diversity Petitioners have standing to press their claims. On the merits, we hold that the FCC's retention of the "top-four" prong of its local television ownership rule was not arbitrary and capricious. We also hold that the Incubator Order's definition of "comparable markets" was adequately noticed and was not arbitrary and capricious. And we decline to hold that the FCC has unreasonably delayed action on the proposal to adopt procurement rules for the broadcasting industry. We do conclude, however, that the Commission has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order.

Citizen Petitioners ask us to appoint a mediator or master to "ensure timely compliance" with our decision. Citizen Petitioners' Br. at 43. Courts will sometimes appoint a special master to oversee compliance with remedial decrees, but these cases typically involve institutions such as prisons where the Court could not otherwise easily ascertain whether the defendant is complying, and the master's job is limited only to observing and reporting. *See*, *e.g.*, *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982) (*per curiam*). There is no need for such an observational special master here, where the Commission's actions on remand will be published in the Federal Register and readily available for subsequent judicial review. Moreover, we would decline in any event to appoint a special master with any

powers beyond the simply observational, as doing so would raise grave constitutional concerns, *see e.g. Cobell v. Norton*, 334 F.3d 1128, 1141-42 (D.C. Cir. 2003), and we do not doubt the Commission's good faith in its efforts to comply with our requests.

Because yet further litigation is, at this point, sadly foreseeable, this panel again retains jurisdiction over the remanded issues.

Prometheus Radio Project et al. v. Federal Communications Commission, Nos. 17-1107, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335, **SCIRICA**, *Circuit Judge*, concurring in part and dissenting in part

The Telecommunications Act of 1996 mandates that the Federal Communications Commission (FCC) regularly review its broadcast media ownership rules to ensure they remain in step with the demands of a rapidly evolving marketplace. Yet some of these rules date back to the 1990s and early 2000s, and one all the way to 1975, before the Internet revolutionized American media consumption. Americans today increasingly rely on online sources for local news and information. Studies in the record reinforce what most people old enough to recall the days before WiFi and iPads understand instinctively: the explosion of Internet sources has accompanied the decline of reliance on traditional media. The realities of operating a viable broadcasting enterprise today look little like they did when the FCC enacted the current ownership rules. Despite all of this, the FCC's broadcast ownership rules remained largely static for fifteen years.

The FCC's most recent review of its ownership rules culminated in an order that accounted for these changes. The FCC evaluated the current market dynamics, concluded the existing rules built for a pre-Internet marketplace no longer serve the public interest, and repealed or modified the rules accordingly. The FCC weighed the rules' effects on competition, localism, and diversity to determine what changes would advance the public interest.

I join several parts of my colleagues' decision, including their rejection of the challenges to the incubator program's "comparable markets" definition and the *Reconsideration Order*'s retention of a modified "top-four" restriction in the Local TV Rule. But I do not share their conclusion that the *Reconsideration Order* and *Incubator Order* are arbitrary and capricious. In my view, the FCC balanced competing policy goals and reasonably predicted the regulatory changes dictated by the broadcast markets' competitive dynamics will be unlikely to harm ownership diversity. I would not delay the FCC's actions. I would allow the rules to take effect and direct the FCC to evaluate their effects on women- and minority-broadcast ownership in its 2018 quadrennial review.

I.

The parties are intimately familiar with the FCC's quadrennial review of the broadcast ownership rules. *See Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*). I summarize the relevant history and principles that guide this process before briefly reviewing the FCC's most recent action.

A.

The orders at issue stem from the FCC's review of its broadcast ownership rules. Through these rules the FCC advances its statutory mandate to regulate broadcast media as "public convenience, interest, or necessity requires." 47 U.S.C. § 303; *see Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214 (1943). Early versions of the

ownership rules cabined common ownership within and across broadcast media to promote the public interest. *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*). The FCC adopted broadcast ownership rules with the objective to "promot[e] competition among the mass media" and to "maximiz[e] diversification of services sources and viewpoints." *Id.* at 784 (internal quotation marks and citation omitted). These in turn would benefit the public through higher quality programming and broader options. The FCC determines the appropriate amount of common ownership by weighing the harms of excessive concentration—diminished programming diversity, stifled competition, and the like—against the competitive realities of running viable broadcast enterprises.

A need for regulatory reform became palpable as the Internet emerged, transforming how Americans receive news and entertainment. Rapid technological change had left the framework regulating media ownership ill-suited to the marketplace's needs. The public interest analysis at the heart of the FCC's ownership rules is as dynamic as the media landscape. A static set of ownership regulations could not serve the public interest for all time. *See Prometheus I*, 373 F.3d at 437 (Scirica, C.J., dissenting in part and concurring in part).

With continued change all but certain, Congress retooled the approach to regulating affected markets. It enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which directs the FCC to review the broadcast ownership rules periodically. The relevant provision, Section 202(h), instructs:

> The Commission shall review . . . all of its ownership rules [quadrennially] as part of its regulatory

> reform review . . . and shall determine whether any of [its] 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.

Telecommunications Act of 1996, § 202(h), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004). "[C]ompetition, localism, and diversity" are the values that guide the FCC's "public interest" analysis under Section 202(h). *Prometheus I*, 373 F.3d at 400; *see also id.* at 446 (Scirica, C.J., dissenting in part and concurring in part). The FCC considers five types of diversity: viewpoint, outlet, program, source, and minority and women ownership. *See id.* at 446 (Scirica, C.J. dissenting in part and concurring in part) (summarizing the FCC's analysis in its 2002 biennial review order).

Embodied in Section 202(h) is the imperative that the broadcast ownership rules stay in sync with the media marketplace. *See id.* at 391. What is in the "public interest" changes over time as the marketplace evolves, so the FCC must reassess competitive conditions to set appropriate regulations. The provision's language and the accompanying legislative history reveal a belief that "opening all telecommunications markets to competition" will best suit a marketplace comprised of diverse media platforms and shaped by technological advancement. *See* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.). Section 202(h) directs the FCC to assess the

harms of consolidation and abandon restrictions that deprive the public of competitive benefits associated with some levels of common ownership.[1]

B.

The FCC concluded its 2010/14 quadrennial review by largely retaining the rules restricting common ownership. *See Second Report & Order, 2014 Quadrennial Regulatory Review*, 31 FCC Rcd. 9864 (2016) (*2016 Report & Order*). The rules, according to the FCC, "promote[d] competition and a diversity of viewpoints in local markets, thereby enriching local communities through the promotion of distinct and antagonistic voices." *Id.* ¶ 3.

On petitions for reconsideration, the FCC repealed or loosened most of these ownership rules. *See Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802 (2017) (*Reconsideration Order*). The thrust of the FCC's analysis is that technological innovation and fundamental changes to the media marketplace have eroded many of the assumptions underlying the ownership rules. *See*, *e.g.*, *id.* ¶¶ 1, 19, 22, 43, 60, 71-73. The rules have thus ceased serving the public interest. The Internet boom has ushered in rivals that enjoy competitive advantages vis-à-vis broadcasters. The ownership rules impede broadcasters' ability to engage in procompetitive transactions without offering compensating benefits to the public.

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[1] Although framed in deregulatory terms, we have understood the provision to allow modifications making the rules "more or less stringent." *Prometheus I*, 372 F.3d at 395.

The FCC's repeal of the Newspaper/Broadcast Cross-Ownership (NBCO) Rule illustrates the *Reconsideration Order*'s public interest balancing. The NBCO Rule barred combinations between broadcast stations and local newspapers to preserve "strong local voices." *Id.* ¶ 9. When the rule was adopted in 1975, daily print newspapers constituted a predominant voice in local news. The rule thus promoted viewpoint diversity and localism by ensuring independent sources of local content. But the FCC's careful study and informed judgment show this reasoning no longer holds. Traditional media compete with "digital-only news outlets with no print or broadcast affiliation." *Id.* ¶ 19. The FCC determined that the burst of Internet sources means local newspapers' independence from broadcast is no longer essential to promote viewpoint diversity. *See id.* ¶¶ 18-22. The flipside of this growth is the dwindling significance of print newspapers. Repealing the NBCO Rule, the FCC determined, lifts a barrier to combinations that may enhance localism. *See id.* ¶ 26. Transactions between broadcasters and local newspapers could enable "collaboration and cost-sharing" that improve program quality. *Id.* ¶ 27. These efficiencies could "attract new investment in order to preserve and expand" local programming. *Id.* ¶ 42. The FCC predicted repeal of the NBCO Rule "is unlikely to have a significant effect on minority and female ownership in" broadcast markets in part because broadcasters would be better positioned to acquire newspapers than the reverse. *Id.* ¶ 46. So ownership diversity, like competition and localism, did not justify keeping the rule. *See id.* ¶ 48.

While the FCC's public interest analysis balances competition, localism, and diversity, the last consideration has attracted most of the attention in this litigation. Neither the *2016 Report & Order* nor *Reconsideration Order* found evidence that showed keeping or changing the rules would affect ownership diversity. "[E]mpirical study of the relationship between cross-ownership restrictions" and ownership diversity is complicated by "obstacles that make such study impractical and unreliable," the FCC observed, yet it invited comment on both study design and the likely connection. *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, et al., Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371 ¶ 198 n.595 (2014) (*2014 FNPRM*). The *2016 Report & Order* rejected arguments that making the rules more restrictive "will promote increased opportunities for minority and female ownership" because the record lacked evidence supporting such a causal connection. ¶ 77 (Local TV Rule); *see id.* ¶ 127 (Local Radio Rule). The *Reconsideration Order* considered the consequences of relaxing the rules on ownership diversity and determined the record did not support arguments that minority and women broadcasters would be harmed by the changes. *See*, *e.g.*, ¶ 15 (NBCO Rule) ("[W]e find that eliminating the rule will have no material effect on minority and female broadcast ownership."). No commenter introduced evidence that contradicted the FCC's prediction that changing the rules would unlikely affect ownership diversity. The *Reconsideration Order* announced the

FCC's intention to pursue an incubator program, to facilitate entry and bolster ownership diversity. *See* ¶¶ 121-25.

II.

Citizen Petitioners contend the FCC's orders are arbitrary and capricious because they do not adequately analyze the new rules' likely effects on minority and women broadcast ownership. The APA's "arbitrary and capricious" standard together with Section 202(h) guide our review.

We must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). Under this deferential review, we uphold the FCC's decision provided it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Where, as here, the FCC makes predictions about the likely consequences of its decisions, "complete factual support in the record for [its] judgment or prediction is not possible or required." *NCCB*, 436 U.S. at 814; *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("Where . . . the FCC must make predictive judgments about the effects of [its regulations], certainty is impossible."). These predictions are "less amenable to rigid proof"; they "are more in the nature of policy decisions entitled to substantial deference." *NAACP v. FCC*, 682 F.2d 993, 1001 (D.C. Cir. 1982), *rev'd on other grounds*, *FCC v. Fox Telev. Stations, Inc.*, 556 U.S. 502 (2009).

As this Court has emphasized and notes again here, Section 202(h) "also affects our standard of review." *Prometheus III*, 824 F.3d at 40; *see* Maj. Op. 18. To the extent the meaning of Section 202(h) is disputed, the question would ordinarily "implicat[e] an agency's construction of the statute which it administers," thus triggering "the principles of deference described in" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *see also Sinclair Broad. Grp. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2004) (deferring to FCC's reasonable interpretation of another provision of the Telecommunications Act of 1996 under *Chevron*).

III.

My colleagues find, "based on the evidence and reasoning the Commission has given us," it has not satisfied its obligation to show changes in the ownership rules "will not harm ownership diversity." Maj. Op. 39. But the FCC enjoys a measure of deference when it balances policy objectives based on predictions of the consequences of its rules. This key disagreement leads me to depart from my colleagues in three respects. First, because the FCC's consideration of the interplay between its ownership rules and ownership diversity satisfies the APA and Section 202(h), I would deny the challenges to the *Reconsideration Order* and allow the new rules to take effect. Second, I believe the substance of the FCC's eligible entity definition and the process by which it was adopted accords with the APA. Third, I do not believe the FCC acted arbitrarily or capriciously when it adopted the *Incubator Order*. Accordingly, I would deny the petitions and allow the FCC's orders to take effect.

A.

Citizen Petitioners leave untouched the FCC's core determination that the ownership rules have ceased to serve the "public interest." The *Reconsideration Order* chronicles significant changes throughout media markets and explains why maintaining the rules no longer serves that public interest goal. No party identifies any reason to question the FCC's key competitive findings and judgments. Citizen Petitioners argue instead that all the rule changes that make up the *Reconsideration Order* should be vacated because the FCC did not adequately consider the new rules' likely effects on women- and minority-broadcast ownership. But neither Section 202(h) nor the APA requires the FCC to quantify the future effects of its new rules as a prerequisite to regulatory action. Congress prescribed an iterative process; the FCC must take a fresh look at its rules every four years. This process assumes the FCC can gain experience with its policies so it may assess how its rules function in the marketplace. The FCC has sufficiently explained its decision and deserves an opportunity to implement its policies.

Citizen Petitioners overlook "that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). The FCC's Section 202(h) review typifies agency policymaking entitled to deference, subject to the APA. Section 202(h) directs the FCC to balance competing goals —competition, localism, and diversity—to guarantee that its "regulatory framework [keeps] pace with the competitive changes in the marketplace." *Prometheus I*, 373 F.3d at 391. The FCC enjoys a "considerable

amount of discretion" when it weighs objectives to reach policy decisions. *Rural Cellular*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (internal quotation marks and citation omitted). The record confirms the FCC analyzed the relevant considerations and properly exercised its discretion. *See*, *e.g.*, *Reconsideration Order* ¶ 63 (Radio/TV Cross-Ownership Rule) (concluding the rule "no longer strikes an appropriate balance between the protection of viewpoint diversity and the potential public interest benefits that could result from the efficiencies gained by common ownership of radio and television stations in a local market"); *see also id.* ¶¶ 55-58 (rule no longer contributes substantially to viewpoint diversity); *id.* ¶ 59 (rule is out of step with "realities of the digital media marketplace"); *id.* ¶ 62 ("rule already permits significant cross-ownership in local markets"); *id.* ¶ 64 ("no evidence that any additional common ownership" resulting from repeal "would disproportionately or negatively impact minority- and female-owned stations").

Traditional principles of deference are particularly apt here. Not every decision the FCC makes is susceptible to precise analysis; some "rest on judgment and prediction rather than pure factual determinations." *WNCN Listeners Guild*, 450 U.S. at 594. Predictions about the future effects of rules not yet in being are "inherently speculative." *Council Tree Inv'rs, Inc. v. FCC*, 863 F.3d 237, 243 (3d Cir. 2017) (*Council Tree IV*) (internal quotation marks omitted).

The FCC reasonably predicted on the record before it that the new rules would not diminish or harm minority and women ownership. The question whether the rules and ownership diversity are interconnected was aired over the course of the 2010/14 quadrennial review.

The FCC invited comment and data that might shed light on this connection. *See*, *e.g.*, *2014 FNPRM* ¶ 222. It concluded—based on its understanding of the broadcast markets, the evidence in the record, and the only data submitted—that repeal of the rules was unlikely to harm ownership diversity. *See*, *e.g.*, *Reconsideration Order* ¶ 83 (Local TV Rule) ("In this lengthy proceeding, no party has presented contrary evidence or a compelling argument demonstrating why relaxing this rule will" harm ownership diversity.); *id.* ¶ 69 (adopting revised rule based on understanding of changed competitive dynamics); *id.* ¶ 71 (observing changes in marketplace but noting "broadcast television stations still play a unique and important role in their local communities"); *see also 2014 FNPRM* ¶ 224 (Radio/TV Cross-Ownership Rule) (noting no commenter has shown "low levels of [women and minority] ownership are a result of existing radio/television cross-ownership rule").[2] The effect

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[2] To the extent my colleagues require the FCC to conduct empirical analysis on remand, they risk impermissibly adding requirements beyond the APA. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015). They quote *Stilwell v. Office of Thrift Supervision*'s instruction that the "APA imposes no general obligation on agencies to produce empirical evidence." Maj. Op. 38 (quoting 569 F.3d 514, 519 (D.C. Cir. 2009)). But they argue *Stilwell* is distinguishable because there the agency relied on its "long experience" supervising the industry and did not act on "faulty and insubstantial data" like the FCC did here. *Id.* Setting aside the FCC's eight decades regulating broadcast media, the basic principle that the APA "imposes no general obligation on agencies to produce empirical evidence" applies regardless of the quality of the data in the record. *Stilwell*, 569 F.3d at 519; *see Council Tree IV*, 863 F.3d at 244 ("[W]e review only for the use of relevant, not perfect, data."). Were it otherwise, the principle would be meaningless.

the new rules will have on women- and minority-broadcast ownership may remain difficult to uncover until the FCC gains experience with the new rules. *See NCCB*, 436 U.S. at 796-97; *Council Tree Inv'rs, Inc. v. FCC*, 619 F.3d 235, 252-53 (3d Cir. 2010). Faced with such a question, "complete factual support in the record for the Commission's judgment or prediction is not possible or required." *NCCB*, 436 U.S. at 814. Under these circumstances settled principles of administrative law counsel deference to the FCC's prediction.[3]

Citizen Petitioners emphasize that the FCC acted on faulty minority-ownership data and no women-ownership data. *See*, *e.g.*, Citizen Petitioners' Br. 26-30. This data, which the FCC acknowledged as imperfect, measured minority ownership before and after two prior regulatory changes—in 1996 and 1999. Such data weaknesses are not fatal to the FCC's regulations—not only because, as noted, data gaps are inherent to predictive regulation, but also because it is not certain the data demanded would alter the FCC's analysis. First, Citizen Petitioners assume that the experience of these earlier changes will speak directly to the effects of the *Reconsideration Order*. Even if the FCC could obtain improved data on these decades-old regulatory changes, that information offers only modest predictive value for the consequences of the FCC's current rules regarding modernization. Second, as noted the FCC considers

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[3] This is true despite Citizen Petitioners' criticism of the FCC's methodology and data. Not only does the FCC have policymaking discretion, subject to the APA it also has discretion "to proceed on the basis of imperfect scientific information, rather than to invest the resources to conduct the perfect study." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (quoting *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999)).

five types of diversity, not to mention competition and localism. The FCC's lack of some data relevant to one of these considerations should not outweigh its reasonable predictive judgments, particularly in the absence of any contrary information, such that its entire policy update is held up.

The FCC must "repeal or modify" rules that cease to serve the public interest even when it lacks optimal data. Telecommunications Act of 1996, § 202(h). The FCC has revised its Form 323 and conducted outreach programs to ease compliance with its reporting requirements. *2016 Report & Order* ¶ 265. These are encouraging measures that could make the FCC's data more reliable, benefiting future quadrennial reviews. The FCC intends to take up a variety of diversity-related proposals in its 2018 quadrennial review. *See 2018 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, Notice of Proposed Rulemaking*, 33 FCC Rcd. 12111 ¶¶ 93-121 (2018). I would direct it to follow through on its announcement as well as study the effects of the latest rules on ownership diversity. I would not, however, delay the *Reconsideration Order* based on the analytical shortcomings Citizen Petitioners emphasize.

In short, I believe the FCC has explained its decision. I would deny the petitions and allow the *Reconsideration Order*'s rule changes to take effect.

B.

My colleagues remand the *2016 Report & Order*'s eligible entity definition for the FCC to ascertain what effect the revenue-based definition will have on women and minority ownership. But the FCC adopted the eligible entity definition to "serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs." *See 2016 Report & Order* ¶ 279; *see id.* ¶¶ 280-86. It thoroughly explained its policy choice. The record indicated that the revenue-based eligible entity definition will promote the FCC's "traditional policy objectives . . . by enhancing opportunities for small business[es]." *Id.* ¶ 281. The FCC's brief experience with this definition confirmed "a significant number of broadcast licensees and permittees availed themselves of policies based on the revenue-based eligible entity standard." *Id.* ¶ 283 (observing widespread use of the policy allowing certain eligible entities generous construction permits). No commenters argued the revenue-based eligible entity definition does not serve the public interest according to the FCC's analysis. *Id.* ¶ 276.

This stands in contrast to the last time the FCC employed this definition. During its 2006 quadrennial review the FCC adopted a revenue-based eligibility entity definition to promote ownership diversity. The approach failed because the FCC provided no support for why its definition would "be effective in creating new opportunities for broadcast ownership by . . . women and minorities." *Prometheus II*, 652 F.3d at 470 (internal quotation marks and citation omitted). The key distinction, of course, is the FCC's policy decision to re-

orient its eligible entity definition. As revised, it is intended to "encourage innovation and enhance viewpoint diversity" by "promoting small business participation in the broadcast industry." *2016 Report & Order* ¶ 235. Because the FCC pursued the revenue-based definition in past efforts to promote ownership diversity, it evidently believed the definition would not harm ownership diversity. Nothing in the present record suggests otherwise. In my view the FCC properly complied with its obligations under the APA.

C.

Under today's outcome, I regret that the FCC's incubator program will not have an opportunity to stand or fall on its own merit. *See Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, 33 FCC Rcd. 7911 (2018) (*Incubator Order*). Citizen Petitioners take issue with the program's criteria for who is eligible to realize its benefits. The FCC adopted a two-prong eligible entity definition: participants must be both "new entrants" based on the number of stations owned and "small businesses" based on revenue. *See id.* ¶ 16. The FCC designed these criteria "to encourage new entry into" an "extremely capital-intensive" industry. *Id.* ¶ 18. The program's benefits will not exclusively accrue to minority and women broadcasters as the eligibility criteria sweep in all emerging radio broadcasters. This breadth is consistent with the incubator program's stated goal. Yet based on its review of data from incentive auctions, the FCC predicts that the "new entrant" prong will likely benefit prospective women and minority applicants. *Id.* ¶¶ 21-24.

The incubator program is a reasonable policy designed to "support the entry of new and diverse voices into the broadcast industry." *Id.* ¶ 1. The FCC "has long contemplated the potential for" a program that pairs emerging and experienced broadcasters to ease entry into radio broadcasting. *Id.* ¶ 2. The *Incubator Order* established the first program to convert these ideas into a concrete policy. *See* ¶ 3. Before adopting the program, the FCC considered alternative eligibility criteria and invited "comment on how to determine eligibility for participation in the incubator program." *Id.* ¶ 17; *see id.* ¶¶ 28-30 (declining to adopt competing proposals that might prove "administratively inefficient," and committing to "conduct outreach to help encourage participation in the incubator program by mission-based entities and Native American Nations" that are eligible). It then provided comprehensive reasoning to justify the path it chose. *See id.* ¶ 20 ("The record reflects that individuals seeking to purchase their first or second broadcast station are the ones that often face the most challenging financial hurdles."); *id.* ¶ 21 (citing incentive auction data showing definition could modestly benefit women and minorities); *id.* ¶ 22 (citing comments suggesting the same); *id.* ¶ 25 & n.53 (noting that revenue cap narrows band of eligible entities); *id.* ¶ 27 ("Use of an objective standard has the advantage of being straightforward and transparent for potential applicants, as well as administrable for the Commission without application of significant additional processing resources."). The FCC complied with the APA in determining its "eligible entity" definition. Its choice, in my view, is an aspect of program design largely left to the agency's policy discretion, subject to the APA, Telecommunications Act of 1996, and other relevant statutes. The FCC's order

draws a rational line between the record and decision made, and I would allow the incubator program to take effect.

IV.

For the reasons provided, I would deny the petitions for review and allow the FCC's orders to take effect.

APPENDIX B

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

MB Docket Nos. 14-50, 09-182, 07-294, 04-256

IN THE MATTER OF 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;
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;

PROMOTING DIVERSIFICATION OF OWNERSHIP IN THE BROADCASTING SERVICES;

RULES AND POLICIES CONCERNING ATTRIBUTION OF JOINT SALES AGREEMENTS IN LOCAL TELEVISION MARKETS

Adopted: Aug. 10, 2016
Released: Aug. 25, 2016

SECOND REPORT AND ORDER

By the Commission: Commissioner Clyburn issuing a statement; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

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I. INTRODUCTION

1. With this Second Report and Order (Order), we bring to a close the 2010 and 2014 Quadrennial Review

proceedings.[1] In this Order, we maintain strong media ownership rules, take steps to help promote small business participation in the broadcast industry, and adopt rules that will help to promote transparency in local television markets. The Commission has built a substantial record that evidences both the existence of a dynamic media marketplace and the continuing importance of traditional media outlets in their local communities. We recognize that broadband Internet and other technological advances have changed the ways in which many consumers access entertainment, news, and information programming. Traditional media outlets, however, are still of vital importance to their local communities and essential to achieving the Commission's goals of competition, localism, and viewpoint diversity. This is particularly true with respect to local news and public interest programming, with traditional media outlets continuing to serve as the primary sources on which consumers rely.

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[1] *See 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 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 (2014) (*FNPRM* and *Report and Order*); *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 et al.*, MB Docket No. 09-182, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (*NPRM*); *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, Notice of Inquiry, 25 FCC Rcd 6086 (2010) *(NOI)*.

2. Moreover, for television broadcasters, theirs is an industry on the precipice of great change. The ongoing voluntary incentive auction of broadcast television spectrum, which is critically important to the Commission's efforts to unleash the full transformative potential of broadband Internet, provides television broadcasters with a new and unique financial opportunity. We anticipate that the auction will both free up significant spectrum for mobile broadband and result in an even healthier broadcast industry. While the auction may have a dramatic impact on the television landscape in many local markets, based on our assessment of the record and the ongoing nature of the auction, we find that it is too soon to quantify this impact; accordingly, it would be premature to change our media ownership rules in anticipation of the incentive auction's impact at this time.[2] We will soon commence our evaluation of the broadcast marketplace post-auction, and we expect that these issues will feature prominently in future media ownership reviews.

3. Based on our careful review of the record, we find that the public interest is best served by retaining our existing rules, with some minor modifications. These rules promote competition and a diversity of viewpoints in local markets, thereby enriching local communities through the promotion of distinct and antagonistic voices. Ideally, our media landscape should be diverse because our population is diverse, and retaining the existing media ownership rules is one way in which the Commission can help to promote such diversity. The record in this

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[2] For additional discussion of the incentive auction, see paragraphs 79-81, *infra*.

proceeding leads us to conclude that retaining the existing rules is the best way to promote our policy goals in local markets at this time. In addition, following the Third Circuit's decision in *Prometheus III,* we are readopting the Television Joint Sales Agreement (JSA) Attribution Rule adopted in the *Report and Order* in this proceeding.[3]

4. We also address in this Order the Third Circuit's remand in *Prometheus II* of certain aspects of the Commission's 2008 *Diversity Order.*[4] Specifically, we reinstate the revenue-based eligible entity standard, as well as the associated measures to promote the Commission's goal of encouraging small business participation in the broadcast industry, which we believe will cultivate innovation and enhance viewpoint diversity. Also, as directed by the court, we have considered the socially and economically disadvantaged business definition as a possible basis for favorable regulatory treatment, as well as other possible definitions that would expressly recognize the race and ethnicity of applicants.[5] However, we find that the demanding legal standards the courts have said must be met before the Government may implement preferences based on such race- or gender-conscious definitions have not been satisfied.

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[3] *See infra para.* 15.

[4] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011) (*Prometheus II*); *see also Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (*Diversity Order and Diversity Third FNPRM*).

[5] *Prometheus II*, 652 F.3d at 471-73.

5. Finally, we take steps to address concerns about the use of a variety of sharing agreements between independently owned commercial television stations. Specifically, we adopt a definition of Shared Service Agreements (SSAs) and require commercial television stations to disclose those SSAs by placing the agreements in each station's online public inspection file. This action will lead to more comprehensive information about the prevalence and content of SSAs between television stations, which will improve the Commission's and the public's ability to assess the potential impact of these agreements on the Commission's rules and policies.

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73. *Minority and Female Ownership. The FNPRM* tentatively concluded that the proposed Local Television Ownership Rule was consistent with the Commission's goal to promote minority and female ownership of broadcast television stations and sought comment on the potential impact of the incentive auction on minority and female ownership and whether that impact should affect the 2014 Quadrennial Review.[200]

74. UCC et al. state that the spectrum auctions will have a negative effect on ownership opportunities for minorities and women because of the loss of spectrum for low power television (LPTV) stations.[201] UCC et al. do not believe that retaining the existing ownership rules is enough to safeguard minority and female ownership from broadcast consolidation.[202] The Smaller

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[200] *FNRPM*, 29 FCC Rcd at 4400, 4401-02, paras. 70, 73.

[201] UCC et al. FNPRM Comments at 28.

[202] *Id.* at 30.

Market Coalition argues that more flexible ownership and operating arrangements (e.g., JSAs and SSAs) would increase minority and female ownership,[203] a contention that has been much disputed in the record."[204]

75. We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast television stations. While we retain the existing Local Television Ownership Rule for the reasons stated above,

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[203] Smaller Market Coalition FNPRM Comments at 13-14.

[204] *See*, *e.g.*, Letter from Bob Butler, President, National Association of Black Journalists, to Tom Wheeler, Chairman, FCC (filed Mar. 10, 2014); Letter from Andrew Jay Schwartzman, Institute of Public Representation, to Marlene H. Dortch, Secretary, FCC (filed Mar. 21, 2014) (recounting support of National Association of Broadcast Employees and Technicians-CWA, and Communications Workers of America, AFL-CIO, for attribution of JSAs and arguing that enforcement of attribution rules will promote diversity); Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC (filed Mar. 21, 2014) (joining National Hispanic Media Coalition (NHMC) in support of the attribution of JSAs, alleging harm to diversity, localism, and competition); Letter from S. Derek Turner, Research Director, Free Press, to Mignon Clyburn, Commissioner, FCC (filed Mar. 24, 2014) (supporting attribution of JSAs and refuting argument that JSAs lead to new and diverse ownership); Letter from Terry O'Neil, President, National Organization for Women, to Tom Wheeler, Chairman, FCC (filed Mar. 24, 2014) (supporting attribution of JSAs and arguing that JSAs have not created true opportunities for female ownership); Letter to Tom Wheeler, Chairman, FCC (filed Mar. 24, 2014) (letter on behalf of multiple public interest groups, including National Association of Hispanic Journalists, Center for Media Justice, UCC, Common Cause, and Media Literacy Project, urging attribution of JSAs and other related agreements in order to promote greater diversity of voices in the broadcast television industry).

to promote competition among broadcast television stations in local markets, and not with the purpose of preserving or creating specific amounts of minority and female ownership, we find that retaining the existing rule nevertheless promotes opportunities for diversity in local television ownership.[205] The competition-based rule helps to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.[206]

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[205] We note also that we retain without modification the current failed/failing station waiver policy, including the requirement that the waiver applicant attempt to first solicit an out-of-market buyer, which promotes possible new entry in a market by ensuring that out-of-market entities interested in purchasing a station are aware of station sale opportunities. *See 1999 Ownership Order*, 14 FCC Rcd at 12937, para. 74.

[206] *See* Media Ownership Study 9, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied 2-3, by Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie (2011) (Media Ownership Study 9) (finding, based on theoretical analysis, that the presence of more independently owned outlets can increase viewpoint diversity in a market). Premised on the reasonable assumption that more than one viewpoint exists on many issues, Media Ownership Study 9 supports the related conclusion that competition among firms with similar viewpoints improves information transmission. *Id.* at 26-27. Similarly, Media Ownership Study 2 examines the effects of media market structure on consumer demand and welfare, finding that "the representative consumer values different viewpoints in the reporting of information on news and current affairs, more information on community news, and more information that reflects the interests of women and minorities." Media Ownership Study 2, Consumer Valuation of Media as a Function of Local Market Structure 0, by Scott J. Savage and Donald M. Waldman (2011) (Media Ownership Study 2). It finds, using simulation

76. We are unconvinced by the Smaller Market Coalition's argument that sharing agreements, such as JSAs and SSAs, promote minority and female ownership.[207] While the record demonstrates that some stations that are owned by minorities and women participate in JSAs, the record also indicates that many such stations do not.[208] Moreover, there is no evidence that current minority or female station owners utilized such agreements to acquire those stations. To the contrary, anecdotal evidence suggests that JSAs, in particular, have been used by large station owners to foreclose entry into markets and that the Commission's decision to attribute JSAs has actually led to greater ownership diversity[209]—a proposition supported by multiple commenters throughout this proceeding.[210] As discussed in Section V, many joint operating agreements are not attributable under the Commission's current rules, allowing for a meaningful level of cooperation for cost-saving purposes so long as the independence of the brokered station is preserved. Therefore, the Commission's

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techniques, that any negative effects on diversity associated with common ownership of television stations in a market are smaller in markets with multiple independent television voices. *See* Media Ownership Study 2 at 49.

[207] We discuss sharing agreements in Section V.

[208] *See* Smaller Market Coalition FNPRM Comments at 13-14. The Smaller Market Coalition provides statistics regarding only full power television stations owned by women and African Americans. By their own data, the majority of stations owned by women do not participate in JSAs; moreover, they do not offer any statistics for stations owned by other minority groups, which make up the largest portion of minority station owners. *See 2014 323 Report.*

[209] *See supra* note 169.

[210] *See supra* note 204.

rules do not prevent minority- and women-owned entities or other small business owners or new entrants from utilizing such agreements to facilitate station ownership, to the extent that such agreements are beneficial and do not result in ownership rule violations.

77. Additionally, we find the claim that tightening the Local Television Ownership Rule will promote increased opportunities for minority and female ownership to be both speculative and unsupported by existing ownership data.[211] The National Telecommunications and Information Administration (NTIA) ownership data from 1990-2000 identified 32 minority-owned full power television stations in 1998 (racial and ethnic minorities)—the year before the Commission relaxed the former rule that had restricted ownership to a single television station in a market.[212] Following a decline in the 1999/2000

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[211] *See*, *e.g.*, National Hispanic Media Coalition et al. NPRM Comments at 3-5 (NHMC et al.); UCC et al. NPRM Comments at 24; *see also* Free Press NPRM Comments at 44 (asserting that tightening the television ownership limits could promote ownership diversity by creating ownership opportunities for new entrants); Free Press NPRM Reply at 19. We note that combining older data with more recent data from FCC Form 323 biennial ownership reports (beginning in 2009) introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace. However, in the absence of a continuous, unified data source, the Commission must rely on the available data, and our findings herein are consistent with the data.

[212] U.S. Dep't of Commerce, Nat'l Telecomms and Info. Admin., Changes, Challenges, and Charting new Courses: Minority Commercial Broadcast Ownership in the United States 39 (2001) (NTIA 2001 Minority Ownership Report); *see also 1999 Ownership Order*, 14 FCC Rcd at 12924-43, paras. 42-91. This was down from a previous peak of 38 minority-owned full-power television stations in 1995 and 1996/97. NTIA 2001 Minority Ownership Report at 39.

NTIA data to 23 stations,[213] the Commission's recent Form 323 ownership data demonstrate that minority ownership has grown since that rule was eliminated: 60 stations in 2009; 70 stations in 2011; and 83 stations in 2013.[214] Data provided by Free Press similarly show an increase in minority ownership after the Commission relaxed the Local Television Ownership Rule in 1999.[215] No data provided in the record support a contention that

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The Commission has previously acknowledged that NTIA's data collection methodology did "not insure a complete listing of all commercial radio and television stations owned by minorities" and the data did not include separate data on female ownership. *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23096-97, para. 100 (1998). However, these are the only data from that time period that are available for purposes of comparison and evaluation of claims that relaxation of the Local Television Ownership Rule reduced minority ownership.

[213] NTIA 2001 Minority Ownership Report at 39.

[214] *See 2014 323 Report*, 29 FCC Rcd at 7838, paras. 6-7; *2012 323 Report*, 27 FCC Rcd at 13816-17, paras. 5-6 (updated in footnote 20 of the *2014 323 Report* to correct African American ownership total from 10 to 11). As stated in footnote 16 of the *2014 323 Report*, the number of minority-owned stations was temporarily increased by 14 stations because an Asian individual indirectly held a majority interest in these stations while the entity that owned the stations was in bankruptcy. This individual's interest was terminated in November 2013, which eliminated the temporary increase. Even discounting those 14 stations, there were 69 minority-owned stations in 2013 based on the 323 data, which is more than double the number in 1998.

[215] *See*, *e.g.*, S. Derek Turner & Mark Cooper, Out of the Picture 2007: Minority & Female TV Station Ownership in the United States (Oct. 2007), http://www.freepress.net/sites/default/files/fp-legacy/otp2007.pdf (Turner/Cooper TV Study) (finding that minorities owned 43 commercial full-power television stations as of October 2007).

the duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women.

78. On the other hand, while the data reflect an increase in minority ownership following relaxation of the Local Television Ownership Rule, we have no evidence in the record that would permit us to infer causation and thus we decline to loosen the rule on this basis.

79. Finally, we find that it is impossible at the present time to analyze the implications of the incentive auction for the Local Television Ownership Rule generally, or minority and female ownership specifically.[215] In the auction proceeding, the Commission has considered the effects of the auction on diversity, stating that "[v]oluntary participation in the reverse auction, via a channel sharing, ultra-high frequency (UHF)-to-very-high frequency (VHF), or high-VHF-to-low-VHF bid, offers a significant and unprecedented opportunity for these owners to raise capital that may enable them to stay in

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[216] The broadcast incentive auction will comprise of two separate but interdependent auctions—a reverse auction, which will determine the price at which broadcasters will voluntarily relinquish their spectrum usage rights; and a forward auction, which will determine the price companies are willing to pay for flexible use wireless licenses to deliver high-speed data services. Television stations have a number of options by which they can participate: they can choose to go off the air and relinquish their license entirely or relinquish their current channel to share a channel with another station, or they can move from their current channel to a channel in a different band. The lynchpin joining the reverse and the forward auctions is the "repacking" process. Repacking involves reassigning channels to the remaining television stations in order to create contiguous blocks of cleared spectrum suitable for flexible use.

the broadcasting business and strengthen their operations."[217]

80. The broadcast television incentive auction is ongoing and its implications—including, for example, which stations will relinquish their spectrum entirely and which will relinquish their current channel in order to share a channel with another station(s)—will not be known for some time. Broadcasters interested in participating in the reverse auction filed their applications in January 2016.[218] Entities interested in bidding in the forward auction on the spectrum made available through the reverse auction filed applications in February 2016.[219] The clock round bidding for the reverse auction commenced on May 31, 2016, and concluded on June 29, 2016; the Commission announced August 16, 2016, as the start

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[217] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6850, para. 695 (2014) (*Incentive Auctions Report and Order*). A licensee's participation in the reverse auction does not mean it has decided to exit the business, even if its bid is accepted. The auction provides for bid options that allow the licensee to obtain a share of auction proceeds but still remain on the air: (i) channel sharing; (ii) a UHF station could bid to move to a VHF channel; and (iii) a high VHF station (channels 7-13) could bid to move to a low VHF channel (2-6).

[218] *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, Public Notice, 30 FCC Rcd 12559 (2015).

[219] *Forward Auction Application Filing Window Opens Today at Noon After One-Day Weather Delay; FCC Form 175 Deadline Extended to February 10, 2016*, Public Notice, 31 FCC Rcd 313 (2016).

date for the initial stage of the forward auction.[220] Under statute, the identities of the broadcasters participating in the reverse auction are confidential.[221] After the conclusion of the auction—the date of which is unknown—the Commission will release a public notice announcing the reverse and forward auction winners, and identifying those television stations that will be reassigned to new channels (or "repacked"). Reassigned stations will have up to 39 months after release of that public notice to complete the transition to their new channels, while winning bidders who will relinquish their spectrum entirely or move to share a channel with another station must do so within a specified number of months from receipt of their incentive payment.[222]

81. In light of these factors, and due to the fact that the incentive auction is a unique event without precedent, we cannot evaluate or predict the likely impacts of the auction at this time. As noted above, we will soon

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[220] *See Broadcast Auction Scheduled to Begin March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, Public Notice, 30 FCC Rcd 8975 (2015); *62 Applicants Qualified to Bid in the Forward Auction (Auction 1002) of the Broadcast Television Incentive Auction; Clock Phase Bidding to Begin on August 16, 2016*, AU Docket No. 14-252, Public Notice, DA 16-796 (July 15, 2016).

[221] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(a)(3) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (requiring "all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction . . . , including withholding the identity of such licensee until the [spectrum] reassignments and reallocations . . . become effective")

[222] *Incentive Auctions Report and Order*, 29 FCC Rcd at 6580, para. 34.

commence our evaluation of the broadcast marketplace post-auction, and we expect that the Commission will address the implications of the incentive auction for the media ownership rules in the context of future quadrennial reviews. Further, the court in *Prometheus III* indicated that "the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership."[223] Consistent with this direction and our previous requests for comment on this issue, we have evaluated the record and the status of the ongoing incentive auction, and it is our determination that it is too soon to assess the impact of the auction on minority and female ownership.

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124. *Minority and Female Ownership. The FNPRM* tentatively concluded that the proposed Local Radio Ownership Rule was consistent with the Commission's goal to promote minority and female ownership.[320] The *FNPRM* noted that part of the rationale for retaining the AM/FM subcaps was to promote new entry, particularly in the AM band, which has historically provided low-cost ownership opportunities for new entrants, including women and minorities.[321] The *FNPRM* also tentatively declined to tighten the ownership limits in order to promote minority and female ownership, as some commenters had recommended, and found that retention of the existing ownership limits addressed the concerns of those commenters who believed that additional consolidation would harm minority and

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[223] *Prometheus III*, 824 F.3d at 54 n.13.

[320] *FNPRM*, 29 FCC Rcd at 4416, para. 108.

[321] *Id.* at 4416, para. 111.

female ownership.[322] UCC et al. support the Commission's proposal to retain the existing Local Radio Ownership Rule; however, they assert that the Commission must do even more to increase levels of minority and female ownership, including tightening the numerical limits or ending the exemption for grandfathered combinations.[323]

125. We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations.[324] While we retain the existing Local Radio Ownership Rule for the specific reasons stated above, we find that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. This competition-based rule indirectly advances our diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. We have also retained the AM/FM subcaps, in part, to help promote new entry—as noted, the AM band in particular has historically provided lower-cost ownership opportunities for new entrants.

126. Consistent with our analysis of the local television ownership rule above, however, we find the claim that tightening the Local Radio Ownership Rule would promote increased opportunities for minority and female ownership to be speculative and unsupported by

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[322] *Id.* at 4417, para. 112.

[323] UCC et al. FNPRM Comments at 30.

[324] *See FNPRM*, 29 FCC Rcd at 4416-17, paras. 108-12.

existing ownership data.[325] Notably, NTIA ownership data from 1995—the year before the local radio ownership limits were relaxed and set to the existing levels—identified 312 minority owned radio stations (racial and ethnic minorities for both AM and FM stations).[326] The data demonstrate lower overall levels in 1996/97 (284 stations) and 1998 (305 stations); however, the total grew to 426 stations in 1999/2000, though NTIA attributes approximately half the growth between 1999 and 1999/ 2000 to improved methodology for identifying minority owned stations.[327] The Commission's Form 323 ownership data demonstrate that minority ownership has grown—indeed, more than doubled—since the rule was relaxed: 644 stations in 2009; 756 stations in 2011; and 768 stations in 2013.[328] Data provided by Free Press

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[325] Combining older data with more recent data from FCC Form 323 biennial ownership reports (beginning in 2009) introduces potential variation based on differences in the way the data were collected rather than actual changes in the marketplace. However, in the absence of a continuous, unified data source, the Commission must rely on the available data, and our findings herein are consistent with the data.

[326] NTIA 2001 Minority Ownership Report at 38. As noted in the discussion of the Local Television Ownership Rule, the Commission has previously acknowledged that NTIA's data collection methodology did "not insure a complete listing of all commercial radio and television stations owned by minorities" and the data did not include separate data on female ownership. However, these are the only data from that time period that are available for purposes of comparison and evaluation of claims that tightening the local radio ownership limits would promote minority ownership. *See supra* note 212.

[327] NTIA 2001 Minority Ownership Report at 37-38.

[328] *See 2014 323 Report*, 29 FCC Rcd at 7846-47, 7848-49; *2012 323 Report*, 27 FCC Rcd at 13824-25, 13826-27.

also show an increase in minority ownership after the Local Radio Ownership Rule was relaxed in 1996.[329] No data in the record support a contention that tightening the local radio ownership limits would promote ownership opportunities for minorities and women.

127. In addition, we do not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African-American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.

128. While the NTIA and Form 323 data discussed above show an increase in ownership diversity since the local radio ownership limits were relaxed in 1996, which we have noted, we recognize some limits to their probative value. It is important to note that there is nothing in these data or any other evidence in the record that would permit us to infer causation; therefore, we decline to loosen the existing ownership limits on the basis of any trend reflected in the data. In addition, as discussed above, we decline to loosen the current limits,

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[329] *See* S. Derek Turner, Off The Dial: Female and Minority Radio Station Ownership in the United States 16 (June 2007) (finding that minorities (racial and ethnic minorities) owned 776 commercial radio stations as of February 2007).

which place limits on consolidation, because we continue to find that the existing rule remains necessary to promote competition in local radio markets. Consistent with this conclusion, we remain mindful of the potential impact of consolidation in the radio industry on ownership opportunities for new entrants, including small businesses, and minority- and women-owned businesses, and we will continue to consider the implications in the context of future quadrennial reviews.

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IV. DIVERSITY ORDER REMAND

234. In addition to assessing each of our broadcast ownership rules subject to quadrennial review pursuant to Section 202(h), we are considering in this proceeding the Third Circuit's remand of the Commission's 2008 *Diversity Order*, in particular the decision in that order to adopt a revenue-based eligible entity definition as a race-neutral means of facilitating ownership diversity. In *Prometheus II*, the Third Circuit held that the Commission's decision to adopt the revenue-based definition was arbitrary and capricious because the Commission did not show how such a definition specifically would assist minorities and women, who were among the stated intended beneficiaries of that action.[716] In light of this conclusion, the Third Circuit remanded each of the measures that relied on the revenue-based eligible entity definition the Commission adopted in the *Diversity Order*.[717] The court also instructed the Commission to consider the other eligible entity definitions that the

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[716] *Prometheus II*, 652 F.3d at 469-72.

[717] *Id.* at 471-73.

Commission discussed in the *Third Diversity FNPRM* accompanying the *Diversity Order*, including a proposal based on the socially disadvantaged business (SDB) definition employed by the Small Business Administration (SBA).[718] The *NPRM* sought comment on how the Commission should respond to the court's remand and on other actions that the Commission should consider to enhance the diversity of ownership in the broadcast industry, including minority and female ownership of broadcast stations.[719] The *FNPRM* offered tentative conclusions in response to the court's remand and sought comment on whether any of those conclusions should be reconsidered based on additional or new information in the context of the *2014 Quadrennial Review*.[720] In *Prometheus III*, the Third Circuit ordered the Commission "to act promptly to bring the eligible entity definition to a close" by "mak[ing] a final determination as to whether to adopt a new definition."[721]

235. We discuss below the actions that we believe are appropriate in response to the Third Circuit's remand of the *Diversity Order*. As a threshold matter, we discuss the Commission's ongoing initiatives to promote diversity of ownership among broadcast licensees and to expand opportunities for minorities and women

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[718] *Id.* at 471-72. The Third Circuit specifically instructed the Commission to consider the alternative eligibility standards it had proposed in the *Diversity Order* "before it completes its 2010 Quadrennial Review." *Id.* at 471.

[719] *NPRM*, 26 FCC Rcd at 17544-56, paras. 147-70.

[720] *FNPRM*, 29 FCC Rcd at 4478-4518, paras. 242-319.

[721] *Prometheus III*, 824 F.3d at 49. The court stated that it did not intend to "prejudge the outcome of this analysis." *Id.*

to participate in the broadcast industry. We also discuss the Commission's ongoing improvements to the collection of data and other empirical evidence that are relevant to minority and female ownership issues. We next discuss the measures we are adopting today to enhance ownership diversity. Based on the record in this proceeding, the Third Circuit's remand instructions, and our analysis of the preexisting eligible entity standard and the measures to which it applied, we conclude that we should reinstate the revenue-based eligible entity standard and apply it to the regulatory policies set forth in the *Diversity Order*. We conclude that reinstating the previous revenue-based standard will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. We find that small businesses benefit from flexible licensing policies and that easing certain regulations for small business applicants and licensees will encourage innovation and enhance viewpoint diversity. We also believe that the benefits of reinstating the eligible entity standard and applying it to the regulatory measures set forth in the *Diversity Order* outweigh any potential costs of our decision to do so. Accordingly, we conclude that this action will advance the policy objectives that traditionally have guided the Commission's analyses of broadcast ownership issues.

236. This action does not, of course, preclude our consideration of other or additional eligibility standards that have been put forward as means to promote minority and women ownership of broadcast stations. As discussed further below, we decline to adopt an SDB eligibility standard, which expressly would recognize the race and ethnicity of applicants, or any other race- or gender-conscious measure in this proceeding. We

have carefully studied the record, and the evidence does not establish a basis for race-conscious remedies. Thus, we do not believe that such measures would withstand review under the equal protection component of the Due Process Clause of the Constitution.[722] Finally, we evaluate additional measures that commenters have proposed as potential means of promoting diversity of ownership, aside from the measures that the Third Circuit remanded in *Prometheus II*, including a proposal that the Commission adopt an Overcoming Disadvantage Preference (ODP) standard.

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2. Continuing Improvements to Data Collection

256. As explained in the *FNPRM*, the Commission actively has sought to improve its collection and analysis of broadcast ownership information.[779] We noted that the Commission had already implemented major changes to its Form 323 biennial ownership reports to improve the reliability and utility of the data reported on the form, including data regarding minority and female ownership of broadcast stations.[780] We acknowledged that previous shortcomings in the Form 323 data had impaired the ability of the Commission and interested parties to study and analyze issues related to minority and female ownership. However, we noted that the

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[722] *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-230, 235 (1995). The Supreme Court held in *Adarand* that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of judicial review. 515 U.S. at 229-30.

[779] *FNPRM*, 29 FCC Rcd at 4481-87, paras. 249-62.

[780] *Id.* at 4481, para. 249.

Commission had responded to Form 323-related criticisms and suggestions by substantially revising the form and making certain data from the 2009 biennial Form 323 report filings, as well as previous data collected by the Commission and third parties, available to the authors of the 11 peer-reviewed media ownership studies that are included in the record of this proceeding.[781] And as discussed in more detail below, the Commission recently adopted additional, significant improvements to its broadcast ownership data collection, including revisions to Form 323-E for noncommercial educational broadcast stations that will enhance the completeness of the data collection, promote data integrity, and ensure that the data are electronically readable and aggregable.[782]

257. In response to the *FNPRM*, several commenters take issue with the Form 323 collection process, including the response rate of respondents, completeness of the data collection (e.g., no requirement that noncommercial educational (NCE) broadcast stations provide race, ethnicity, and gender information), and analysis and presentation of the data.[783] For example, while acknowledging that the response rates have improved

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[781] *Id.* at 4482-84, paras. 252-53. These efforts are discussed below, as well as more recent actions that the Commission has taken to improve its broadcast ownership data collection. *See infra* paras. 259-270.

[782] *See infra* paras. 261-264.

[783] *See, e.g.*, Free Press FNPRM Comments at 16-17; Howard Media Group/Carolyn Byerly FNPRM Comments at 1-2, 4-5; Leadership Conference on Civil and Human Rights FNPRM Comments at 2 (LCCHR); UCC et al. FNPRM Comments at 16-23; Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Sec-

since 2009, multiple commenters raise concerns about the response rates for particular services, such as AM radio and LPTV stations.[784] These commenters urge the Commission to take steps to improve the response rates, including the use of enforcement actions against stations that fail to file.[785] UCC et al. urge the Commission to complete its initiatives to improve the completeness and accuracy of its Form 323 data collection.[786]

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retary, FCC, at 1 & Attach., Ownership diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc. (filed Dec. 11, 2014) (UCC et al. Dec. 11, 2014 *Ex Parte* Letter); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Nov. 25, 2014).

[784] *See* Howard Media Group/Carolyn Byerly FNPRM Comments at 5-6; LCCHR FNPRM Comments at 2; UCC et al. FNPRM Comments at 17-18. UCC et al. also suggests that filing rates for FM stations were lower than they should have been in 2013. UCC et al. FNPRM Comments at 17-18.

[785] *See, e.g.*, Howard Media Group/Carolyn Byerly FNPRM Comments at 5-6; UCC et al. FNPRM Comments at 18; UCC et al. Dec. 11, 2014 *Ex Parte* Letter, Attach., Ownership Diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc.

[786] UCC et al. FNPRM Comments at 18-19; Letter from Andrew Jay Schwartzman, Counsel to UCC et al., to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 5, 2015) (UCC et al. Feb. 5, *2015 Ex Parte* Letter); UCC et al. Dec. 11, 2014 *Ex Parte* Letter at 1 & Attach., Ownership Diversity Data Form 323 Action Items for 2015, and Attach., Summary of Studies Recommended by UCC OC Inc.; *see also* Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed May 6, 2016) (urging the Commission "to remedy the errors of past quadrennial reviews, particularly with respect to the adequacy of data under consideration"); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Mar. 24, 2016) (urging the Commission to "collect high-quality data and conduct appropriate studies to support action [to promote minority and female ownership of

WGAW asks the Commission to make various changes to the Consolidated Database System (CDBS) that, according to WGAW, would promote transparency.[787]

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broadcast stations]"); Letter from Cheryl A. Leanza, Co-Chair, LCCHR, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Oct. 30, 2014) (noting "the importance of FCC improvements to [broadcast ownership] data"). In addition, UCC et al. urge the Commission to collect additional information to assess the impact of retaining or amending the media ownership limits on minority- and women-owned businesses, such as information about television SSAs, local news service agreements, and other joint ventures that station owners may be using to circumvent the local television rule. *Id.* at 24-25. As discussed below, we are adopting a definition of SSAs and requiring the disclosure of SSAs involving commercial television stations. *See supra* Section V.

[787] WGAW FNPRM Comments at 15 ("[T]he Commission should update [CDBS] to include all information collected in the station file and in the license application and make such data available in exportable file formats."); *id.* ("Information on SSAs and JSAs should be included in the CDBS and summarized in the Commission's annual video competition report."). These proposed changes, however, do not appear to improve the Commission's data collection efforts for diversity purposes, or otherwise promote ownership diversity, and are therefore outside the scope of this proceeding. In addition, we believe that the WGAW proposal would impose significant costs on the Commission that appear to exceed any possible benefits at this time. Prior to 2016, the Commission required only broadcast TV stations to upload public file documents to a central, FCC-hosted online database. The Commission recently expanded this obligation to broadcast radio stations and other entities, and at this time only certain radio stations are required to upload public file materials to the Commission's online public file database. Other radio stations are not required to upload their public file materials to the Commission's online database until March 2018. *See Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report and Order, 31 FCC Rcd 526 (2016). The FCC-hosted online public file is a separate database from CDBS, where the Commission currently receives

258. Commenters also restate earlier concerns that the reports that Commission staff issue summarizing 323 data present the Commission's ownership data in a format that commenters assert is difficult for researchers to use and with no analysis.[788] In addition, some

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and stores data from broadcast ownership filings. *See FCC, TV Station Profiles & Public Inspection Files*, https://stations.fcc.gov/ (last visited June 17, 2016); FCC, *CDBS Public Access*, http://licensing.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm (last visited June 17, 2016). However, as discussed below, complete raw data from the Commission's broadcast ownership filings, as well as CDBS public database files, are available for download on the Commission's website, and it is updated on a daily basis to account for new and amended filings. Researchers and other parties currently can download the data files from the Commission's website at any time and study, search, and manipulate the data in a wide variety of ways. *See infra* paras. 267-268. This suggests that developing an extensive catalog of complex query options within the public search functionality of our electronic filing system would impose unnecessary costs on the Commission. Also, we note that the Commission decided in the *Form 323/CORES Report and Order* to add a new positional interest category to Form 323 for parties that are attributable by virtue of a JSA or LMA. 31 FCC Rcd at 439, para. 84.

[788] *See* Free Press FNPRM Comments at 16; Howard Media Group/Carolyn Byerly FNPRM Comments at 1-4; LCCHR FNPRM Comments at 2; UCC et al. FNPRM Comments at 20; UCC et al. Dec. 11, 2014 *Ex Parte* Letter, Attach., Summary of Studies Recommended by UCC OC Inc. Howard Media Group/Carolyn Byerly also argue that the ethnic and racial categories used in the *2014 323 Report* create the impression that Hispanics/Latinos are not a minority group, which Howard Media Group/Carolyn Byerly believe makes the ethnic and racial categories "vague and confusing." *Id.* at 4-5. According to Howard Media Group/Carolyn Byerly, this obfuscates the ownership data and renders the *2014 323 Report* inaccurate and unreliable. *Id.* The gender, ethnicity, and race categories identified on Form 323 follow the guidance provided by the Office of Management and Budget. *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other*

commenters criticize the 323 Reports for failing to provide certain information about minority owners, such as call signs, broadcast location, and market information.[789] According to UCC et al., this information is essential for commenters to analyze how amending or retaining the Commission's media ownership limits would affect minority and female ownership.[790] As discussed below, we have taken significant steps to address these concerns.

259. *Collection of Biennial Ownership Data.* As discussed above, the Commission has improved its collection and analysis of broadcast ownership information. Indeed, our recent efforts have largely addressed the concerns expressed by certain commenters. The Commission has been engaged in a sustained effort to improve the quality, utility, and reliability of broadcast ownership data it collects on FCC Forms 323 and 323-E. In 2009, the Commission substantially revised Form 323

Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835, 7837, n.9 (MB 2014) (*2014 323 Report*) (citing Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (Oct. 30, 1997) (Race and Ethnicity Data Standards)); *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*, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13814, 13816, n.5 (MB 2012) (*2012 323 Report*) (citing Race and Ethnicity Data Standards).

[789] Asian Americans Advancing Justice FNPRM Comments at 16-17 (AAJC); UCC et al. FNPRM Comments at 20.

[790] UCC et al. FNPRM Comments at 20.

to facilitate longitudinal comparative studies of broadcast station ownership.[791] The changes also addressed Form 323-related criticisms and suggestions from the United States Government Accountability Office (GAO)[792] and from researchers who had attempted to use the data submitted on previous versions of Form 323 to analyze broadcast ownership issues in the 2006 Quadrennial Review proceeding.[793]

260. To improve the quality of its broadcast ownership data, the Commission adopted several significant changes to Form 323 in the *323 Order*. The Commission established a new, machine-readable Form 323 that enabled for the first time electronic analysis of the reports filed by television and radio broadcasters. The

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[791] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, 5902-04, paras. 11-13 (2009) (*323 Order and Fourth Diversity FNPRM*), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (*323 MO&O and Fifth Diversity FNPRM*).

[792] U.S. Gov't Accountability Office, GAO-08-383, Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess (2008) (GAO Report). GAO cited several shortcomings with the Commission's data collection process: (1) exemptions from the biennial filing requirement for certain types of broadcast stations; (2) inadequate data quality procedures; and (3) problems with storage and retrieval. *Id.* at 5; *see also 323 Order*, 24 CC Rcd at 5901, para. 10; *Promoting Diversification of Ownership in the Broadcasting Services*, Sixth Further Notice of Proposed Rulemaking, 28 FCC Rcd 461, 463, para. 4 (2013) (*Sixth Diversity FNPRM*).

[793] *See 323 Order*, 24 FCC Rcd at 5900-01, para. 7 & n.18.

Commission also set a uniform filing deadline of November 1 for biennial ownership reports on Form 323 and required filers to report their ownership interests as they exist on October 1 of the filing year.[794] These uniform dates make it possible to discern statistically valid trends in minority and female broadcast ownership over time, which was not possible using the previous rolling filing deadlines, and to ensure the timely collection of the data.[795] The Commission also expanded the requirement to file Form 323 biennially to include sole proprietors and partnerships of natural persons, as well as low power television (LPTV) and Class A television licensees.[796]

261. Most recently, the Commission in 2016 adopted a number of additional enhancements to its broadcast ownership data collection in order to further improve the comprehensiveness and reliability of the data. These recent enhancements will enable more effective analysis of ownership trends in support of the Commission's policy initiatives. In particular, the Commission implemented a Restricted Use FCC Registration Number (Restricted Use FRN)—a new identifier within the

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[794] 47 CFR § 73.3615(a). In addition to the biennial filing of Form 323, licensees and permittees are required to file a non-biennial Form 323 (1) within 30 days of a grant of an application for original construction permit, (2) on the date the permittee applies for a station license, and (3) within 30 days of the consummation of authorized assignments or transfers of control of permits and licenses. *Id.* § 73.3615(b)-(c).

[795] *323 Order*, 24 FCC Rcd at 5908-09, para. 22; *Sixth Diversity FNPRM*, 28 FCC Rcd at 463, para. 4.

[796] 47 CFR § 73.3615(a); *see also 323 Order*, 24 FCC Rcd at 5904-05, paras. 14-16; *Sixth Diversity FNPRM*, *28* FCC Rcd at 463-64, para. 4.

Commission's Registration System (CORES)—that will allow for unique identification of individuals listed on broadcast ownership reports, without necessitating the disclosure to the Commission of individuals' full Social Security Numbers.[797] The Commission also eliminated the availability of the interim Special Use FRN for individuals reported on broadcast ownership reports, except in certain limited circumstances. Because the Special Use FRN offers no way for the Commission to identify individuals reliably, restricting its use will improve the integrity and utility of the Commission's broadcast ownership data."[798]

262. In addition, the Commission prescribed revisions to Form 323-E for NCE broadcast stations that will conform the reporting requirements for NCE stations more closely to those for commercial stations filing Form 323. Specifically, the Commission revised Form 323-E to collect race, gender, and ethnicity information for attributable interest holders; to require that CORES FRNs or Restricted Use FRNs be used; and to conform the biennial filing deadline for NCE station ownership reports to the biennial filing deadline for commercial station ownership reports.[799] These revisions to Form

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[797] *Promoting Diversification of Ownership in the Broadcasting Services et al.*, Report and Order, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 398, 412-20, paras. 25-42 (2016) (*Form 323/CORES Report and Order*). Four parties have filed petitions for reconsideration of the *Form 323/CORES Report and Order*. *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 81 Fed. Reg. 31223 (May 18, 2016).

[798] *Form 323/CORES Report and Order*, 31 FCC Rcd at 413, para. 29.

[799] *Id.* at 420-28, 432-33, paras. 43-55, 64-67.

323-E will enhance the completeness of the Commission's broadcast ownership data collection, promote data integrity, and ensure that the data are electronically readable and aggregable. These revisions address criticisms that the Commission's race, ethnicity, and gender data were incomplete because the Commission had not previously collected such data relating to NCE stations.[800]

263. The Commission also adopted a number of other changes to Forms 323 and 323-E that will streamline the filing process and improve data quality.[801] These changes are intended to provide filers with additional time for completing and submitting biennial ownership reports, while reducing the amount of time and resources required to address the mechanical aspects of the ownership report preparation and filing process, thereby allowing parties to spend more time focused on the accuracy and completeness of the ownership information they submit to the Commission.

264. Together, the further enhancements that we adopted in the *Form 323/CORES Report and Order* will enable the Commission to obtain data providing a more useful, accurate, and thorough picture of minority and female broadcast station ownership, while reducing filing burdens. These improvements also address the Third Circuit's directive that the Commission obtain more and better data concerning broadcast ownership to support its rulemaking decisions. Ultimately, we believe that these actions will assist efforts to study and

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[800] *See, e.g.*, UCC et al. FNPRM Comments at 15.

[801] *Form 323/CORES Report and Order*, 31 FCC Rcd at 429-39, paras. 59-84.

analyze issues related to minority and female ownership, by both the Commission and third parties. And as explained in the following discussion, the Commission has also taken a number of other steps to improve its collection of ownership data.

265. *Improving Response Rates and Data Quality.* In addition to substantially revising Forms 323 and 323-E, the Commission has made ongoing outreach efforts to assist filers in an effort to improve response rates and to reduce common filing errors. Prior to the 2011, 2013, and 2015 biennial filing periods for Form 323, the Media Bureau released public notices to remind licensees of commercial AM, FM, TV, LPTV, and Class A television stations, as well as all entities with attributable interests in such stations, of their obligation to file a biennial ownership report.[802] To assist both novice and experienced filers, the Bureau has hosted information sessions regarding the filing of biennial ownership reports on Form 323. During the most recent session, which was held prior to the start of the 2015 biennial filing window, Bureau staff presented an overview of the form, conducted a filing demonstration, discussed common filing mistakes, and responded to questions from

[802] We note that in instances where a station fails to file a biennial ownership report as required by the Commission's rules, the Commission can use its enforcement authority to impose a forfeiture on the licensee of the station. 47 U.S.C. § 503(b). Enforcement decisions are made on a case-by-case basis based on the facts and circumstances of each unique case before the Commission.

the public.[803] The Commission has made a video recording of this information session available on its website to assist filers."[804]

266. In addition to these efforts, the Media Bureau has established several online resources for filers. Those resources include a dedicated Form 323 webpage containing links to notices and other documents regarding Form 323,[805] a Frequently Asked Questions webpage providing useful information about the form and its electronic filing capabilities, and a webpage identifying some of the most common filing errors and ways to avoid them, which Bureau staff compiled based on experience during previous biennial filing periods. At Form323@fcc.gov, Bureau staff also respond to inquiries received from filers (e.g., licensees and attributable entities) and the public regarding the filing of commercial biennial ownership reports. We believe these ongoing outreach efforts will continue to further the Commission's objective of improving its broadcast ownership data collection, and we anticipate similar outreach efforts with respect to the modified Forms 323 and 323-E, as filers transition to the new forms and filing procedures.

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[803] *Media Bureau Announces Biennial Form 323 Information Session*, Public Notice, 30 FCC Rcd 8455 (Aug. 20, 2015). The filing window for the 2015 Form 323 biennial ownership report filings closed on December 2, 2015. Commission staff is currently compiling a report based on those filings, and we expect that the forthcoming report will help inform future Commission proceedings.

[804] The video recording is available at https://www.fcc.gov/news-events/events/2015/09/biennial-form-323-information-session.

[805] The website is available at https://www.fcc.gov/media/ownership-report-commercial-broadcast-station-form-323.

267. *Analysis of Ownership Data.* In order to assist parties in their ability to access and analyze the ownership data, the Commission has ensured that the data submitted on Form 323 are incorporated into a relational database, the most common database format, which is standard for large, complex, interrelated datasets. Complete raw data from the Commission's broadcast ownership filings, both current and historical, are available for download from the Commission's website, and the data are updated on a daily basis to account for new and amended filings.[806] Researchers and other parties may download the data files from the Commission's website at any time and study, search, and manipulate the data in a wide variety of ways. The Commission has made explanatory documents publicly available and easy to find. Also, in response to requests from outside parties, the Commission now provides spreadsheets that contain additional ownership data, such as call signs, broadcast location, and market information. These spreadsheets are released with the 323 Reports to help present a broader picture of the biennial Form 323 data.

268. In addition, the Media Bureau hosted an all-day public workshop in September 2015 to assist individuals and organizations that wish to use and study the large amount of broadcast ownership data that is available to

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[806] *See FCC, CDBS Database Public Files*, https://www.fcc.gov/media/radio/cdbs-database-public-files (last visited June 17, 2016); FCC, *Readme file for CDBS Public Files* (*Broadcast Database*) (Nov. 7, 2014), https://transition.fcc.gov/ftp/Bureaus/MB/Databases/cdbs/_readme.html.

the public on the Commission's website.[807] The workshop addressed a number of topics concerning access to, and use of, the Commission's commercial broadcast ownership data, including relevant data that the Commission collects, how members of the public can access those data, and mechanisms for querying, studying, and visualizing the data, including in combination with data available from non-FCC sources. The workshop, a video of which is available online, provides researchers with the tools and understanding to electronically search, aggregate, and cross reference the data in order to prepare their own analysis.[808]

269. We reiterate that the Commission does not consider the 323 Reports to be studies that would help support the adoption of race- or gender-based preferences or policies—indeed, they are not studies at all. These Reports, and the accompanying spreadsheets, contain valuable data about minority and female ownership of broadcast stations. The Reports aggregate the data and are not in and of themselves a study of ownership information. The Commission has used the data from the *2012* and *2014 323 Reports* to inform its analyses in this proceeding.[809] In addition, ownership data from Form 323 filings have been incorporated into multiple

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[807] *Media Bureau Announces Workshop on Access to, and Use of, the FCC's Form 323 Data*, Public Notice, 30 FCC Rcd 8204 (MB 2015).

[808] A video of the workshop is available on the Commission's website at https://www.fcc.gov/newsevents/events/2015/09/form-323-data-workshop.

[809] *See, e.g.*, *supra* paras. 77, 126 (using ownership data collected through 2013 to examine minority ownership trends following relaxation of the Local Television Ownership Rule and the Local Radio Ownership Rule).

studies. As noted above, seven of the 11 peer-reviewed media ownership studies in the record as of the date of the *FNPRM* incorporated the 2009 Form 323 data, as well as previous data collected by the Commission and third parties.[810] These studies examine issues such as media quality, innovation, viewpoint diversity, local information programming, the provision of programming to minority audiences, and local television news.[811] These studies have been discussed extensively in the record, both in the context of individual media ownership rules and in the Commission's response to the remand issues from *Prometheus II*. We also note that the Hispanic Television Study included 2011 Form 323 data. The study is the Commission's first systematic examination of the Hispanic television marketplace and is one of the first to incorporate comprehensive data from the recently improved 323 ownership form.

270. The Commission's improved ownership data are already contributing to meaningful analysis and studies regarding media ownership and diversity policies. We are hopeful that interested parties will use the data to conduct further studies and analyses—particularly with respect to trends concerning broadcast station ownership by minorities and women—endeavors that should be aided by the Commission's research workshop, discussed above.

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[810] *FNPRM*, 29 FCC Rcd at 4483, para. 253.

[811] *Id.*

B. Remand Review of the Revenue-Based Eligible Entity Standard

1. Background

271. In the *NPRM* the Commission sought comment on a number of actions it could take with respect to the remanded eligible entity definition, including the possibility of reinstating the revenue-based definition to support policy objectives other than increased minority and female ownership of broadcast stations.[812] In particular, the Commission asked whether re-adoption of the revenue-based standard would serve the Commission's traditional goals of fostering viewpoint diversity, localism, and competition by enhancing opportunities in broadcasting for small businesses and new entrants.[813] Recognizing the Third Circuit's apparent skepticism that the Commission would be able to demonstrate on remand that the revenue-based eligible entity standard promotes increased ownership of broadcast stations by minorities and women, the Commission also asked commenters to supply any available evidence that would show a stronger connection between the revenue-based eligible entity definition and our goal of increasing minority and female ownership of broadcast stations.[814]

272. The Commission adopted the revenue-based eligible entity definition in the *2002 Biennial Review Order* as an exception to the prohibition on the transfer of

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[812] *NPRM*, 26 FCC Rcd at 17550-51, paras. 159-62.

[813] *Id.* at 17550-51, paras. 160-61.

[814] *Id.* at 17550, para. 160.

grandfathered station combinations that violated the local radio ownership limits.[815] The Commission adopted this flexible transfer policy to promote diversity of ownership in broadcasting by facilitating new entry by and growth of small businesses in the broadcast industry.[816] Thereafter, in the *Diversity Order*, the Commission concluded that additional uses of the eligible entity definition would advance its objectives of promoting ownership diversity by facilitating greater small business participation in the broadcast industry.[817] The Commission stated at that time that the adoption of new measures relying on this definition would "be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including minorities and women.[818]

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[815] *2002 Biennial Review Order*, 18 FCC Rcd at 13809-12, paras. 487-90. The exception permitted broadcast licensees to assign or transfer control of a grandfathered combination to an eligible entity, which the Commission defined as any entity that would qualify as a small business consistent with revenue-based standards for its industry grouping, as established by the SBA. The exception also allowed eligible entities to sell existing grandfathered combinations intact to new owners, subject to limited restrictions. *Id.* at 13810-12, paras. 488-90.

[816] *Id.* at 13810-11,para. 488.

[817] *Diversity Order*, 23 FCC Rcd at 5926, para. 7. The Commission adopted the following measures that relied on the eligible entity definition: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rule; (3) Distress Sale Policy; (4) Duopoly Priority for Companies that Finance or Incubate an Eligible Entity; (5) Extension of Divestiture Deadline in Certain Mergers; and (6) Assignment or Transfer of Grandfathered Radio Station Combinations. *Id.* at 5928-45, paras. 10-61.

[818] *Id.* at 5927, para. 9.

273. In *Prometheus II*, the Third Circuit vacated and remanded each of the measures adopted in the *Diversity Order* that incorporated the eligible entity definition.[819] The court held that the Commission failed to show that measures based on the eligible entity definition "will enhance significantly minority and female ownership," which it found was a stated goal of the rulemaking proceeding culminating in the *Diversity Order*.[820] The court further observed that, in discussing its decision to adopt the eligible entity definition, the Commission had referred "only to 'small businesses,' and occasionally 'new entrants,' as expected beneficiaries."[821] Between 2002 and the Third Circuit's remand of the measures relying on the eligible entity definition in 2011, the Commission had used the revenue-based standard to support a range of measures intended to encourage ownership diversity.

274. In response to the *NPRM*, several commenters, including the Alliance for Women in Media (AWM) and NAB, supported reinstatement of the revenue-based eligible entity definition and the measures to which it previously applied as a means of enhancing ownership opportunities for small businesses and new entrants generally, regardless of race or gender.[822] In its comments,

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[819] *Prometheus II*, 652 F.3d at 437.

[820] *Id.* at 471; *see also id.* at 470 (finding that the Commission had failed to "explain how the eligible entity definition adopted [in the *Diversity Order*] would increase broadcast ownership by minorities and women"); *id.* at 471 (finding that the eligible entity definition "lacks a sufficient analytical connection to the primary issue that Order was intended to address").

[821] *Id.* at 470.

[822] AWM NPRM Comments at 6-7; NAB NPRM Comments at 55-56; NAB NPRM Reply at 33.

NAB noted that reinstating the pre-existing eligible entity standard and the measures that relied on that standard would further the Commission's statutory goal of eliminating market barriers for entrepreneurs and small businesses.[823] UCC et al. recommended that, instead of abandoning or repurposing the revenue-based definition, the Commission should assess whether the standard has had any measurable impact on minority and female ownership of broadcast stations.[824] In contrast, other commenters, such as DCS, argued that the pre-existing eligible entity definition should not be reinstated because it had no measurable impact on minority ownership.[825] According to DCS, no meaningful impact on minority ownership would be achieved by relying on a definition based solely upon the revenue limits that the SBA has established for small businesses.[826]

275. In the *FNPRM*, we tentatively concluded that reinstating the revenue-based eligible entity standard would serve the public interest by enabling more small businesses to participate in the broadcast industry, thereby encouraging innovation and expanding ownership and viewpoint diversity.[827] We tentatively concluded that such a standard is an appropriate and worthwhile approach for

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[823] NAB NPRM Comments at 56 (citing 47 U.S.C. § 257(a)); NAB NPRM Reply at 33 (citing 47 U.S.C. § 257(a)).

[824] UCC. et al. NPRM Comments at 32-33.

[825] DCS NPRM Comments at 19. For this proposition, DCS quotes *Prometheus II*, which stated that the revenue-based definition does not increase minority ownership because "minorities comprise 8.5 percent of commercial radio station owners that qualify as small businesses, but [only] 7.78 percent of the commercial radio industry as a whole." *Id.* (quoting *Prometheus II*, 652 F.3d at 470).

[826] *Id.*

[827] *FNPRM*, 29 FCC Rcd at 4489, para. 267.

expanding ownership diversity regardless of whether the standard was also effective in promoting ownership of broadcast stations specifically by women and minorities.[828] Noting that the Commission has previously applied SBA standards to define eligible entities, we proposed to define an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue.[829] We proposed to require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria.[830] Further, we tentatively concluded that, if we chose to reinstate the eligible entity definition, it would be appropriate to re-adopt each of the previous measures that relied on this definition prior to remand in *Prometheus II*. We noted in the *FNPRM* that our records indicated that a significant number of applicants

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[828] *Id.*

[829] *Id.* at 4491, para. 272.

[830] *Id.* at 4491-92, para. 272. Specifically, we proposed that the eligible entity would have to hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6 n.14 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489).

and permittees had previously availed themselves of one or more of those measures.[831]

276. Although no commenters challenge the *FNPRM*'s tentative conclusion that reinstating the revenue-based eligible entity standard will promote small business participation in broadcasting, some commenters assert that the standard has not been shown to increase ownership of broadcast stations by minorities and women specifically—something that the *FNPRM* explicitly acknowledges. MMTC states that the *FNPRM* fails to include any meaningful proposals to advance minority ownership and does not promote the creation of a meaningful eligible entities program pursuant to the Third Circuit's remand.[832] Rather, MMTC argues, the *FNPRM* reverts to a flawed eligible entities definition based on SBA size standards with little regard for whether this approach will promote minority media ownership effectively.[833] UCC et al. state that the Commission, by proposing to re-adopt a revenue-based eligible entity definition, fails to act on their prior suggestion that the Commission assess whether a small business definition had any impact on ownership by minorities and women.[834] UCC et al. acknowledge that in

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[831] *FNPRM*, 29 FCC Rcd at 4489-90, paras. 269-71.

[832] MMTC FNPRM Comments at 4-5.

[833] *Id.*

[834] UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24. UCC et al. state that the Commission does not analyze the race, gender, or ethnicity of any eligible entities that benefited from the transfer of construction permits policies even though the Commission has collected race and gender data at least since 2009. UCC et al. FNPRM Comments at 15. And, even though a majority (67 percent) of the eligible entities that utilized the construction permit transfer extension policy are noncommercial educational stations

the *FNPRM* the Commission cited data to support its tentative conclusion that the revenue-based eligible entity standard promotes viewpoint diversity, but those commenters suggest that the Commission should have also analyzed whether any entities controlled by women or minorities were among those that benefited from the policies relying on the eligible entity standard."[835] According to UCC et al., the fact that the Commission did not cite evidence demonstrating that the revenue-based eligible entity standard will specifically promote minority and female ownership of broadcast stations, combined with the low number of stations controlled by minorities or women while the revenue-based standard was in effect, confirms that the revenue-based standard lacks a sufficient analytical connection to promoting broadcast ownership by minorities and women.[836]

277. Native Public Media and the National Congress of American Indians (NPM/NCAI) agree with those commenters who oppose the tentative conclusion that re-adopting the previous eligible entity definition is an appropriate measure to further diversity in response to the court's remand.[837] NPM/NCAI argue that, in order

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(NCEs), the Commission has never acted on its proposal to collect race, gender, and ethnicity data for NCEs, state UCC et al. UCC et al. FNPRM Comments at 15. UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24. As noted above, however, the Commission recently adopted revisions to Form 323-E to collect race, gender, and ethnicity data for NCE stations as part of the biennial ownership report filings. *Supra* Section IV.A.2.

[835] UCC et al. FNPRM Comments at 15.

[836] *Id.* at 16. UCC et al. FNPRM Comments at 15; UCC et al. FNPRM Reply at 23-24.

[837] Native Public Media and the National Congress of American Indians FNPRM Reply at 4-6 (NPM/NCAI).

to advance ownership diversity, the Commission could expand the definition of eligible entity to include Tribes and Tribal applicants until such time as sufficient evidence is developed to support a race-conscious eligible entity definition.[838] NPM/NCAI advocate this expansion of the eligible entity definition as an interim step that the Commission could take now while it conducts further studies on which race- and gender-specific actions could be taken.[839]

278. Although they object to the reinstatement of the revenue-based eligible entity standard, DCS urge the Commission not to abandon the policy of allowing the transfer of grandfathered radio combinations under certain conditions or the policy of affording eligible entities that acquire broadcast construction permits additional time to construct their facilities under certain circumstances."[840] Further, DCS and MMTC urge the Commission to broaden the construction deadline extension policy to include construction permits for major

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[838] NPM/NCAI FNPRM Reply at 6-7. Specifically, NPM/NCAI request that the Commission alter the definition of eligible entities to include "any Tribe or Tribal applicant as defined by 47 CFR § 73.7000." *Id.* at 7.

[839] NPM/NCAI FNPRM Reply at 7. In support of this approach, NPM/NCAI state that the Commission has previously found that a classification based on Tribes or Tribal members would not trigger strict scrutiny. *Id.* According to NPM/NCAI, Tribal radio plays a crucial role in Native communities, because Tribal lands often do not have access to reliable cell service or broadband Internet. Consequently, NPM/NCAI assert that some Native communities depend on radio to provide not only cultural information but also news and public safety and health announcements. *Id.* at 8. We address this proposal below. *See infra* note 847.

[840] DCS NPRM Comments at 14-15, 19, 31.

modifications of authorized broadcast facilities.[841] NAB similarly supports the policy regarding the transfer of grandfathered radio station combinations, as well as other race-neutral, incentive-based approaches that reduce barriers to entry, such as the reinstatement of the higher Equity Debt Plus (EDP) attribution threshold for eligible entities.[842] However, UCC et al. argue that without an alternative eligible entity definition that is reasonably and explicitly related to the specific goal of increasing ownership of broadcast stations by women and minorities, re-adopting the higher EDP attribution threshold and the policy regarding the transfer of grandfathered radio combinations will not promote minority and female ownership.[843]

2. Discussion

279. We conclude that the Commission's prior revenue-based eligible entity definition should be reinstated and applied to the regulatory policies set forth in the *Diversity Order*. We find that reinstating the eligible entity definition and the measures to which it applied will serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs. As discussed below, we find that the record supports these conclusions. Accordingly, we reinstate our previous revenue-based eligible entity definition and the measures adopted in the *Diversity Order* that were vacated and remanded by the Third Circuit in *Prometheus II*.

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[841] MMTC FNPRM Comments at 8-9; DCS NPRM Comments at 31; DCS NPRM Supplemental Comments at 38-42.

[842] NAB FNPRM Comments at 92-94.

[843] UCC et al. FNPRM Reply at 22-25.

280. We conclude that the revenue-based eligible entity standard is a reasonable and effective means of promoting broadcast station ownership by small businesses and potential new entrants. We continue to believe that small business applicants and licensees often have financial and operational needs that are distinct from those of larger broadcasters, and that they require greater flexibility with regard to licensing, construction, auctions, and transactions. By easing certain regulations for small business applicants and licensees, we believe we will increase station ownership opportunities for small businesses and new entrants, to the benefit of the public interest.

281. Moreover, we conclude that our traditional policy objectives will be served by enhancing opportunities for small business participation in the broadcast industry via the eligible entity standard. We continue to believe that enabling more small businesses to participate in the broadcast industry will encourage innovation and promote competition and viewpoint diversity. As the Commission has noted previously, greater small business participation in communications markets "will expand the pool of potential competitors" and "should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.[844] We continue to believe that this is true. Furthermore, increasing opportunities for small businesses to participate in the broadcast industry will foster viewpoint diversity by facilitating the dissemination of broadcast licenses to a wider variety of applicants than would otherwise be the case. Competition and viewpoint diversity are two primary policy objectives

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[844] *2002 Biennial Review Order*, 18 FCC Rcd at 13637, para. 51.

that have traditionally guided the Commission's analysis of broadcast ownership issues.

282. The record supports these conclusions. Commenters, including AWM and NAB, agree that re-adopting the revenue-based eligible entity standard is an appropriate means of enhancing ownership opportunities for small businesses and new entrants.[845] Although UCC et al. criticize our proposal to reinstate the revenue-based standard, they also acknowledge the data we cited in the *FNPRM* to support our conclusion that the standard promotes viewpoint diversity.[846] UCC et al. and other commenters that criticize the revenue-based eligible entity standard do so based on their view that the standard is not an effective means of increasing ownership specifically by women and minorities.[847] However,

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[845] AWM NPRM Comments at 6-7; NAB NPRM Comments at 53, 55-56; NAB NPRM Reply at 32-33; *see also* NAB FNPRM Comments at 91-92 (supporting incentives-based measures that reduce barriers to entry into broadcasting for all small businesses).

[846] UCC et al. FNPRM Comments at 15.

[847] *See* MMTC FNPRM Comments at 4; UCC et al. FNPRM Comments at 15-16; UCC et al. FNPRM Reply at 23-24; NPM/NCAI FNPRM Reply at 6; DCS NPRM Comments at 19. As noted above, NPM/NCAI argue that, pending further action on a race- and gender-conscious eligible entity standard, the Commission "can take another significant step towards overcoming th[e] underrepresentation [of Native Americans in broadcast station ownership] by expanding the definition of eligible entity to include Native Nations." *See* NPM/NCAI FNPRM Reply at 6-8. As discussed above, we are re-instating the revenue-based eligible entity standard to promote broadcast station ownership by small businesses and new entrants. We do not believe it is necessary to expand our revenue-based eligible entity definition to include Tribes and Tribal Applicants in order to enable more small businesses to participate in the broadcast industry. Moreover, as NPM/NCAI point out, the Commission has

this has no bearing on our conclusion that the standard will help promote small business and new entrant participation in the broadcast industry.

283. Our decision to reinstate the revenue-based eligible entity standard is also supported by the Commission's own records, which indicate that a significant number of broadcast licensees and permittees availed themselves of policies based on the revenue-based eligible entity standard between the implementation of that standard and its suspension following *Prometheus II*. One of those policies was to allow an eligible entity that acquired an expiring broadcast construction permit to obtain additional time to build out its facilities in certain circumstances.[848] In the *FNPRM*, we noted that many

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adopted measures in a separate proceeding that are intended to expand broadcast opportunities for Tribal Nations and Tribal entities. *Id.* at 6-7. To the extent that their proposal is intended to increase broadcast service to Tribal lands, we believe it is outside the scope of this quadrennial review proceeding. We note that, in the *Rural Radio* proceeding, the Commission adopted a Tribal Radio Priority in order to expand the number of radio stations owned or majority controlled by federally recognized American Indian Tribes and Alaska Native Villages, or Tribal consortia, broadcasting to Tribal lands. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583 (2010); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642 (2011).

[848] *See Diversity Order*, 23 FCC Rcd at 5930-3 1, paras. 15-16; *see also* 47 CFR § 73.3598(a) ("An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the

small businesses made use of this measure. Our records at the time indicated that Commission staff processed approximately 247 Form 314 construction permit assignment applications in which the assignee self-identified as an eligible entity during the period this measure was in use.[849] Those 247 initial applications resulted in the construction and operation of at least 132 new broadcast facilities.[850] A more recent review of our records indicates that nearly all of these stations remain on the air. Based on a recent staff review, of the 132 new stations that were built and commenced operation, 118 stations (approximately 89.4 percent) were still operating and an additional three eligible entities that previously were not licensed or had not built out their facilities had since been licensed.[851] In addition to the 247

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construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license.").

[849] *FNPRM*, 29 FCC Rcd at 4489-90, para. 269. FCC Form 314 requires that assignees in broadcast transactions indicate whether the assignee is an eligible entity as that term is defined in the *Diversity Order*. FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Section III—Assignee, Question 6(d), (e)(A)-(B), http://transition.fcc.gov/Forms/Form314/314.pdf. Specifically, the assignee must include a detailed showing demonstrating proof of status as an eligible entity.

[850] *FNPRM*, 29 FCC Rcd at 4489-90, para. 269. Eleven (4.5 percent) of the eligible entities were not yet licensed or had not built out the facilities specified on their construction permits, and at the time 104 of the construction permits held by eligible entities had been cancelled for various reasons. *Id.*

[851] Based on staff analysis of CDBS data as of August 25, 2015, the data reveal that 109 (90.1 percent) of these 121 stations are FM stations; 10 (8.3 percent) are AM stations; one (0.8 percent) is a digital TV station; and one (0.8 percent) is an FM translator station.

Form 314 applications that sought Commission consent to the assignment of a construction permit to an eligible entity, our records indicate that during the relevant period Commission staff processed 21 Form 315 construction permit transfer of control applications in which the transferee self-identified as an eligible entity.[852] All but one of these facilities (95.2 percent) were constructed following approval of the transfer of control and are now on the air.[853]

284. The data clearly suggest that providing additional time to construct broadcast facilities has facilitated market entry by small broadcasters. Further,

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Moreover, 82 (67.8 percent) of these stations are noncommercial educational (NCE) stations. We note that in the past NCE licensees have not been required to report information concerning the race, gender, or ethnicity of individuals who hold attributable interests in NCE stations. As discussed above, in January we updated our reporting requirements for NCE stations to more closely parallel the requirements for commercial broadcast stations, including by requiring that NCE licensees report race, gender, and ethnicity information for attributable interest holders in NCE stations. *Form 323/CORES Report and Order*.

[852] Similar to Form 314, FCC Form 315 requires that transferees in broadcast transactions indicate whether the transferee is an eligible entity as that term is defined in the *Diversity Order*. FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, Section IV—Transferee(s), Question 8(d), (e)(A)-(B), https://transition.fcc.gov/Forms/Form315/315.pdf. The transferee must include a detailed showing demonstrating proof of status as an eligible entity.

[853] One of these 21 construction permits was cancelled. Of the 20 stations that have been built and are operating, 11 (55 percent) are FM stations; seven (35 percent) are AM stations; one (5 percent) is a low-power FM station; and one (5 percent) is a low-power TV station. All but one of these stations are commercial stations. FCC staff analysis of CDBS data as of August 25, 2015.

we note that the data reflect the use of the prior eligible entity standard in a limited context and do not reflect the total number of applicants and permittees that benefited from all the various broadcast policies that relied on the revenue-based eligible entity standard. Even so, this information supports our conclusion that the revenue-based eligible entity standard has been used successfully by a significant number of small firms and has not only aided their entry, but also contributed to the sustained presence of small firms in broadcasting in furtherance of our public interest goals.

285. In addition to reinstating the revenue-based eligible entity standard, we believe it is in the public interest to apply the standard to the full range of construction, licensing, transaction, and auction measures to which it previously applied. AWM and NAB support reinstatement of these measures,[854] and DCS has urged the Commission to reinstate the measures concerning construction permit deadlines and transfers of grandfathered radio station combinations.[855] Commenters that have argued against reinstatement have done so based on whether the measures will specifically increase minority and female ownership of broadcast stations,[856] which again has no bearing on whether the measures will promote small business participation in the broadcast industry. Accordingly, the Commission hereby re-adopts each measure relying on this definition that was remanded in *Prometheus II*. Specifically, we reinstate the following

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[854] AWM NPRM Comments at 6-7; NAB NPRM Comments at 53, 55-56; NAB NPRM Reply at 32-33.

[855] DCS NPRM Comments at 14-15, 31.

[856] *See, e.g.*, UCC et al. FNPRM Reply at 22-25.

measures: (1) Revision of Rules Regarding Construction Permit Deadlines;[857] (2) Modification of Attribution Rule;[858] (3) Distress Sale Policy;[859] (4) Duopoly Priority

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[857] *Diversity Order*, 23 FCC Rcd at 5930, para. 15 (revising construction permit rules to allow the sale of an expiring construction permit to an eligible entity that pledges to build out the permit within the time remaining in the original construction permit or within 18 months, whichever period is greater); *see also* 47 CFR § 73.3598(a). In reinstating this measure, the Commission emphasizes that this exception to our strict broadcast station construction policy is limited to one 18-month extension based on one assignment to an eligible entity.

[858] *Diversity Order*, 23 FCC Rcd at 5936, para. 31 (relaxing the equity/debt plus (EDP) attribution standard for interest holders in eligible entities by "allow[ing] the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in [the EDP standard] without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station provided (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity"); *see also* 47 CFR § 73.3555, Note 2(i)(2). In addition, pursuant to the new entrant bidding credits available under the Commission's broadcast auction rules, the modified EDP attribution standard was available to interest holders in eligible entities that are the winning bidders in broadcast auctions. *See* 47 CFR § 73.5008(c)(2). We also reinstate this application of the modified EDP standard.

[859] *Diversity Order*, 23 FCC Rcd at 5939, para. 39 (modifying the distress sale policy by allowing a licensee that has been designated for a revocation hearing or has a renewal application that has been designated for hearing on basic qualification issues to sell the station to an eligible entity prior to the hearing).

for Companies that Finance or Incubate an Eligible Entity;[860] (5) Extension of Divestiture Deadline in Certain Mergers;[861] and (6) Assignment or Transfer of Grandfathered Radio Station Combinations.[862] Moreover, to ensure realization of our policy goals, in reviewing the sale of a permit to an eligible entity, we will assess the *bona-fides* of both the arms-length structure of the transaction and the assignee's status as an eligible entity as proposed in the *FNPRM*.[863] In addition, we clarify that this exception to our broadcast station construction policy applies both to original construction permits for the construction of new stations and to construction permits for major modifications of authorized broadcast facilities.[864]

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[860] *Id.* at 5943, para. 56 (giving an applicant for a duopoly that agrees to finance or incubate an eligible entity priority over other applicants in the event that competing duopoly applications simultaneously are filed in the same market).

[861] *Id.* at 5943-44, paras. 57-60 (agreeing to consider requests to extend divestiture deadlines when applicants actively have solicited bids for divested properties from eligible entities and further stating that entities granted such an extension must sell the divested property to an eligible entity by the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity).

[862] *Id.* at 5944-45, para. 61 (permitting the assignment or transfer of a grandfathered radio station combination intact to any buyer so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations).

[863] *FNPRM*, 29 FCC Rcd at 4490, n.797.

[864] *See* MMTC FNPRM Comments at 8-9; DCS NPRM Comments at 31; DCS NPRM Supplemental Comments at 38-42. We agree with DCS that the purpose of this measure would be best served by applying it in the manner stated above. DCS Supplemental NPRM Comments at 40 (explaining that major modifications can be difficult

We also lift any prior suspension of Commission rules implementing these measures and applying the eligible entity standard."[865]

286. Consistent with the Commission's pre-existing eligible entity definition, we define an eligible entity as any entity—commercial or noncommercial—that would qualify as a small business consistent with SBA standards for its industry grouping, based on revenue.[866] For all SBA programs, a radio or television station with no more than $38.5 million in annual revenue currently is considered a small business.[867] To determine qualifi-

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and time-consuming and concluding that an 18-month extension of the construction deadline can be critical to the preservation of the modification permit and would encourage the sales of stations undergoing such major changes to small businesses and new entrants).

[865] *See Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011); *see also* 47 CFR §§ 73.3555, Note 2(i)(2), 73.3598(a), 73.5008(c)(2). As of the effective date of the reinstated Eligible Entity measures, the suspension will no longer be in effect.

[866] *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6; *2002 Biennial Review Order*, 18 FCC Rcd at 13810-11, paras. 488-89. As the Commission previously held, going forward we will include both commercial and noncommercial entities within the scope of the term "eligible entity" to the extent that they otherwise meet the criteria of this standard. In the *FNPRM*, we sought comment on whether to use different eligible entity definitions for commercial and noncommercial entities, and no commenters have urged us to do so. *FNPRM*, 29 FCC Rcd at 4491, para. 272 n.803.

[867] *See* 13 CFR § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business

cation as a small business, the SBA considers the revenues of domestic and foreign affiliates, including the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations.[868] We will also require an eligible entity to satisfy one of several control tests to ensure that ultimate control rests in an entity that satisfies the revenue criteria. Specifically, the eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interest; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.[869]

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for the radio industry is listed in NAICS code 515112, and the definition of a small business for the television industry is listed in NAICS code 515120.

[868] *Id. §§* 121.103, 121.105.

[869] *FNPRM*, 29 FCC Rcd at 4491-92, para. 272; *Diversity Order*, 23 FCC Rcd at 5925-26, para. 6 n.14 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489). When the Commission, in the *2002 Biennial Review Order*, ruled that licensees would be allowed to transfer grandfathered station combinations to eligible entities, it required that control of the eligible entity purchasing the grandfathered combination must meet one of several control tests, as stated above, to meet the Commission's public interest objectives and ensure that the benefits of the exception flowed as intended. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13811, para. 489. We readopt these requirements for the same reasons.

C. Remand Review of a Race- or Gender-Conscious Eligible Entity Standard

1. Background

a. *Prometheus II* and the *NPRM*

287. Our adoption of a revenue-based definition of eligible entity to promote small business participation in the broadcast industry does not, of course, preclude us from considering whether to adopt an additional standard designed specifically to promote minority and female ownership of broadcast stations. The Third Circuit in *Prometheus II* instructed the Commission to consider the other eligible entity definitions it had proposed when it adopted the revenue-based definition in the *Third Diversity FNPRM*, including a proposal based on the SDB definition employed by SBA.[870] The *NPRM* sought comment on the benefits and risks of adopting an SDB standard, which expressly would recognize the race and ethnicity of applicants. The *NPRM* also solicited input on other proposals that were included in the *Third Diversity FNPRM* and any other race- or gender-conscious standards the Commission should consider.[871]

288. In response to the *NPRM*, a number of commenters supported the adoption of a race- or gender-conscious standard as a means to increase minority and

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[870] *Prometheus II*, 652 F.3d at 471-72. The Third Circuit specifically instructed the Commission to consider the alternative eligibility standards it had proposed in the *Diversity Order* "before it completes its 2010 Quadrennial Review." *Id.* at 471.

[871] *See NPRM*, 26 FCC Rcd at 17552-53, paras. 165-66.

female ownership of broadcast stations.[872] Commenters asserted that, based on *Prometheus II*, the Commission must fully consider the feasibility of adopting an SDB standard in this proceeding and is not permitted to defer consideration of race- or gender-based action until a future proceeding.[873] Some commenters also asserted that, prior to the conclusion of this proceeding, the Commission must provide any further data and complete any additional empirical studies that may be necessary to evaluate or justify the adoption of an SDB standard.[874] Similarly, several commenters asked the Commission not to make any changes to any of the media ownership rules until it collects and analyzes data on broadcast ownership by women and minorities in a manner that they view as consistent with the court's remand of the eligible entity standard.[875]

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[872] *See* UCC et al. NPRM Comments at 30; DCS NPRM Comments at 15-18; Free Press NPRM Comments at 12; Hawkins NPRM Reply at 4, 14-15; NHMC et al. NPRM Comments at 30-33; NABOB 2012 323 Report Comments at 3-6; *see generally* NABOB NOI Comments; LCCHR 2012 323 Report Comments at 4.

[873] *See* Hawkins NPRM Reply at 14-15; Free Press NPRM Comments at 6, 9; UCC et al. 2012 323 Report Comments at 4; NHMC 2012 323 Report Comments at 4; LCCHR 2012 323 Report Comments at 4; Media Alliance 2012 323 Report Comments at 3-4.

[874] *See* LCCHR 2012 323 Report Comments at 4; NHMC 2012 323 Report Comments at 4; UCC et al. 2012 323 Report Comments at 4, 10, 27. Several commenters further argued that the Commission's *2012 323 Report* does not satisfy the Third Circuit's directive for the Commission to fully consider the feasibility of adopting an SDB standard. *See* UCC et al. 2012 323 Report Comments at 10-16; NHMC 2012 323 Report Comments at 4-5.

[875] *See* Letter from Michael J. Scurato, Policy Counsel, National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC

289. Several commenters further seemed to assert that *Prometheus II* not only obligates the Commission to consider fully the feasibility of implementing a race-conscious eligible entity standard in this proceeding, but also requires the Commission to adopt such a standard.[876] However, other commenters suggested that the Commission currently lacks evidence sufficient to implement a race- or gender-targeted standard.[877] In light of this perceived deficiency, one commenter suggested that the Commission promptly implement an ODP standard, which the commenter described as race- and gender-neutral, while the Commission develops the record necessary to adopt a constitutionally sustainable race-

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(filed July 2, 2012); UCC et al. NPRM Comments at 38; Free Press NPRM Comments at 10; LCCHR NPRM Comments at 1-4.

[876] *See*, *e.g.*, NABOB 2012 323 Report Comments at 10 ("The Court in *Prometheus II* made clear that it believes the Commission can adopt [a race-conscious] 'eligible entity' definition . . . and the Court expects that definition to be along the lines of the SDB definitions used by other Federal agencies."); NHMC 2012 323 Report Comments at 7 ("[B]efore completing the 2010 Quadrennial Review the Commission must develop a workable SDB definition. The court has been expecting such action since its [*Prometheus I* decision], and it renewed that expectation in [*Prometheus II*]." (footnotes omitted)).

[877] *See* NHMC et al. NPRM Comments at 32-33 (indicating that the Commission has insufficient data to adopt a workable SDB definition); DCS NPRM Comments at 15, 17 (acknowledging that, in light *of Adarand*, the Commission would face a high hurdle in developing race-conscious remedies given current shortcomings in available data and a need to update existing studies); DCS 2012 323 Report Comments at 6-7 (recommending that the Commission adopt race-neutral policies while it conducts *Adarand* studies to develop a more complete record should race- and gender-conscious proposals prove to be necessary); LCCHR 2012 323 Report Comments at 3-4; UCC et al. NPRM Comments at 30.

conscious definition.[878] The ODP proposal is based on a recommendation from the Diversity Advisory Committee that the Commission initiate a rulemaking proceeding to design, adopt, and implement a new preference in its competitive bidding process that would award bidding credits to persons or entities that demonstrate that they have overcome significant disadvantage.[879]

b. The *FNPRM*

290. In the *FNPRM*, we rejected assertions that the Commission is required to adopt an SBD standard or another race- or gender-conscious eligible entity standard in this proceeding based on *Prometheus II*.[880] We

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[878] *See* DCS NPRM Comments at 18.

[879] *Id.* at 2. The Commission released a Public Notice in 2010 in response to the Diversity Advisory Committee's recommendation. *Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage*, Public Notice, 25 FCC Rcd 16854 (MB/WTB 2010) (*Auction Preference Public Notice*). In its comments on the *NPRM*, DCS also recommended that the Commission issue a Notice of Proposed Rulemaking to adopt an ODP standard in the context of the competitive bidding process for broadcast licenses. DCS NPRM Comments at 19-21. DCS asserted that the Commission should adopt a race-conscious standard that closely reflects the SBA's SDB standard once it gathers sufficient data to justify such an approach. *Id.* at 15-16. DCS opined that most minorities seeking ownership in the broadcast industry likely will fit within the SBA's definitions of a socially and economically disadvantaged business or individual. *Id.* Citing the current low levels of minority and female ownership of broadcast stations, DCS also asserted that an SDB standard is appropriate because certain groups face considerable challenges in attempting to access spectrum opportunities. *Id.* at 2, 6-8, 13-14.

[880] *FNPRM*, 29 FCC Rcd at 4497, para. 283.

also rejected commenters' arguments that the Commission is not permitted to conclude this quadrennial review proceeding until we have completed any and all studies or analyses that might enable us to take such action in the future consistent with current standards of constitutional law.[881]

291. The *FNRPM* also provided a detailed discussion of the constitutional analysis that would apply to any race- or gender-conscious measure that the Commission might adopt.[882] The *FNPRM* first set forth a constitutional analysis of the Commission's interest in enhancing viewpoint diversity. We noted that a race-conscious eligible entity standard would be subject to strict constitutional scrutiny and that, under strict scrutiny, such a standard must be justified by a compelling governmental interest and narrowly tailored to further that interest.[883]

292. Based on our preliminary analysis, we tentatively concluded that we did not have sufficient evidence to satisfy the constitutional tests that would apply to an SDB standard or any other race- or gender-conscious eligible entity standard that the Commission might

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[881] *Id.*

[882] *Id.* at 4496-4512, paras. 282-306.

[883] *Id.* at 4480, 4492-93, 4496-97, paras. 246, 276, 282 (citing, *inter alia*, *Adarand*, 515 U.S. 200; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). *See also Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (*Fisher I*) ("[R]acial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" (quoting *Grutter*, 539 U.S. at 328)); *Fisher v. University of Texas at Austin*, No. 14-981, 2016 WL 3434399, at *7 (June 23, 2016) (*Fisher II*) ("Race may not be considered [by a university] unless the admissions process can withstand strict scrutiny." (quoting *Fisher I*, 133 S. Ct. at 2418)).

adopt.[884] While we tentatively concluded that a reviewing court could deem the Commission's interest in promoting a diversity of viewpoints compelling, we tentatively concluded that the record evidence did not demonstrate that adoption of race-conscious measures would be narrowly tailored to further that interest.[885] We also tentatively found that the record did not reveal a feasible means of conducting the type of individualized consideration that the Supreme Court would be likely to require in order for a race-conscious measure to pass constitutional muster under strict scrutiny.[886]

293. We noted that gender-based diversity measures would be evaluated under an intermediate standard of review and upheld as constitutional if the government's actions are deemed substantially related to the achievement of an important objective.[887] We tentatively concluded that the record evidence does not establish a relationship between female ownership and viewpoint diversity that is as substantial as the Supreme Court is likely to require under intermediate scrutiny.[888]

294. We also identified significant issues that would need to be resolved prior to the implementation of an ODP standard—as had been proposed by DCS—such as (1) what social or economic disadvantages should be cognizable under an ODP standard, (2) how the Commission could validate claims of eligibility for ODP status, (3)

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[884] *FNPRM*, 29 FCC Rcd at 4496-97, para. 282.

[885] *Id.* at 4497-4505, paras. 284-98.

[886] *Id.* at 4505-06, para. 299.

[887] *Id.* at 4508, para. 301 (citing *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

[888] *Id.*

whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (4) how the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (5) how the Commission could evaluate the effectiveness of the use of an ODP standard.[889] We noted that it is not entirely clear whether the proposed ODP standard would be subject to heightened scrutiny.[890] Further, we noted that the Commission may lack the resources necessary to conduct the type of individualized consideration that an ODP standard would require and that the Commission would have difficulty fully evaluating the potential diversity contributions of individual applicants without running afoul of First Amendment values.[891]

295. The *FNPRM also* provided a detailed constitutional analysis of the Commission's interest in remedying past discrimination. We tentatively concluded that the record contained some evidence that would support a finding of discrimination in the broadcast industry but that the evidence was not of sufficient weight to satisfy the constitutional standards that apply to race- and gender-based remedial measures.[892] In particular, we tentatively found that there was no evidence in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and

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[889] *Id.* at 4506-07, para. 300.

[890] *Id.*

[891] *Id.*

[892] *Id.* at 4509-12 paras. 302-06.

women-owned firms. We tentatively concluded that we could not demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence.[893] We sought comment on these issues and our preliminary analysis, including any other factors or relevant precedent that we should consider.

296. As discussed in greater detail below, many commenters continue to support the adoption of a race- or gender-conscious eligible entity standard as a means of increasing minority and female ownership of broadcast stations.[894] While many commenters are critical of the Commission's analysis in the *FNPRM*, they generally do not provide additional evidence or new analysis that would support a departure from our tentative conclusion in the FNPRM that we cannot, as matters stand, adopt

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[893] *Id.*

[894] *E.g.*, AAJC FNPRM Comments at 2; Free Press FNPRM Comments at 14-15; LCCHR FNPRM Comments at 2-3; MMTC FNPRM Comments at 7-8; NABOB FNPRM Comments at 4-6; NPM/NCAI FNPRM Reply at 4-6; UCC et al. FNPRM Reply at 27; WGAW FNPRM Comments at 15. For example, NABOB advocates a policy approach to directly support industry entry by minorities akin to policies such as the former minority tax certificate, minority distress sale policy, and the minority credit in comparative hearings. NABOB FNPRM Comments at 4, 6. It asserts that from 1934 to 1978, when the Commission had no such specific policies, there was very little minority broadcast station ownership; from 1978 to 1995, the Commission had such policies and minority ownership saw rapid growth, asserts NABOB. Thereafter, following suspension of these policies, NABOB asserts, minority broadcast ownership experienced a severe decline. *Id.* at 4. As discussed above, however, NABOB's assertion that minority ownership has experienced a severe decline is contrary to the record evidence. *See supra* paras. 77, 126.

race- or gender-conscious measures. Nor do they propose specific, executable studies that plausibly might generate evidence that would support the adoption of race- or gender-conscious measures.

2. Discussion

297. We decline to adopt an SDB eligibility standard or other race- or gender-conscious eligible entity standard. As we further discuss below, we have studied this issue repeatedly and find that there is no evidence in the record that is sufficient to satisfy the constitutional standards to adopt race- or gender-conscious measures. And no commenter has proposed actionable study designs that would likely provide the evidence necessary to support race- and/or gender-conscious measures. While we find that a reviewing court could find the Commission's interest in promoting a diversity of viewpoints over broadcast media compelling, we do not believe that the record evidence sufficiently demonstrates that adoption of race-conscious measures would be narrowly tailored to further that interest. In particular, we find that the evidence in the record, including the numerous studies that have been conducted or submitted, does not demonstrate a connection between minority ownership and viewpoint diversity that is direct and substantial enough to satisfy strict scrutiny. The two recent studies that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.[895] Other studies

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[895] *See FNPRM*, 29 FCC Rcd at 4501, para. 292 ("[Media Ownership Study 8A] finds that the relationship between minority ownership and viewpoint diversity is not statistically distinguishable from zero."); *id.* at 4501, para. 293 ("With respect to minority ownership

in the record examine the relationship between minority ownership and other aspects of our diversity goal, such as programming or format diversity, rather than the viewpoint diversity that the Supreme Court has recognized as an interest "of the highest order" and that the Commission believes is most central to First Amendment values.[896] Many of the studies, too, demonstrate at most a limited relationship between minority ownership and other aspects of our diversity goal.[897]

298. In addition, we do not believe that the record evidence establishes a sufficiently strong relationship between diversity of viewpoint and female ownership of broadcast stations that would satisfy the constitutional standards for gender-based classifications. We find that the evidence in the record does not reveal that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.[898] Because the studies in the record do not indicate that increased female ownership will increase viewpoint diversity, we believe that they do not provide a rationale for adopting gender-based diversity measures.[899]

299. Moreover, we do not believe that the record evidence is sufficient to establish a compelling interest in

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in particular, the authors [of Media Ownership Study 8B] find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.").

[896] *Turner I*, 512 U.S. at 663 (internal quotations omitted); *see FNPRM*, 29 FCC Rcd at 4502-05, paras. 294-98.

[897] *See FNPRM*, 29 FCC Rcd at 4501-05, paras. 292-98.

[898] *See id.* at 4508, para. 301.

[899] *See id.* at 4508-09, para. 301 n.923.

remedying past discrimination. We find that there is no evidence in the record demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms, and we lack a plausible way to determine the number of qualified firms owned by minorities and women.[900] We believe that we cannot demonstrate a compelling interest in remedying discrimination in the Commission's licensing process in the absence of such evidence.[901] Because the only statistical evidence in the record pertains to discriminatory access to capital and the rest is anecdotal evidence that is of more limited value for purposes of satisfying heightened scrutiny, we find that the record evidence of past discrimination in the broadcast industry —both by the Commission itself and by private parties with the Commission acting as a passive participant—is not nearly as substantial as that accepted by courts in other contexts as satisfying strict scrutiny.[902] Accordingly, we cannot adopt rules that explicitly rely on race or gender.[903]

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[900] *See id.* at 4509, para. 303.

[901] *See id.*

[902] *See id.* at 4509-12, paras. 302-06. As discussed below, some courts have held that evidence of a governmental role in past gender discrimination is not required for remedial gender-based measures, which are subject to intermediate scrutiny. *See infra* note 947. Based on our evaluation of the record evidence, we also conclude that it is not of sufficient weight to support gender-based remedial action. *See infra* Section IV.C.2.b.

[903] The *FNPRM* also contains a detailed and thorough analysis of these issues, and it reflects the Commission's extensive efforts to

a. Enhancing Viewpoint Diversity.

300. *Race-Based Diversity Measures.* In the *FNPRM*, we expressed our belief that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling to survive the first prong of the strict scrutiny test, and we sought comment on this analysis.[904] In response to the *FNPRM*, many commenters agree that the Commission's interest in promoting viewpoint diversity could be deemed sufficiently compelling under strict scrutiny, and we affirm this belief.[905] The U.S. Supreme Court to date has accepted only two justifications for race-based action as compelling for purposes of strict scrutiny: student body diversity in higher education and remedying past discrimination.[906] In *Metro Broadcasting*, the Court held, based on the application of intermediate constitutional scrutiny, that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective."[907] However,

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evaluate the current constitutional considerations and available evidence regarding the adoption of race- and gender-conscious measures.

[904] *FNPRM*, 29 FCC Rcd at 4497-4500, paras. 284-88.

[905] *See, e.g.*, AAJC FNPRM Comments at 14; UCC et al. FNPRM Comments at 25; UCC/Common Cause FNPRM Reply at 13-14.

[906] *See generally Grutter*, 539 U.S. 306; *Adarand*, 515 U.S. 200.

[907] *Metro Broad.*, 497 U.S. at 567. *See also Turner I*, 512 U.S. at 663 (finding that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment"); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1 (1945). In reaching its determination that broadcast diversity is, at the very least, an important governmental objective, the Court stated that "[s]afeguarding the public's right to receive a diversity of views and

the D.C. Circuit held in *Lutheran Church* that broadcast diversity does not rise to the level of a compelling governmental interest.[908] Also, in 2007, the Supreme Court declined to recognize a compelling interest in diversity outside of "the context of higher education."[909] In the *FNPRM*, we tentatively found that the case law nevertheless supports our position that viewpoint diversity would be found to be compelling—even though the law is unsettled.[910] Regardless of whether viewpoint diversity is a compelling interest, however, we find that we still cannot adopt an SDB eligibility standard or other race- or gender-conscious eligibility standard, as discussed below.

301. Assuming a reviewing court could be convinced that diversity of viewpoint is a compelling governmental interest, we find that the record in this proceeding fails to satisfy the second prong of the strict scrutiny test, i.e., that there is a sufficient nexus between minority ownership of broadcast stations and viewpoint diversity. As we explained in the *FNPRM*, the two recent studies

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information over the airwaves is . . . an integral component of the FCC's mission" and that the Commission's "'public interest' standard necessarily invites reference to First Amendment principles." *Metro Broad.*, 497 U.S. at 567 (quoting *Nat'l Citizens*, 436 U.S. at 795). In *Adarand*, the Court overruled the application of intermediate scrutiny in *Metro Broadcasting* but did not disturb other aspects of that decision, including the recognition of an important governmental interest in broadcast diversity. *See Adarand*, 515 U.S. 200.

[908] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-55 (D.C. Cir. 1998).

[909] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 703 (2007).

[910] *FNPRM*, 29 FCC Rcd at 4498-99, paras. 285-87.

in the record that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.[911] Also, consistent with the *FNPRM*, we find that the body of evidence contained in the other 2010 Media Ownership Studies and the studies that commenters submitted in this proceeding largely concerns program or format diversity rather than viewpoint diversity, which we believe is the only kind of diversity likely to be accepted as a compelling governmental interest under strict scrutiny.[912] Moreover, as explained in the *FNPRM*, many of those studies support only limited conclusions.[913] Al-

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[911] *See id.* at 4501, para. 292 ("[Media Ownership Study 8A] finds that the relationship between minority ownership and viewpoint diversity is not statistically distinguishable from zero."); *id.* at 4501, para. 293 ("With respect to minority ownership in particular, the authors [of Media Ownership Study 8B] find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity.").

[912] As stated in the *FNPRM*, the Supreme Court's prior recognition of broadcast diversity as an interest "of the highest order" seems to pertain to viewpoint diversity. *FNPRM*, 29 FCC Rcd at 4502, para. 294 (citing *Turner I*, 512 U.S. at 663).

[913] *See, e.g.*, *FNPRM*, 29 FCC Rcd at 4502-03, para. 295 (tentatively finding that the evidentiary value of a 2006 study commissioned by the Benton Foundation in the context of a strict scrutiny analysis would be limited because it covered only three neighborhoods in one metropolitan area); *id.* at 4503-04, para. 297 (noting that the Turner Radio Study and Turner/Cooper TV Study commissioned by Free Press offer only limited analyses of the content provided by minority stations and do not provide any definitive analysis of viewpoint diversity issues). Commenters have not submitted any studies in this proceeding that provide the type of evidence that we pre-

though we invited commenters to provide additional evidence and other information that might be relevant to our analysis, some commenters merely dispute our assessment of known evidence, rather than submit additional information that we did not consider in the *FNPRM*.[914] We reject claims that, in tentatively finding that the evidence in the record does not demonstrate the requisite connection between minority ownership and viewpoint diversity, we relied on dissenting opinions to establish "an artificial and unofficial standard" for narrow tailoring or evaluated the record evidence inconsistently in order to "minimize" evidence of a connection between minority ownership and viewpoint diversity.[915]

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viously indicated we believe would be necessary to satisfy the constitutional standards that apply to race- and gender-conscious measures. *See FNPRM*, 29 FCC Rcd at 4500-05, paras. 289-98 (evaluating the record evidence and tentatively finding that it does not demonstrate the "nearly complete" or "tightly bound" nexus between diversity of viewpoint and minority ownership that would be required to justify a race-based eligible entity definition); *id.* at 4508, para. 301 (tentatively finding that record evidence does not demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations); *infra* paras. 304, 308.

[914] As discussed below, however, these commenters generally seem to accept our view that the record evidence does not provide a sufficient basis for the Commission to adopt race-conscious measures that will withstand strict scrutiny. *See infra* para. 304.

[915] *See* AAJC FNPRM Comments at 14-15; UCC/Common Cause FNPRM Reply at 6-14. *See also* AAJC FNPRM Comments at 15 (asserting that it is premature for the Commission to affirm its tentative conclusions on narrow tailoring without knowing "how it will actually implement race-conscious policies"); NABOB FNPRM Comments at 12-13 (asserting that the FNPRM identifies several studies that "clearly demonstrate" that minority audiences prefer minority

To the contrary, our narrow tailoring analysis included a discussion of relevant judicial precedent, and our tentative findings were based on a careful reading of that

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programming and that based upon this measure, the Commission has a substantial amount of evidence demonstrating that minority ownership leads to viewpoint diversity); UCC/Common Cause FNPRM Reply at 14 ("AAJC correctly explains that, without a specific policy before [it], it is impossible for the Commission to use the four-prong *Grutter* test to evaluate [whether race-conscious measures would be narrowly tailored to further the Commission's interest in viewpoint diversity]."); UCC et al. FNPRM Comments at 25 (asserting that it is premature for the Commission to affirm its tentative conclusions on narrow tailoring). We disagree with assertions that it is premature for the Commission to reach any conclusions on narrow tailoring. The Third Circuit directed the Commission to consider the SDB eligibility standard and other eligible entity definitions proposed in the *Third Diversity FNPRM*, and we are complying with the court's instruction based on an extensive analysis of applicable judicial precedent and available empirical evidence.

In addition to criticizing the *FNPRM's* assessment of the record evidence and the applicable evidentiary standard, UCC/Common Cause also criticize the *FNPRM* for "ask[ing] whether a theory of viewpoint diversity or remediation is viable, when in fact the Commission would likely need to pursue several legal theories jointly to succeed." UCC/Common Cause FNPRM Reply at 12. Because of the "complex relationships," the unique role of broadcasting in the U.S., and the nature of scholarship in this area, the Commission should consider "the cumulative justifications of viewpoint diversity, remediation, and the additional compelling interests that are also impacted by broadcasting," assert UCC/Common Cause. UCC/Common Cause FNPRM Reply at 12. As we explained in the *FNPRM* and continue to believe, we do not believe that any interest other than viewpoint diversity or remediation of discrimination (if established by the record) would be found to be a compelling governmental interest sufficient to satisfy the first prong of the strict scrutiny test. And we know of no case law, nor does UCC/Common Cause cite any, which analyzes justifications for race-conscious action on a "cumulative" basis. Consequently, we reject UCC/Common Cause's suggestion.

precedent, taken as a whole, and our assessment of the body of evidence in this proceeding.[916] We find no reason in the present record to depart from that analysis. Other commenters suggest additional topics that they believe the Commission should study but do not propose specific, executable studies or claim that the additional inquiries they propose would establish the requisite nexus between minority ownership and viewpoint diversity.[917]

302. Moreover, while we find that the *Hispanic Television Study* is an important contribution to the study of the impact of ownership on programming and viewership, we do not believe that the study's findings materially impact our constitutional analysis. Given the scope of the study (i.e., examining the nexus between ownership, programming, and viewing), many of the study's findings do not inform our viewpoint diversity analysis specifically, which focuses primarily on local news and public affairs programming. However, certain findings were instructive. Notably, the study found evidence suggesting that Hispanic viewers watch local, Spanish-language news at higher levels than English-language news and that Hispanic ownership is associated with local, Spanish-language news programming.[918] The study cautions that these results are only suggestive and that limitations in the data (such as the small sample size of Hispanic-owned stations) makes it difficult to identify statistically significant results.[919] Accordingly, while the study is a useful addition to the research into these issues, the suggestive results are insufficient for a final

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[916] *See FNPRM*, 29 FCC Rcd at 4500-05, paras. 289-98.

[917] *See, e.g.*, UCC/Common Cause FNPRM Reply at 9, 11.

[918] *Hispanic Television Study* at 74-75, paras. 136-37.

[919] *Id.* at 2 para. 5.

conclusion of the relationships examined.[920] Therefore, we do not believe that the study changes our constitutional analysis, though it has helped inform the study of these issues. Indeed, commenters generally agree with our assessment that the study has not provided a basis for the Commission to adopt race-conscious measures.[921]

303. Some commenters disagree with our analysis of case law involving judicial review of race-based classifications, as discussed above, but they do not cite any precedent that we did not consider in the *FNPRM*. As we explained there, we believe that empirical evidence of a stronger nexus between minority ownership and viewpoint diversity than was demonstrated in *Metro Broadcasting* would be required in order for a race-conscious rule to withstand strict scrutiny.[922] We are not persuaded by Asian Americans Advancing Justice (AAJC)'s assertions to the contrary, which we believe are substantially the same as those we considered and rejected in the *FNPRM*.[923]

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[920] *Id.* at 1, para. 1.

[921] *See, e.g.*, NHMC Hispanic TV Study Comments at 5.

[922] *FNPRM*, 29 FCC Rcd at 4500, para. 290.

[923] AAJC FNPRM Comments at 15; *see also* NABOB FNPRM Comments at 5 ("Indeed, the Supreme Court has acknowledged and accepted that minority ownership leads to programming diversity, and the Third Circuit Court of Appeals has acknowledged that the Supreme Court's determination of the nexus between minority ownership and programming diversity is still the law of the land. . . . " (citing *Prometheus II*, 652 F.3d at 471, n.42)). These commenters do not cite any additional judicial precedent to support their argument here.

304. And while some commenters disagree with the sufficiency of our efforts to study the connection between minority ownership and viewpoint diversity, the evidence in the record, our assessment of the evidence, and the applicable evidentiary standard in this proceeding,[924] they generally seem to accept our view that the evidence is not sufficient to enable the Commission to adopt race-based measures. For instance, NABOB acknowledges that additional studies may not provide evidence that could support race-conscious measures and "therefore [the Commission] cannot promise to create a policy that is specifically designed to promote minority ownership."[925] Similarly, UCC et al. suggest that the record evidence does not provide a sufficient basis for the Commission to adopt a race-conscious eligibility standard.[926] Other commenters also seem to concede, implicitly or explicitly, that the evidence in the present record is insufficient to support race-conscious action by the Commission.[927]

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[924] As discussed above, we reject these assertions. *See supra* para. 301 & note 915.

[925] NABOB FNPRM Comments at 17, n.39.

[926] UCC et al. FNPRM Comments at 23-24.

[927] *See*, *e.g.*, Free Press FNPRM Comments at 14-15 (accepting that the record evidence does not satisfy the, constitutional standards for race- or gender-conscious measures); *id.* at 19 (stating that the Commission is "without evidence to support specific measures to enhance ownership by women and people of color"); LCCHR FNPRM Comments at 2 (stating that "the Commission must return its focus to producing *Adarand* studies"); NHMC FNPRM Comments at 13-14 (stating that collecting and analyzing data and conducting studies exploring barriers to entry "are important first steps that the Commission must take" in order to promote minority and female ownership); NPM/NCAI FNPRM Reply at 6 ("Although the

305. In addition, we continue to believe that implementing a program for awarding or affording preferences related to broadcast licenses based on the "individualized review" that the Supreme Court has required under strict scrutiny would pose a number of significant administrative and practical challenges for the Commission and would not be feasible. As we explained in the *FNPRM*, where race-conscious governmental action is concerned, the Supreme Court previously has found that narrow tailoring requires individualized review, serious, good-faith consideration of race-neutral alternatives, minimal adverse impacts on third parties, and temporal limits.[928] In particular, the Court found in *Grutter* that narrow tailoring demands that race be considered "in a flexible, non-mechanical way" alongside other factors that may contribute to diversity and that consideration of race was permissible only as one among many disparate factors in order to evaluate individual applicants for admission to an educational institution.[929]

FCC is committed to gathering evidence to support a race and gender conscious definition that would diversify ownership in radio, this record is not likely to be completed in the immediate future."); UCC/Common Cause FNPRM Reply at 11-12 (recommending a model for addressing "important evidentiary issues . . . that the Commission believes must be overcome . . . to take proactive steps to improve diversity in broadcasting"); WGAW FNPRM Comments at 15 (urging the Commission "to do the necessary work to develop a sound legal theory for policies that expressly recognize the importance of race and gender in broadcast licensing").

[928] *FNPRM*, 29 FCC Rcd at 4505, para. 299.

[929] *Grutter*, 539 U.S. at 334, 338-39; *see also id.* at 334 (stating that, to be narrowly tailored a race-conscious admissions program may consider race or ethnicity only as a "'plus' in a particular applicant's file," i.e., it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each

We find that the manner in which the Commission allocates broadcast licenses differs from university admissions in many important respects. For instance, the process of acquiring a new commercial broadcast license is dictated by statute and involves a highly structured, open, and competitive bidding process.[930] Individuals or entities must enter bids for broadcast allotments—a market-based regime—and must offer the highest monetary value for the allotment in order to acquire a construction permit.[931] As we explained in the *FNPRM*, we believe that this framework does not lend itself to the type of case-by-case consideration envisioned by *Grutter*.[932] Although the *FNPRM* sought comment on potential ways in which an individualized review process could be incorporated feasibly, effectively, and efficiently into any race-conscious measures adopted by the Commission, no commenter has offered such a proposal,

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applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight" (citing *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 315-17 (1978))).

[930] 47 U.S.C. § 309(j).

[931] *See Auction of FM Broadcast Construction Permits Scheduled for March 26, 2013 et al.*, Public Notice, 27 FCC Rcd 10830 (MB/WTB 2012) (seeking comment on, *inter alia*, simultaneous multiple-round auction design, bidding rounds, reserve price or minimum opening bids, bid removal/bid withdrawal, and post-auction payments); *see also Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15923-24, 15961, paras. 7-9, 112 (1998), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

[932] *FNPRM*, 29 FCC Rcd at 4505-06, n.911.

nor has the Commission been able to develop one. Therefore, we conclude that the record reveals no feasible means of carrying out the type of individualized consideration that the Supreme Court has required under strict scrutiny.[933]

306. *ODP Proposal.* As we noted in the *FNPRM*, it is not entirely clear whether the proposed ODP stand-

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[933] UCC/Common Cause assert that the *FNPRM* confines its consideration of the proposed ODP standard to the Commission's viewpoint diversity interest without considering whether the proposed ODP standard could be applied as a remedial measure. UCC/Common Cause FNPRM Reply at 13. We disagree. The administrative, practical, and First Amendment issues that we have identified would need to be resolved prior to the implementation of an ODP standard regardless of whether that standard is used to further the Commission's interest in viewpoint diversity or remedy past or present discrimination. *See supra* paras. 293, 305. Moreover, as we discuss below, we do not believe that available evidence of discrimination in the broadcast industry is of sufficient weight to demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process. *See infra* Section IV.C.2.b.

Contrary to the assertions of UCC/Common Cause, the *FNPRM* did not tentatively conclude that the Commission "must emulate university admissions in order to pursue viewpoint diversity." UCC/Common Cause FNPRM Reply at 13; *see* Letter from Cheryl A. Leanza, Policy Advisor, UCC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed May 25, 2016) (UCC May 25, 2016 *Ex Parte* Letter). Rather, the *FNPRM* noted that the Supreme Court relied in part on the concept of "critical mass" to find the requisite nexus between student body diversity and race-based admissions and that this concept is not easily transferable to broadcasting. *FNPRM*, 29 FCC Rcd at 4504, n.905.

ard would be subject to heightened constitutional scrutiny.[934] Even assuming that it is not subject to heightened review under the equal protection component of the Due Process Clause, we decline to adopt the proposed ODP standard in the absence of a feasible means of implementing such a standard without running afoul of First Amendment values. Several commenters express general support for the proposed ODP standard but none have proposed a method for the Commission to provide the type of individualized consideration that an

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[934] *FNPRM*, 29 FCC Rcd at 4506-07, para. 300. *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 912-13 (1995) (facially race-neutral electoral districting plan triggers strict scrutiny if predominantly motivated by racial concerns); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1997) (developer failed to carry its burden of proving that racial discrimination was a motivating factor in local authorities' zoning decision that prevented the construction of racially integrated low-cost housing); *Fisher II*, 2016 WL 3434399, at *16-17 (petitioner cannot assert simply that increasing university's reliance on facially neutral component of admissions policy would make it more race neutral when its purpose is to boost minority enrollment). MMTC asserts that the *FNPRM* "mischaracterized" the ODP standard as a race-conscious measure that would be subject to heightened scrutiny. MMTC FNPRM Comments at 5-6. We disagree. The *FNPRM* did not describe the proposed ODP standard as a race-conscious measure. Rather, the *FNPRM* noted that it is not entirely clear whether the proposed ODP standard would be subject to heightened constitutional scrutiny. *FNPRM*, 29 FCC Rcd at 4506, para. 300 & n.915; *see* UCC/Common Cause FNPRM Reply at 13 ("[W]e do not disagree with the Commission's conclusion that [an ODP standard] would likely receive strict scrutiny if an individual's race[] . . . or ethnicity could be used to presume eligibility for preferences."). We explained that an ODP standard that does not facially include race-conscious criteria, yet is constructed for the purpose of promoting minority ownership, might be subject to heightened scrutiny. *FNPRM*, 29 FCC Rcd at 4506 n.915. *See Miller*, 515 U.S. at 912-13; *Fisher II*, 2016 WL 3434399.

ODP standard would require without being unduly resource-intensive and inconsistent with First Amendment values. Commenters also have not addressed other specific issues that the *FNPRM* indicated would need to be resolved prior to implementation of the ODP proposal.[935] In particular, no commenter has proposed a means for the Commission to validate claims of eligibility for ODP status. Based on available information about the proposal, we believe that validating a claim of eligibility for ODP status would require a finding that the applicant has faced and overcome a "substantial disadvantage"—a determination that inherently would be prone to some degree of subjectivity—as well as a finding that the applicant would likely contribute to viewpoint diversity by virtue of him or her facing and overcoming a substantial disadvantage. We do not believe that there is a means for the Commission to administer such a program in a manner that is sufficiently objective and consistent,[936] and that would ensure that the Commission does not evaluate applicants based on a

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[935] *See*, *e.g.*, MMTC FNPRM Comments at 5; NAB FNPRM Comments at 92-93; Bonneville/Scranton FNPRM Reply at 9.

[936] *See*, *e.g.*, *Auction Preference Public Notice*, 25 FCC Rcd at 16864 (Diversity Advisory Committee Recommendation on Preference for Overcoming Disadvantage) ("Importantly, a qualifying disadvantage would have to be 'substantial.' The definition of what constitutes a substantial disadvantage would be addressed in the rulemaking and would be further refined on a case-by-case basis. To the extent possible, it is desirable to reduce subjectivity and achieve consistency among individualized determinations."); *id.* at 16864-65 ("This requirement does not contemplate that successful applicants necessarily will have fully and finally overcome the disadvantages they faced. . . . The degree of success required to show that a disadvantage has been sufficiently overcome would be further refined in a rulemaking and case-by-case determinations.").

subjective determination as to whether a particular applicant would be likely to contribute to viewpoint diversity.[937] In addition, no commenter has offered input on (1) what social or economic disadvantages should be cognizable under an ODP standard,[938] (2) whether applicants should bear the burden of proving specifically that they would contribute to diversity as a result of having overcome certain disadvantages, (3) how the Commission could measure the overcoming of a disadvantage if an applicant is a widely held corporation rather than an entity with a single majority shareholder or a small number of control persons, and (4) how the Commission could evaluate the effectiveness of the use of an ODP standard. Accordingly, we are not adopting the proposed ODP standard.

307. *Gender-Based Diversity Measures.* Gender-based measures are subject to a less restrictive Constitutional standard—intermediate scrutiny—than race-

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[937] *See Metro Broad.*, 497 U.S. at 585 n.36 (noting that the Commission eschews involvement in licensees' programming decisions to avoid constitutional issues that would be raised if it "denied a broadcaster the ability to carry a particular program or to publish his own views, if it risked government censorship of a particular program, or if it led to the official government view predominating public broadcasting") (citations and internal quotations omitted).

[938] In its recommendation concerning a preference for overcoming disadvantage, the Diversity Advisory Committee identified "a non-exhaustive list of disadvantages which, if substantial, would likely qualify an individual for a preference." *Auction Preference Public Notice*, 25 FCC Rcd at 16860-71 (Diversity Advisory Committee Recommendation on Preference for Overcoming Disadvantage); DCS NPRM Comments at 2 (urging the Commission to adopt the Diversity Advisory Committee's ODP proposal). No commenters in this proceeding have offered additional input on the social or economic disadvantages that should be cognizable under an ODP standard.

based measures. Under intermediate scrutiny, a gender-based classification must be substantially related to the achievement of an important objective.[939] While *Metro Broadcasting* established that viewpoint diversity is at least an important government objective, *Lamprecht v. FCC* found that available evidence failed to demonstrate a statistically meaningful link between ownership of broadcast stations by women and programming of any kind.[940] As a result, the D.C. Circuit, in *Lamprecht*, overturned the Commission's former gender preference policy.[941] In order to overcome *Lamprecht*, the Commission must be able to establish the requisite connection between viewpoint diversity and ownership by women; however, in the *FNPRM* we stated that, based on our evaluation of relevant studies, we did not believe there was evidence to demonstrate that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations.[942]

308. In response to the *FNPRM*, UCC et al. question the tentative conclusion that women-controlled stations do not substantially contribute to viewpoint diversity in a manner that differs from other stations or otherwise varies significantly from that provided by other stations, arguing that the Commission has done little to

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[939] *FNPRM*, 29 FCC Rcd at 4508, para. 301 (citing *Virginia*, 518 U.S. at 531-33; *Hibbs*, 538 U.S. 721).

[940] *Id.* (*citing Lamprecht*, 958 F.2d 382, 396-98 (D.C. Cir. 1992)).

[941] *Id.* (citing generally *Lamprecht*, 958 F.2d 382).

[942] *Id.* at 4508-09, para 301 & n.923.

no research on this issue.[943] Commenters, however, did not provide any additional evidence, studies, proposed study designs, or other information that is relevant to our analysis of this issue. The Commission has similarly been unable to identify such evidence or devise study designs that are likely to provide such evidence.[944] While commenters still express general support for gender-based initiatives,[945] such support is not sufficient absent evidence to establish a connection between viewpoint diversity and ownership by women. And while we acknowledge that the data show that women-owned stations are not represented in proportion to the presence of women in the overall population, we do not believe that the evidence reveals that the content provided via women-owned broadcast stations substantially contributes to viewpoint diversity in a manner different from other stations or otherwise varies significantly from that provided by other stations."[946] Therefore, we conclude that

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[943] UCC et al. FNPRM Comments at 25 n.103.

[944] In its efforts to create specific study designs (which includes reaching out to experts in the field), the Commission has identified a number of issues that significantly impede study of the connection between ownership and viewpoint diversity. These issues include, for example, the lack of a reliable measure of viewpoint; small sample size; accounting for potential variations from differences in the way the data were collected rather than actual changes in the marketplace when combining old and new sets; and the lack of relevant data sets from before and after policy changes or marketplace developments (if any can be identified) that would help demonstrate causation regarding the impact of ownership on viewpoint diversity.

[945] AAJC FNPRM Comments at 2; WGAW FNPRM Comments at 15; Free Press FNPRM Reply at 21; UCC et al FNPRM Reply at 21

[946] As we explained in the *FNPRM*, the only study included in the record of this proceeding that analyzes the relationship between female ownership and broadcast content is the Turner Radio Study,

there is insufficient evidence to satisfy the constitutional standards that apply to gender-based measures.

b. Remedying Past Discrimination

309. Similarly, we conclude that, although we have studied extensively the question, there is no "strong basis in evidence"[947] of discrimination in the award of broadcast licenses or other discrimination in the broadcast industry in which the government has actively or passively

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which finds that markets that contain radio stations with either female or minority ownership are more likely to broadcast certain progressive and conservative talk shows. We do not believe that this study demonstrates a causal relationship between female or minority ownership and the diversity of viewpoints or content available, as it does not control for other factors that may explain both the presence of a greater diversity of talk shows and a higher percentage of female or minority ownership in certain markets. Other studies in the record establish that female ownership of broadcast stations is well below the proportion of women in the population, a fact that is not in dispute in this proceeding. *See FNPRM*, 29 FCC Rcd at 4508-09, n.923.

[947] *Richmond v. JA. Croson Co.*, 488 U.S. 469, 500 (1989). Less evidence is required for gender-based measures, although an "exceedingly persuasive justification" is still necessary. *Virginia*, 518 U.S. at 530; *see also Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 909 (11th Cir 1997). The question of whether governmental participation is required is unsettled. Some courts have held that private discrimination need not be linked to governmental action under intermediate scrutiny. *See Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 321 F.3d 950, 959-60 (10th Cir.), *cert. denied*, 540 U.S. 1027 (2003) (citing *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994); *Coral Cons. Co. v. King Cty.*, 941 F.2d 910, 932 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992)). As discussed in this section, we also conclude that the record evidence is not of sufficient weight to support gender-based remedial action.

participated that would satisfy the constitutional standards that apply to race- or gender-based remedial measures. In the *FNPRM*, we noted that the Commission never has asserted a remedial interest in race- or gender-based broadcast regulation.[948] We explained that the evidence of discrimination offered in the studies that commenters cited, while informative, was not nearly as substantial as that accepted by courts in other contexts.[949] In response, commenters are generally critical of the Commission's analysis but most do not cite any additional relevant precedent or data that we did not discuss in the *FNPRM*.[950] Although UCC/Common

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[948] *FNPRM*, 29 FCC Rcd at 4509, para. 302.

[949] *Id.* at 4509-12, paras. 302-06.

[950] *See*, *e.g.*, MMTC FNPRM Comments at 7 (encouraging the Commission to "review the record, particularly the 2010 Initial Comments of the Diversity and Competition Supporters," which, according to MMTC, details "the Commission's history of erecting market entry barriers that kept minorities out of the media industry and validating [the] discriminatory practices of segregationist licensees."); UCC/Common Cause FNPRM Reply at 3-6 (arguing, *inter alia*, that the *FNPRM* incorrectly rejects the 2000 Historical Study because the study does not show that the Commission itself engaged in discrimination, even though such evidence is not the standard; rejects evidence of discrimination in the 2000 Capital Markets Study without adequately explaining why the study's focus on non-broadcast industry information makes it less probative of discrimination in the broadcast industry; ignores the 2000 Auction Utilization Study, in which UCC/Common Cause believe there is evidence of discrimination in wireless auctions; ignores Part 3 of the 2000 Broadcast Licensing Study, in which UCC/Common Cause find "useful indicators" that might show that the Commission acted as a passive participant in private discrimination in the broadcast industry; wrongly states that the Commission never has asserted a remedial interest in race- or gender-based broadcast regulation and that commenters have not focused on establishing a case for remedial measures; and

Cause identify additional information that they believe is relevant to an analysis of the Commission's interest in remedying past discrimination, they do not assert that such information is sufficient to satisfy the relevant constitutional requirements.[951] We have evaluated the evidence in the record, and we find that it is not of sufficient weight to support race- or gender-based remedial measures.

310. We disagree with UCC/Common Cause's assertion that we raised the bar in our remedial interest tentative conclusions and that we incorrectly rejected or ignored evidence of discrimination in the broadcast industry.[952] Rather than rejecting evidence because it does not prove that the Commission itself has engaged in discrimination, the *FNPRM* tentatively found that existing evidence of past discrimination is not nearly as substantial in this case as the evidence that courts have required in other contexts. In particular, we noted the absence

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indicates a need for a large number of studies, such as those found in *Adarand*, but then "dismisses the value of studies conducted in the 1980s").

[951] *See supra* note 950. There is no inconsistency, as UCC/Common Cause claim, between our conclusion in this proceeding that we lack the strong basis in evidence of racial discrimination in the broadcast industry in which the FCC has been complicit that is necessary to adopt *race-conscious remedial action* and the Commission's adoption of bans on discrimination in advertising contracts and in private transactions. *See* UCC/Common Cause FNPRM Reply at 3. The latter actions are not race-conscious measures and therefore did not require an evidentiary foundation sufficient to withstand strict scrutiny. They were simply measures designed to combat private discrimination in the marketplace.

[952] UCC/Common Cause FNPRM Reply at 3-6; *see* UCC May 25, 2016 *Ex Parte* Letter at 2.

of evidence demonstrating a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms. We asked commenters to address whether evidence of a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms is ascertainable. As discussed below, we find that the current research model employed in existing disparity studies is unlikely to produce meaningful results in the broadcast context.[953] In the *FNPRM*, we also observed that the only statistical evidence of discrimination in the record at the time pertained to discriminatory access to capital and that the rest of the evidence was anecdotal and therefore of more limited value in light of the heightened evidentiary requirements of strict scrutiny.[954] As we explained there, the Capital Markets Study found statistical evidence of discrimination in U.S. capital markets, but the study indicates that its results are not fully conclusive.[955] Also, its focus on wireless auctions and other non-broadcast industry information makes it less proba-

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[953] *See infra* para. 312.

[954] *FNPRM*, 29 FCC Rcd at 4511-12, para. 306. As noted above, UCC/Common Cause assert that the *FNPRM* ignored "useful indicators" in part 3 of the 2000 Broadcast Licensing Study that "might indicate passive participation" but do not claim that this study would enable the Commission to adopt race- or gender-based remedial measures that would satisfy the relevant constitutional requirements. UCC/Common Cause Reply at 5; *see* KPMG LLP, Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (2000).

[955] *FNPRM*, 29 FCC Rcd at 4510-11, para. 305.

tive of discrimination in the broadcast licensing process.[956] Even considering the Capital Markets Study together with available anecdotal evidence in other studies,[957] we find that the evidence of past discrimination in the Commission's broadcast licensing process is not nearly as substantial as that accepted by courts in other contexts.[958]

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[956] *Id.* (*citing Croson*, 488 U.S. at 498). In *Croson*, the Supreme Court found that the factual predicate for race-based action was deficient where, among other things, the government failed to make findings specific to the market to be addressed by the remedy. 488 U.S. at 498. Because broadcasting is the industry that would be addressed if we were to adopt remedial measures here, and neither the 2000 Capital Markets Study nor the Auction Utilization Study contains conclusive findings that reveal a governmental role in discrimination in the broadcast industry, we do not believe these studies establish a factual predicate for race-based action that the Court would deem sufficient. *Id.; see* William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes (2000) (Capital Markets Study); Ernst & Young LLP, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions (2000).

[957] *See FNPRM*, 29 FCC Rcd at 4510-12 paras. 304-06 (discussing Capital Markets Study and studies that contain anecdotal evidence).

[958] For instance, in *Adarand v. Slater*, a leading public contracting case in which the Tenth Circuit found the requisite strong basis in evidence, the record contained 39 studies revealing an aggregate 13 percent disparity between minority business availability and utilization in government contracting, a figure which the court found to be "significant," if not overwhelming, evidence of discrimination. In reaching that determination, the court relied on evidence of private discrimination. The evidence was similar in nature to the evidence in this case—denial of access to capital, as well as the existence of exclusionary "old boy" networks and union discrimination that prevented access to the skills and experience needed to form a business —but it was substantially greater in extent and weight. The court

311. We also disagree with suggestions that it is legally permissible for the Commission to infer past discrimination based on the disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population.[959] As explained in the *FNPRM*, the Supreme Court has held that an inference of discrimination may arise when there is a significant statistical disparity between the number of *qualified* minority contractors willing and able to perform a particular service and the number of such contractors actually engaged.[960] Although UCC et al. suggest that no special qualifications are necessary to own a broadcast station, the Commission has long required that broadcast applicants meet certain character, financial, and other qualifications to operate a station.[961] And, of course, not all members of the population are interested in operating a broadcast station.

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had the benefit of a Department of Justice report, prepared in response to the Supreme Court's decision in *Adarand*, summarizing 30 congressional hearings and numerous outside studies providing both statistical and anecdotal evidence of such private discrimination. *See FNPRM*, 29 FCC Rcd at 4511, para. 306 (discussing *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000)).

[959] UCC et al. FNPRM Comments at 23; *see also Croson*, 488 U.S. at 501 ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.").

[960] *See FNPRM*, 29 FCC Rcd at 4509-10, para. 303; *Croson*, 488 U.S. at 509.

[961] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992); *Policy Regarding Character Qualifications in Broadcast Licensing et al.*, Memorandum Opinion and Order, 6 FCC Rcd 3448

Accordingly, we do not believe that evidence of a significant statistical disparity between the number of minority- and women-owned broadcast stations and the number of minorities and women in the general population would be sufficient by itself to overcome the constitutional hurdle that has been established for race- and gender-based remedial measures. Instead, we continue to believe that, absent evidence showing a statistically significant disparity between the number of minority- and women-owned broadcast stations and the number of qualified minority- and women-owned firms,[962] we cannot demonstrate a compelling interest in remedying discrimination in the Commission's broadcast licensing process.

312. UCC/Common Cause assert that the Commission is required to fund research to identify whether

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(1991); *Policy Regarding Character Qualifications in Broadcast Licensing et al.*, Policy Statement and Order, 5 FCC Rcd 3252 (1990); *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, Public Notice, 2 FCC Rcd 2122 (1987); *Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order and Policy Statement, FCC 85-648 (Jan. 14, 1986), 1986 WL 292574; *New Financial Qualifications Standard for Broadcast Television Applicants*, Public Notice, FCC 79-299 (May 11, 1979), 1979 WL 44120; *Financial Qualifications Standards for Aural Broadcast Applicants*, Public Notice, FCC 78-556 (Aug. 2, 1978), 1978 WL 35972.

[962] As discussed below, the record does not reveal a method of identifying such firms. *See infra* para. 312.

such disparities exist.[963] Based on our review of existing disparity studies, we do not believe that is true. In particular, UCC/Common Cause identify no method of studying this question that would produce meaningful results in the broadcast context. For existing studies, often employed in government contracting cases, there is generally a ready database of minority or female contractors that are willing and able to perform a particular service—or an established methodology to identify such contractors—that can be compared to the number of such contractors that are actually engaged by the government. Indeed, in most industries one need not be a government contractor in order to operate a business that provides the services that the government seeks (e.g., construction or advertising). This provides an ample pool of available contractors for the researchers to identify, both nationally and locally, depending on the nature of the program. And Supreme Court precedent instructs that the appropriate comparison is to the number of qualified firms that would be interested in being

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[963] *See* UCC/Common Cause FNPRM Reply at 4, 13; *see also* AAJC FNPRM Comments at 15 (recommending that the Commission "conduct the necessary statistical disparity studies" to establish a compelling interest in remedying past discrimination in the allocation of licenses); UCC et al. FPRM Comments at 25 (asserting that there is no basis for concluding that the existing evidence of discrimination in the broadcast industry is insufficient to satisfy constitutional standards, because the Commission has conducted very little investigation of the impact of past discrimination on women and minorities). According to UCC et al., the Commission should refrain from making any tentative conclusions until its work is complete, including examining its own records and history to evaluate evidence in order to show that remedying past racial (or gender) discrimination is a compelling (or substantial) governmental interest. *Id.* at 25-26.

engaged by the government. However, there are no broadcast station owners other than those already licensed to be broadcasters, and the record does not reveal any method for identifying otherwise qualified firms that are not already broadcast licensees. In these circumstances, there is no pool of qualified non-licensee minority- or women-owned broadcast firms to compare against existing minority- or women-owned broadcast stations. Without such evidence or a methodology for ascertaining such evidence, we find that a disparity study similar to those relied on by other agencies for government contracting purposes is not feasible in the broadcast context. Given our determination of the infeasibility of this research, the lack of any support in the record indicating that it would be feasible, and the very substantial funds and time it would take to conduct it—likely millions of dollars and several years—we do not believe it is in the public interest for the Commission to undertake a disparity study.

c. Other Issues

313. Several commenters state that the *FNPRM* falls short of what-these commenters assert to be the Third Circuit's directive that the Commission gather relevant ownership data and develop policies to address the paucity of female and minority owners among broadcast licensees.[964] As we stated previously, we disagree

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[964] Free Press FNPRM Comments at 16; Free Press FNPRM Reply at 20; MMTC FNPRM Comments at 3-4; NABOB FNPRM Comments at 9-10; NHMC FNPRM Comments at 5-6; NPM/NCAI FNPRM Reply at 4-6; UCC et al. FNPRM Comments at 12-26; UCC et al. Feb. 5, 2015 *Ex Parte* Letter at 2; *see* Howard Media Group/Carolyn Byerly FNPRM Comments at 3; Letter from James

with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the Commission has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.[965] By evaluating the feasibility of implementing a race- or gender-conscious eligibility standard based on an extensive analysis of the available evidence, we have followed the Third Circuit's direction in *Prometheus II and Prometheus III.* We note that over the course of this proceeding, the Commission has performed or commissioned a dozen studies. The *FNPRM* provides a detailed analysis of the relevant studies that were available at the time, and we discuss herein more recent evidence and pertinent information that commenters submitted in response to the *FNPRM*.[966] The Third Circuit court in *Prometheus III* stated that it did not intend to prejudge the outcome of our analysis of the evidence or the feasibility of implementing a race- or gender-con-

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L. Winston, President, NABOB, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Aug. 4, 2016).

[965] *See, e.g.*, NABOB FNPRM Comments at 15. NABOB requests that the Commission delay the issuance of a report and order in this proceeding until the Commission has initiated all of the studies necessary to meet the strict scrutiny standard and has adopted a definition of "eligible entity" that can be used to implement rule and policy changes that have the potential to specifically promote minority ownership of broadcast facilities. NABOB FNPRM Comments at 4, 9. We decline to do so for the reasons discussed herein.

[966] *See supra* Sections IV.C.2.a-IV.C.2.b; *FNPRM*, 29 FCC Rcd at 4496-4511, paras. 282-306.

scious standard that would be consistent both with applicable legal standards and the Commission's practices and procedures.[967]

314. Moreover, we do not believe that any relevant statutory directive requires the adoption of race- or gender-conscious measures in order to promote ownership diversity. The Commission has previously determined that it has a general mandate to promote ownership diversity under Section 257 of the 1996 Act and Section 309(j) of the Act, which includes promoting ownership by small businesses, new entrants, and minority- and women-owned businesses.[968] But this authority does not mandate specific outcomes or ownership levels or race- or gender-conscious action to foster diversity, nor does it permit the adoption of rules and policies that are not supported by the record or that conflict with the Constitution. Therefore, we find the suggestion that the Commission is compelled, either by the Third Circuit or by statute, to adopt race- or gender-conscious measures to be untenable. The Third Circuit ordered the Commission to make a final determination as to whether to adopt a new eligible entity definition (including consideration of SDB- and ODP-based definitions), and we have done so. As discussed herein, the Commission continues to take significant steps to improve its ownership data and to promote ownership diversity, and our determination that we cannot take race- or gender-conscious action at this time does not mean that the Commission

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[967] *Prometheus III*, 824 F.3d at 49-50.

[968] *See, e.g.*, *1998 Biennial Regulatory Review Order*, 13 FCC Rcd at 23095, para. 96.

has failed to act appropriately in furtherance of its goal to promote ownership diversity.

315. Some commenters criticize the Commission based on their perception that the Commission has not made a substantial effort to gather evidence that would support race- and gender-conscious measures.[969] UCC et al. assert that it is inappropriate for the Commission to place the burden of providing additional evidence on commenting parties without describing what it believes is necessary to withstand strict scrutiny.[970] As discussed

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[969] *See*, *e.g.*, NABOB FNPRM Comments at 4, 12; Free Press FNPRM Comments at 17-19; Letter from Wade Henderson, President & CEO, LCCHR, and Nancy Zirkin, Executive Vice President, LCCHR, to Tom Wheeler, Chairman, FCC, at 1-3 (filed Mar. 22, 2016). Free Press notes that an analysis of ownership diversity would be useful even if it fell short of justifying race- and gender-based policies. One "basic assessment" that the Commission has not made is "a study of the types of market and ownership structures that correlate with women's and people of color's entry into the market, success in the market, or exit from the market." Free Press FNPRM Comments at 17; *see also id.* at 19 ("Assessing what types of market structures are more likely to support new entrants and ownership by diverse and independent owners, and promulgating Commission policy to encourage or mirror those structures, does not implicate equal protection issues or require strict scrutiny."). We disagree. As discussed herein, the Commission has made significant efforts to analyze issues of ownership diversity and market structure. *See supra* paras. 246-255, 267-270; *infra* para. 316 & note 973.

[970] UCC et al. FNPRM Comments at 25-26; *see* NHMC FNPRM Comments at 17. *See also* NABOB FNPRM Comments at 16-17 (stating that the report and order should identify existing studies and any new studies that must be prepared to meet the requirements of *Adarand*, and provide a timetable for the Commission's completion of such additional studies).

above, however, the Commission has not only commissioned a number of studies, none of which provided it a constitutional basis to take race- or gender-conscious action; it has also taken a number of steps to improve the quality of its broadcast ownership data and to facilitate future additional studies that commenters, academics, or others believe might provide a constitutional basis to adopt race- and gender-conscious measures. Further, we have provided a detailed and thorough analysis of what is necessary to meet the relevant constitutional standards and identified the reasons we believe that, having studied the question, we do not have evidence that would allow us to meet those standards.[971]

316. In addition, while some commenters have suggested study topics or broad research frameworks, none has provided actionable study designs that the Commission or private researchers could execute.[972] The Commission has expended considerable time and effort throughout the course of this proceeding in an effort to create such study designs; and it has commissioned or performed a dozen studies that it was able to develop over the course of the proceeding.[973] At present, neither the record in this proceeding nor the Commission's

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[971] *See FNPRM*, 29 FCC Rcd at 4496-4512, paras. 282-308.

[972] *See, e.g.*, UCC/Common Cause FNPRM Reply at 11-12; UCC July 20, 2016 *Ex Parte* Letter, Attach., Summary of Studies Recommended by UCC OC Inc.

[973] The media ownership studies commissioned by the Commission and the Commission's *Hispanic Television Study* are instructive examples of the type of study design that is required to effectively analyze issues of ownership and viewpoint, which includes identifying a question, a data set that permits analysis of the question, defining key concepts (e.g., Hispanic-oriented programming), and a theory

own efforts have produced additional study designs that we expect would develop the evidence necessary to support race- and/or gender-conscious measures. Therefore, our decision today that the record does not support the adoption of race- or gender-conscious measures reflects the inability of the Commission and commenters—including many groups and individuals experienced in research methodology—to identify relevant study designs that, if implemented, would be likely to support such measures. While we believe it worthwhile to continue to explore these issues and to monitor the relevant constitutional jurisprudence, we are exercising today our responsibility to pass on the race- and gender-based proposals before us at this time. Our action today does not prevent the Commission from reassessing these measures in the future if changed circumstances suggest a different outcome. Indeed, this decision does not preclude a different finding in the future, including the adoption of a race- and/or gender-conscious measure, based on new information. Additionally, the Commission will be on alert to any such data that may support such a finding and/or that may suggest steps that may lead to the collection of other relevant data.

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by which the data could demonstrate causation or correlation between a policy and an outcome. Absent this level of specificity, general calls to "conduct *Adarand* studies" or to study the impact of the Commission's rules on ownership diversity do not help advance the Commission's research in these areas.

APPENDIX C

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

MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289

IN THE MATTER OF 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

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

PROMOTING DIVERSIFICATION OF OWNERSHIP IN THE BROADCASTING SERVICES

RULES AND POLICIES CONCERNING ATTRIBUTION OF JOINT SALES AGREEMENTS IN LOCAL TELEVISION MARKETS

RULES AND POLICIES TO PROMOTE NEW ENTRY AND OWNERSHIP DIVERSITY IN THE BROADCASTING SERVICES

Adopted: Nov. 16, 2017
Released: Nov. 20, 2017

ORDER ON RECONSIDERATION AND NOTICE OF PROPOSED RULEMAKING

Comment Date: (60 days after publication in the Federal Register)
Reply Comment Date: (90 days after publication in the Federal Register)

By the Commission: Commissioner Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Clyburn and Roseworcel dissenting and issuing separate statements.

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I. INTRODUCTION

1. Today we end the 2010/2014 Quadrennial Review proceeding. In doing so, the Commission not only acknowledges the dynamic nature of the media marketplace, but takes concrete steps to update its broadcast ownership rules to reflect reality. Indeed, the Commission plainly stated in its 2010 *NOI* initiating this proceeding that the broadcast ownership rules required a fresh look in light of "[d]ramatic changes in the marketplace,"[1] yet the resulting *Second Report and Order* issued in August 2016 manifestly failed to adopt any meaningful changes to these rules—and *effectively tightened the* Local Television Ownership Rule.[2] In this Order on Reconsideration, we refuse to ignore the changed landscape and the mandates of Section 202(h), and we deliver on the Commission's promise to adopt broadcast ownership rules that reflect the present, not the past. Because of our actions today to relax and eliminate outdated rules, broadcasters and local newspapers will at last be given a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace. And in the end, it is consumers that will benefit, as broadcast stations and newspapers—those media outlets most committed to serving their local communities—will be better able to invest in local news

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[1] *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*, Notice of Inquiry, 25 FCC Rcd 6086, 6087, para. 1 (2010) (*NOI*).

[2] *See generally 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 et al.*, Second Report and Order, 31 FCC Rcd 9864 (2016) (*Second Report and Order*).

and public interest programming and improve their overall service to those communities.

2. Accordingly, in today's Order on Reconsideration, we grant in part and deny in in part, as set forth herein, various petitions for reconsideration[3] of the *Second Report and Order*. Specifically, we (1) eliminate

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[3] Petition of Connoisseur Media for Reconsideration of the 2010/2014 Quadrennial Review Second Report and Order, MB Docket Nos. 14-50 et al. (filed Dec. 1, 2016) (Connoisseur Petition); Petition of the National Association of Broadcasters for Reconsideration of the 2010/2014 Quadrennial Review Second Report and Order, MB Docket Nos. 14-50 et al. (filed Dec. 1, 2016) (NAB Petition); Petition of Nexstar Broadcasting, Inc. for Reconsideration of the 2010/2014 Quadrennial Review Second Report and Order, MB Docket Nos. 14-50 et al. (filed Dec. 1, 2016) (Nexstar Petition). In addition, various parties filed *ex parte* comments—well after the filing deadline for petitions for reconsideration—urging the Commission to address other aspects of the *Second Report and Order* that were not raised in any petition for reconsideration. *See*, *e.g.,* Letter from Barry A. Friedman, Thompson Hine, Counsel for Dick Broadcasting Company, Inc. of Tennessee, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, and 07-294, at 2 (filed Mar. 24, 2017) (Dicks Broadcasting Mar. 24, 2017 *Ex Parte*) (stating that "continued applicability of the [AM/FM] subcaps warrants a hard look from the Commission"). In effect, these *ex parte* filings are untimely petitions for reconsideration, which we lack discretion to consider absent extraordinary circumstances not present here. *See* 47 U.S.C. § 405(a) ("A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."); *Reuters, Ltd. v. FCC,* 781 F.2d 946 (D.C. Cir. 1986) (express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Adelphia Commc'ns Corp.,* 12 FCC Rcd 10759 (1997) ("The Commission may entertain petitions for reconsideration filed beyond the statutory deadline only where 'extraordinary circumstances indicate that justice would thus be served.'")

the Newspaper/Broadcast Cross-Ownership Rule; (2) eliminate the Radio/Television Cross-Ownership Rule; (3) revise the Local Television Ownership Rule to eliminate the Eight-Voices Test and to modify the Top-Four Prohibition to better reflect the competitive conditions in local markets; (4) decline to modify the market definitions relied on in the Local Radio Ownership Rule, but provide a presumption for certain embedded market transactions; (5) eliminate the attribution rule for television joint sales agreements (JSAs); and (6) retain the disclosure requirement for shared service agreements (SSAs) involving commercial television stations.

3. In addition, we find that the present record supports adoption of an incubator program to promote ownership diversity; however, the structure and implementation of such a program requires further exploration. Accordingly, in the accompanying Notice of Proposed Rulemaking (NPRM), we seek comment on structuring our incubator program to help facilitate new entry into the broadcast services.

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III. MEDIA OWNERSHIP RULES

A. Newspaper/Broadcast Cross-Ownership Rule

1. Introduction

(citing *Gardner v. FCC,* 530 F.2d 1086, 1091 (D.C. Cir. 1976)). Accordingly, we limit our action today to those issues properly raised in timely petitions for reconsideration.

8. Upon reconsideration, we repeal the Newspaper/Broadcast Cross-Ownership (NBCO) Rule in its entirety.[18] For more than forty years, the NBCO Rule has prohibited common ownership of a daily print newspaper and a full-power broadcast station (AM, FM, or TV) if the station's service contour encompasses the newspaper's community of publication.[19] After reviewing the record from the 2010 and 2014 ownership reviews, and the issues raised on reconsideration, we find that the Commission failed to give adequate consideration to the significant record evidence demonstrating that the media marketplace has changed significantly. The Commission's prior reasoning reflected a time long past when consumers had access to only a few sources of

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[18] The NBCO Rule adopted in the *Second Report an Order* is currently on appeal to the Third Circuit. *See supra* para. 7.

[19] *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1074-78, 1099-1106, paras. 99-107, App. F (1975) (1975 *Second Report and Order*). The Commission attempted to modify the rule in its 2002 and 2006 ownership reviews, but those modifications never became effective. Thus, the rule in effect before the *Second Report and Order* was adopted in 2016 was the same as it existed in 1975. Specifically, the rule prohibited the licensing of an AM, FM, or TV broadcast station to a party (including all parties under common control) that directly or indirectly owns, operates, or controls a daily newspaper, if the entire community in which the newspaper is published would be encompassed within the service contour of the station, namely: (1) the predicted or measured 2 mV/m contour of an AM station, computed in accordance with Section 73.183 or Section 73.186; (2) the predicted 1 mV/m contour for an FM station, computed in accordance with Section 73.313; or (3) the Grade A contour of a TV station, computed in accordance with Section 73.684. *See* 47 CFR § 73.3555(d) (2002).

news and information in the local market, including significantly fewer broadcast outlets. Our decision to repeal the rule means that all newspapers (print or digital) now will be allowed to combine with television and radio stations within the same local market, subject to the remaining broadcast ownership rules and any other applicable laws, including antitrust laws.

9. The Commission adopted the NBCO Rule in 1975 primarily to promote viewpoint diversity, observing that "it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues."[20] In the past, the Commission maintained that requiring separate ownership of local broadcasters and newspapers served the rule's purpose because broadcast stations and local newspapers generally were successful enterprises providing strong local voices in a marketplace containing a very limited number of speakers. We find upon further review, however, that prohibiting newspaper/broadcast combinations is no longer necessary to serve the Commission's goal of promoting viewpoint diversity in light of the multiplicity of sources of news and information in the current media marketplace and the diminished voice of daily print newspapers. Whatever the limited benefits for viewpoint diversity of retaining the rule, in today's competitive media environment, they are outweighed by the costs of preventing traditional news providers from pursuing cross-ownership investment opportunities to provide news and information in a manner that is likely to ensure a more informed electorate. As such, we conclude that the NBCO Rule no longer serves the public

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[20] *See 1975 Second Report and Order*, 50 FCC 2d at 1074, para. 99 (also taking competition into account as a correlative goal).

interest and must be repealed pursuant to Section 202(h).[21]

10. The conclusion that the time has come to eliminate the NBCO Rule is shared by many beyond the Commission. For example, following the Commission's ill-advised decision essentially to retain the existing ban in the *Second Report and Order*, Rep. Greg Walden (R-OR) and Rep. John Yarmuth (D-KY) introduced legislation, with additional bipartisan cosponsors, to eliminate the NBCO Rule.[22] Rep. Walden stated that eliminating the rule would "provide much needed flexibility to the many newspapers and broadcasters throughout the country that provide important local news coverage and encourage greater investment in original journalism."[23] And according to Rep. Yarmuth, "it is increasingly important that we do all we can to protect legitimate sources of news."[24] Reed Hundt, a former Commission Chairman during the Clinton Administration, has endorsed the rule's repeal in light of increased access to news and information over the Internet and the financial support that a broadcaster could offer to a

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[21] 1996 Act § 202(h).

[22] To Eliminate the Daily Newspaper Cross-Ownership Rule of the Federal Communications Commission, H.R. 6474, 114th Cong. (2016); *see also* Press Release, Energy and Commerce Committee, Walden and Yarmuth Introduce Bill Eliminating Disco Era Media Ownership Rules (Dec. 7, 2016) (Walden/Yarmuth Press Release), https://energycommerce.house.gov/news-center/press-releases/walden-and-yarmuth-introduce-bill-eliminating-disco-era-media-ownership. The bill's cosponsors included Rep. Gene Green (D-TX), Rep. Bobby Rush (D-IL), Rep. Gus Bilirakis (R-FL), Rep. Pete Olson (R-TX), Rep. Brett Guthrie (R-KY), and Rep. Billy Long (R-MO).

[23] Walden/Yarmuth Press Release.

[24] *Id.*

troubled newspaper.[25] There also is support for eliminating the rule, as discussed below, among organizations representing minority-owned media outlets.[26] They assert that the rule is constraining the ability of minority-owned media outlets to serve their local communities and has outlived its usefulness. Finally, the Third Circuit in May 2016 noted that among the "costs of delay" in repealing the rule has been continuance of a blanket ban on newspaper-broadcast cross-ownership that "the FCC determined more than a decade ago . . . is no longer in the public interest"[27]—a determination that the Third Circuit had upheld in 2004.[28] With this decision, the Commission will finally acknowledge what is clear to so many—it is time to eliminate the NBCO Rule.

2. Background

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[25] Reed Hundt, Opinions, The FCC Should Repeal Its Newspaper-Broadcast Ownership Rule, Washington Post (June 6, 2013), https://www.washintonpost.com/opinions/the-fcc-should-repeal-its-newspaper-broadcast-ownership/rule/2013/06/06/7084e764-cebb-11e2-8845-d970ccb04497_story.html?utm_term=.5caff689bc73.

[26] *See* Letter from James L. Winston, President, National Association of Black Owned Broadcasters (NABOB), to Hon. Ajit Pai, Chairman, FCC, MB Docket No. 14-50 et al. (Feb. 24, 2017) (NABOB Feb. 24, 2017 *Ex Parte* Letter) (supporting elimination of the ban on newspaper/radio combinations); Letter from Dr. Benjamin F. Chavis, Jr., President and CEO, National Newspaper Publishers Association (NNPA), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, at 1 (Feb. 13, 2017) (NNPA Feb. 13, 2017 *Ex Parte* Letter) (supporting elimination of the entire NBCO Rule); *see also infra* paras. 44-45. NABOB's *ex parte* letter did not address newspaper/television combinations.

[27] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 51 (3d Cir. 2016) (*Prometheus III*).

[28] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004) (*Prometheus I*).

11. We incorporate by reference the description of the background of the NBCO Rule in the *Second Report and Order* and confine our summary to a brief overview of the rule's history.[29] As we stated, the Commission's primary intent in adopting the rule in 1975 was to preserve and promote a diversity of viewpoints at the local level.[30] To that end, the Commission prohibited cross-ownership of what it determined to be the predominant providers of local news within a market—daily newspapers and television and radio broadcast stations—although it acknowledged that radio stations generally play a smaller role than newspapers and television stations in the dissemination of local news.[31] The Supreme Court upheld the NBCO Rule in 1978 and found that the Commission reasonably relied on separation of ownership as a means to promote viewpoint diversity.[32] Viewpoint diversity has remained the principal basis for newspaper/broadcast cross-ownership restrictions for over forty years and currently provides the sole support for the rule given the Commission's conclusions since 2003 that the rule is not necessary to promote the goals

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[29] *Second Report and Order*, 31 FCC Rcd at 9914-17, paras. 135-40.

[30] *1975 Second Report and Order*, 50 FCC 2d at 1048-49, 1074, 1075, 1078-81, paras. 9-11, 99, 101, 110-12 (also taking competition into consideration). In evaluating viewpoint diversity, the Commission has focused on local news providers, as opposed to those that offer mostly regional or national news. *See id.* at 1080-81, para. 112; *see also Second Report and Order*, 31 FCC Rcd at 9914, para. 135 & n.338.

[31] *See 1975 Second Report and Order*, 50 FCC 2d at 1075, 1080-83, paras. 101, 112-15.

[32] *FCC v. Nat'l Citizens Comm. for Broad*, 436 U.S. 775, 796 (1978) (*NCCB*).

of competition or localism, and may even hinder localism.[33] The rule's reliance on viewpoint diversity is significant in light of the Supreme Court's recognition on review of this rule that diversity "has not been the sole consideration thought relevant to the public interest" and that the Commission's "other, and sometimes conflicting, goal has been to ensure 'the best practicable service to the public.' "[34]

12. Despite the importance of the rule's purpose to promote viewpoint diversity, the Commission recognized from the outset that there may be circumstances where the cross-ownership restriction should not apply. When it adopted the initial NBCO Rule in 1975, the Commission applied the rule prospectively and limited divestiture of existing newspaper/broadcast combinations to "only the most egregious cases."[35] In addition,

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[33] *See 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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13748-67, paras. 330-69 (2003) (*2002 Biennial Review Order*); *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 et al.*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2021-22, 2038-39, paras. 18-19, 46-49 (2008) (*2006 Quadrennial Review Order*); *Second Report and Order*, 31 FCC Rcd at 9912-13, 9917, 9928, 9930, paras. 129-30, 142, 162, 166-67.

[34] *NCCB*, 436 U.S. at 782; *see also id.* at 807, 809-14 (citing a Commission study showing that cross-owned stations had "statistically significant superiority" in terms of percentage of time devoted to several categories of local programming).

[35] *1975 Second Report and Order*, 50 FCC 2d at 1076, 1080-81, paras. 103, 112.

it contemplated various situations potentially warranting a waiver of the divestiture requirement.[36] In its 2002 and 2006 ownership review proceedings, the Commission retained cross-ownership restrictions generally, but attempted to relax the NBCO rule, concluding that application of an absolute ban was overly restrictive.[37] The Third Circuit deemed that conclusion reasonable but found fault in both instances with the way the Commission executed its decisions to revise the rule, and thus, the 1975 ban remained in effect.[38] In 2016, the Third Circuit observed in *Prometheus III* that the ban's continued operation had imposed "significant expense" on

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[36] *Id.* at 1084-85, paras. 117-19 (finding that a waiver of the divestiture requirement might be appropriate where: (1) there was an inability to dispose of an interest to conform to the rules; (2) the only possible sale was at an artificially depressed price; (3) separate ownership of the newspaper and station could not be supported in the locality; or (4) the purposes of the rule would be disserved by divestiture).

[37] *2002 Biennial Review Order*, 18 FCC Rcd at 13760, 13790, paras. 355, 432 (replacing the NBCO Rule with a set of cross-media limits); *2006 Quadrennial Review Order*, 23 FCC Rcd at 2021-23, paras. 18-20 (adopting a waiver standard that granted a favorable presumption to proposed newspaper/broadcast mergers meeting certain criteria).

[38] *Prometheus I*, 373 F.3d at 399-413 (remanding the 2002 cross-media limits due to certain deficiencies in the Commission's analysis); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 445-53 (3d Cir. 2011) (*Prometheus II*) (vacating and remanding the 2006 modifications to the NBCO Rule after finding that the Commission failed to comply with public notice and comment requirements); *see also Prometheus III*, 824 F.3d at 51-52 (noting court's agreement in *Prometheus I* that a complete ban no longer serves the public interest).

parties that otherwise might be permitted "to engage in profitable combinations."[39]

13. In the *Second Report and Order*, the Commission affirmed its previous findings that an absolute ban was overly restrictive, but concluded that some newspaper/broadcast cross-ownership restrictions continued to be necessary to promote viewpoint diversity.[40] It retained the general prohibition on common ownership of a broadcast station and a daily print newspaper in the same local market, but adopted minor changes to the rule to accomplish what the Commission called a "modest loosening" of the absolute ban. The Commission: (1) modified the geographic scope of the rule to update its analog parameters and to reflect more accurately the markets that newspapers and broadcasters actually serve;[41] (2) adopted an explicit exception for failed and failing broadcast stations and newspapers;[42] and (3) created a case-by-case waiver standard whereby the Commission would grant relief from the rule if the applicants showed

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[39] *Prometheus III*, 824 F.3d at 51-52.

[40] *Second Report and Order*, 31 FCC Rcd at 9913, para. 130.

[41] *Id.* at 9930-33, paras. 168-71 (limiting the rule's prohibition to newspaper/television combinations within the same Nielsen DMA and, in areas where Nielsen has designated an Audio Metro market, to newspaper/radio combinations within the same Nielsen Audio Metro market). Regarding the contour trigger requirement for newspaper/television combinations, the Commission updated the geographic scope of the restriction by replacing its reliance on a television station's obsolete Grade A analog contour with the station's digital principal community contour, as defined in Section 73.625 of the Commission's rules. *See* 47 CFR § 73.625.

[42] *Second Report and Order*, 31 FCC Rcd at 9933-34, paras. 172-75.

that a proposed merger would not unduly harm viewpoint diversity in the market.[43] The Commission declined to eliminate the newspaper/radio cross-ownership restriction from the NBCO Rule after finding that, despite its earlier tentative conclusion that radio stations typically are not primary outlets for local news, radio stations nonetheless provide a meaningful amount of local news and information such that lifting the restriction could harm viewpoint diversity.[44] In addition, the Commission explained that, although the rule may benefit ownership diversity incidentally, the agency's purpose in retaining the rule was not to promote minority or female ownership.[45]

14. NAB petitioned the Commission to reconsider its retention of the NBCO Rule.[46] NMA, Cox, Sinclair, and Bonneville/Scranton filed comments and/or reply

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[43] *Id.* at 9934-41, paras. 176-89.

[44] *Id.* at 9921-26, paras. 150-59. *But see 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 et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17529-30, para. 112 (2011) (*NPRM*); *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 et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4435-36, para. 145 (2014) (*FNPRM and Report and Order*).

[45] *Second Report and Order*, 31 FCC Rcd at 9944, para. 197.

[46] NAB Petition at 14-25; *see also* NAB Reply to Oppositions at 5-6.

comments in support of NAB's petition.[47] UCC et al. filed an opposition to NAB's petition, in which they urge the Commission to retain the NBCO Rule adopted in the *Second Report and Order*.[48]

3. Discussion

15. We find that the NBCO Rule must be repealed because it is not necessary to promote the Commission's policy goals of viewpoint diversity, localism, and competition, and therefore does not serve the public interest.[49] The parties that support reconsideration of the

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[47] NMA Reconsideration Comments at 1-8; NMA Reconsideration Reply at 1-3; Cox Reconsideration Comments at 1-8; Sinclair Reconsideration Reply at 9-10; Bonneville/Scranton Reconsideration Reply at 1-10.

[48] UCC et al. Opposition at 6-7.

[49] The Commission has consistently concluded that the NBCO Rule is not necessary to promote competition because broadcasters and newspapers do not compete in the same product markets. *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 9928-29, 9930, paras. 163, 166-67; *2002 Biennial Review Order*, 18 FCC Rcd at 13748-53, paras. 331-41. Because we are repealing the NBCO Rule on other grounds, we need not address arguments that the rule should be repealed on competition grounds. *See*, *e.g.*, NABOB Feb. 24, 2017 *Ex Parte* Letter at 2-3; NNPA Feb. 13, 2017 *Ex Parte* Letter at 1-2; NMA Mar. 27, 2017 *Ex Parte* Letter at 1-2; NMA Reconsideration Comments at 2. Similarly, we need not reach arguments that ownership does not influence viewpoint. *See Second Report and Order*, 31 FCC Rcd at 9917-18, paras. 142-44. Views on that issue diverge among interested parties. *See*, *e.g.*, NAB Petition at 14-15; UCC et al. Opposition at 6; *see also* Cox Reconsideration Comments at 6-7 (asserting that consumer demand, not ownership, drives viewpoint); NMA Reconsideration Comments at 6 (arguing that cross-ownership does not result in a single viewpoint). *But see Prometheus I*, 373 F.3d at 400-01 (finding that the possibility of a connection between ownership and viewpoint is not disproved by evidence that a connection is not always present). However, we need not resolve the issue here

NBCO Rule argue that the modifications adopted in the *Second Report and Order* were insufficient and that the rule is obsolete and should be eliminated. We agree. We affirm the Commission's longstanding determination that the rule does not advance localism and competition goals, and find today that it is no longer necessary to promote viewpoint diversity, the rule's only remaining policy justification. Although elimination of the rule could theoretically diminish viewpoint diversity to a limited extent due to the loss of an independent voice as a result of any newspaper/broadcast combination, we find that this impact will be mitigated by the multiplicity of alternative sources of local news and information available in the marketplace and the overall financial decline of newspapers. In addition, we find that this concern is outweighed by the countervailing benefits to consumers that can result from newspaper/broadcast combinations. Finally, based on our review of the record, we find that eliminating the rule will have no material effect on minority and female broadcast ownership. Accordingly, we grant NAB's request that we eliminate the NBCO Rule.

a. The Marketplace Has Changed Dramatically

16. On reconsideration, we find that the Commission's decision to retain the NBCO Rule failed to acknowledge the current realities of the media marketplace. In 1975, the broadcast industry was still relatively young, but it had found its footing, owing in part

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because we are eliminating the rule on the ground that, even if ownership might influence viewpoint in certain circumstances, the NBCO Rule is not necessary to foster viewpoint diversity (nor to promote localism or competition).

to the role that newspaper/broadcast cross-ownership had played in its success.[50] Supporters of common ownership claimed that "joint ownership of newspapers and broadcast stations made possible the early development of FM and TV service even though these pioneering stations often had to be operated at a loss.[51] In adopting the cross-ownership rule, the Commission acknowledged the pioneering role of newspapers in the broadcast medium but found that common ownership with newspapers was no longer a critical factor for broadcaster success.[52] The Commission observed that, on the whole, the broadcast industry had "matured" to the point that new entrants could be expected to have an interest in pursuing station ownership.[53] It concluded that "the special reason for encouraging newspaper ownership, even at the cost of a lessened diversity, [was] no longer generally operative in the way it once was."[54] The Commission understood its obligation "to give recognition to the changes which have taken place

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[50] *See 1975 Second Report and Order*, 50 FCC 2d at 1064, 1074-75, paras. 62, 100. In the *2006 Quadrennial Review Order*, the Commission stated that "[i]n the early days of broadcasting, when the success of the then-new medium was not assured, the Commission had actively encouraged newspaper owners to apply for newly available licenses in their local communities . . . hop[ing] that such established local media entities would bring both expertise and financial support to the development of broadcasting as a viable mass medium." *2006 Quadrennial Review Order*, 23 FCC Rcd at 2023, para. 22 (citing *1975 Second Report and Order*, 50 FCC 2d at 1066, 1074-75, paras. 70, 100).

[51] *1975 Second Report and Order*, 50 FCC 2d at 1064, para. 62.

[52] *Id.* at 1074-75, para. 100.

[53] *Id.*

[54] *Id.*

and see to it that its rules adequately reflect the situation as it is, not was."[55]

17. That same obligation now requires us to eliminate the NBCO Rule. Not only have the means of accessing content changed dramatically, but the media marketplace has seen an explosion in the number and variety of sources of local news and information since the Commission adopted the NBCO Rule in 1975. Opponents of the rule point to this increase and argue that the NBCO Rule has become obsolete as a result.[56]

18. In particular, Bonneville/Scranton provided evidence in the record demonstrating the substantial increase in the number of broadcast sources (AM, FM,

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[55] *Id.*

[56] *See, e.g.*, NAB Petition at 16-21; Cox Reconsideration Comments at 7; Bonneville/Scranton Reconsideration Reply at 8-10; Sinclair Reconsideration Reply at 9-10; NMA Reconsideration Comments at 2, 6-8; NMA Reconsideration Reply at 2; Letter from Danielle Coffey, Vice President, Public Policy, NMA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 (Mar. 27, 2017) (NMA Mar. 27, 2017 *Ex Parte* Letter); *see also* Letter from Robert M. McDowell and John R. Feore, Counsel to Gray Television, Inc., Cooley LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 3 (June 28, 2017) (Gray June 28, 2017 *Ex Parte* Letter). *But see* UCC et al. Opposition at 6 (arguing that the Commission repeatedly has considered and rejected the argument that the rule is unjustified given consumers' access to a multitude of voices). We note that the Gray June 28, 2017 *Ex Parte* Letter addresses issues that are not properly before us on reconsideration (e.g., modifying the failed or failing waiver standard in the Local Television Ownership Rule). As discussed above in footnote 3, *supra*, we decline to reach these issues, but we note that the Commission will be reviewing all its broadcast ownership rules in the 2018 Quadrennial Review proceeding.

TV, LPTV) since the Commission originally contemplated the NBCO Rule.[57] The Commission failed to properly credit this increase in the *Second Report and Order*.[58] From the 6,197 full-power radio stations and 851 full-power television stations that existed in the late 1960s, the Commission's latest broadcast totals place the number of full-power radio stations at 15,512 and full-power television stations at 1,775.[59] Contrary to the Commission's conclusion in the *Second Report and Order*, the fact that the number of full-power broadcast stations has more than doubled represents a significant increase that should be considered when evaluating the continued necessity of the NBCO Rule.[60] In addition, the Commission should have taken into account the

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[57] Bonneville/Scranton FNPRM Reply at 4 n.7.

[58] *See Second Report and Order*, 31 FCC Rcd at 9921, para. 149.

[59] Broadcast Station Totals as of June 30, 2017, Press Release (MB July 11, 2017) (June 30, 2017 Broadcast Station Totals), https://apps.fcc.gov/edocs_public/attachmatch/DOC-345720A.pdf; Bonneville/Scranton FNPRM Reply at 4 n.7. The Commission referenced a total of 757 commercial television stations when it adopted the NBCO Rule in 1975. *1975 Second Report and Order*, 50 FCC 2d at 1080, para. 112 n.30; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13647-67, paras. 86-128 (discussing changes in the media marketplace 1960-2000); *id.* at 13656, para. 106 ("There were more than 9,278 radio stations in 1980, and 1,011 broadcast television stations."). As discussed in greater detail below, the impact of the incentive auction on the number of full-power broadcast television stations does not appear to be significant at this time. *See infra* note 248.

[60] *See Second Report and Order*, 31 FCC Rcd at 9921, para. 149; June 30, 2017 Broadcast Station Totals. We also find that it was improper for the Commission to dismiss Bonneville/Scranton's data simply because it represented a nationwide increase which may have been spread unevenly across individual local markets without citing any evidence to support this notion. *See Second Report and Order*, 31 FCC Rcd at 9921, para. 149.

number of low-power broadcast stations, which, as of June 2017, includes 417 Class A television stations; 1,968 low-power television (LPTV) stations; and 1,966 low-power FM (LPFM) stations—none of which services existed when the rule was adopted.[61] This situation is a stark contrast to the state of affairs in 1975, when the "changed circumstances in the broadcasting industry" that prompted adoption of the NBCO Rule included a trend in which "the number of channels open for new licensing had diminished substantially."[62]

19. Equally, if not more significantly, NAB cites evidence of the growing prevalence of independent digital-only news outlets with no print or broadcast affiliation, many with a local or hyperlocal focus.[63] Thirteen years ago, the Third Circuit agreed with the Commission that the record suggested that "cable and the Internet contribute to viewpoint diversity"; the panel members simply disagreed about the "degree" and importance of this trend at that time.[64] Since then, however, the picture has changed significantly. Even the U.S. Supreme

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[61] June 30, 2017 Broadcast Station Totals. Class A television stations must broadcast an average of at least three hours per week of locally produced programming each quarter. 47 CFR § 73.6001(b). Unlike translators, LPTV stations may originate programming. *Id.* § 74.701(f). Under the Commission's LPFM rules, all applicants must demonstrate a local presence; mutually exclusive applicants receive preference points for established local presence and pledges to originate locally at least eight hours of programming per day. *Id.* §§ 73.853(b), 73.872(b).

[62] *NCCB*, 436 U.S. at 797.

[63] NAB Petition at 19-20.

[64] *Compare Prometheus I*, 373 F.3d at 400, *with id.* at 439, 448, 464-69 (Scirica, Chief Judge, dissenting in part).

Court recently recognized the importance of the Internet and social media as sources of news and information for many Americans.[65] As this trend continues to gain momentum and new voices proliferate, the dominance of traditional news outlets diminishes. Although the record contains some evidence that local television stations and newspapers may still be consumers' primary sources of local news and information,[66] we find that the Commission improperly discounted the role of non-traditional news outlets, including Internet and digital-only, in the local media marketplace.

20. The Commission concluded in the *Second Report and Order* that online outlets do not serve as a "substitute" for newspapers and broadcasters providing local news and information.[67] As noted below, this conclusion does not appear to reflect the record evidence as to "how the Internet has transformed the American people's consumption of news and information,"[68] the direction of current trends in this regard,[69] and in particular how those trends have affected younger adults.

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[65] *Packingham v. North Carolina*, No. 15-1194, 137 S. Ct. 1730, slip op. at 8 (S. Ct. June 19, 2017) (describing social media as "for many . . . the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge").

[66] *See Second Report and Order*, 31 FCC Rcd at 9920-21, paras. 147-48.

[67] *Id.* at 9920, para. 148.

[68] *Id.* at 10049 (Dissenting Statement of then-Commissioner Pai).

[69] In the *FNPRM*, the Commission acknowledged that "the extent to which Americans turn to news websites unaffiliated with traditional media may be increasing." *FNPRM*, 29 FCC Rcd at 4426, para. 130 (citing 2012 Pew Research Center study).

At a minimum, the record reflects studies that reject the premise "that people have a primary or single source for most of their local news and information." Rather, "the picture revealed by the data is that of a richer and more nuanced ecosystem of community news and information than researchers have previously identified," in which "Americans turn to a wide range of platforms to get local news and information."[70] Thus, the contributions of such outlets cannot be dismissed out of hand as the existence of these non-traditional news outlets nevertheless results in greater access to independent information sources in local markets. Furthermore, the Commission failed to acknowledge adequately evidence in the record demonstrating the emergence of online outlets that offer local content and have no affiliation with traditional broadcast or print sources.

21. Numerous studies cited in the record establish the emergence and growth of alternative sources of local news and information, including digital-only local news outlets as well as other online sources of local news and information.[71] For example, according to a 2014 Pew

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[70] Pew Research Center and Knight Foundation, How People Learn About Their Local Community 1 (Sept. 26, 2011) (How People Learn About Their Local Community), http://www.pewinternet.org/2011/09/26/how-people-learn-about-their-local-community (cited in NAB FNPRM Comments at 25 & n.83 (cited in NAB Petition at ii & n.4) and Morris FNPRM Reply at 5).

[71] *See*, *e.g.*, Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, and 07-294, at 2 (filed July 15, 2016) (citing two recent Pew Research Center studies examining digital local news sites); Letter from Rick Kaplan, General Counsel and Ex-

Research study, out of 438 digital news sites examined, more than half had a local focus, with the "typical outlet" described as "focused on coverage of local or even neighborhood-level news."[72] Even by 2011, a Pew study confirmed that while newspapers remain popular sources for some such information, 69 percent of those surveyed said that if their local newspaper no longer existed, it would not have a major impact on their ability to keep up with information and news about their community.[73] By 2016, Pew reported that just 20 percent of U.S. adults often get news from print newspapers, with even steeper

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ecutive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, and 07-294, Attach. at 6 (filed July 8, 2016) (documenting several dozen local news sources, including digital-only outlets, in Washington, D.C.); Tribune 2010 NPRM Comments at 28, 37-38, 47-48, 57, 67 (identifying local independent news websites and other sources in five specific markets). Several studies referenced in the above-referenced filings document the prevalence of online local news sources in today's media marketplace. For instance, a 2015 Pew Research Center study—which looked specifically at news providers in Denver, Colorado, Macon, Georgia, and Sioux City, Iowa-found over 140 news providers in Denver, including 25 digital-only news outlets (two of which are affiliated with *The Denver Post*). Pew Research Center, Local News in a Digital Age (Mar. 5, 2015), http://www.journalism.org/2015/03/05/local-news-in-a-digital-age/. Moreover, in a smaller market—Sioux City, Iowa—the study found nearly as many digital-only news outlets (three) as local news/talk radio stations (four). *Id.*

[72] Mark Jurkowitz, Small Digital News Sites: Young, Lean, and Local (Apr. 10, 2014), http://www.pewresearch.org/fact-tank/2014/04/10/small-digital-news-sites-young-lean-and-local/.

[73] How People Learn About Their Local Community at 1 (cited in NAB NPRM Comments at 42-43, n.162); *see also id.* at 4 ("The new data explodes the notion, for instance, that people have a primary or single source for most of their local news and information.").

declines in particular demographics—only 5 percent of those aged 18 through 29, and only 10 percent of those aged 30 through 49.[74] According to the earlier Pew study, for the 79 percent of Americans who are online, "the internet is the first or second most important source for 15 of the 16 local topics examined."[75] Nearly half of adults (47 percent) use mobile devices to get local news and information, and for none of Pew's topics did more than 6 percent of respondents say they depended on the website of a legacy news organization.[76] Among adults under age 40, "the web ranks first or ties for first for 12 of the 16 local topics asked about."[77] Furthermore, in the *Second Report and Order*, the Commission

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[74] Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 (July 18, 2016) (citing A. Mitchell, J. Gottfried, M. Barthel and E. Shearer, Pew Research Center, The Modern News Consumer (July 7, 2016) (Modern News Consumer), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/07/07104931/PJ_2016.07.07_Modern-News-Consumer_FINAL.pdf).

[75] How People Learn About Their Local Community at 22. For this survey, the websites of print newspapers and broadcast television stations were treated as non-Internet sources, i.e., respondents who relied on those websites were grouped with respondents who relied on the print or broadcast source, as the case may be. *Id.* at 4.

[76] *Id.* at 4, 27. According to Pew, "The websites of newspapers and TV stations do not score highly as a relied-upon information source on any topics." *Id.* at 5.

[77] *Id.* at 22; *see also* Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 9-10 (July 7, 2016) (citing study finding that millennials obtain 74 percent of their news from online sources).

too readily dismissed cable news programming as primarily targeted to a wide geographic audience,[78] without considering that most of the major cable operators carry locally-focused cable news networks in parts of their footprint.[79]

22. On reconsideration, we find that the record clearly demonstrates that the wealth of additional information sources available in the media marketplace today, apart from traditional newspapers and broadcasters, strongly supports repealing the NBCO Rule. These dramatic and ongoing changes in the media industry negate concerns that repealing the NBCO Rule will harm viewpoint diversity. We do not perceive a need for the rule in light of the current trends toward greater consumer reliance on these alternative sources of local news and information. The Commission's failure to account properly for the multiplicity of news and information sources available in the current media marketplace factored heavily in its unjustified retention of the NBCO Rule.

b. The Decline of the Newspaper Industry Has Diminished its Voice

23. In addition, restrictions on common ownership of daily print newspapers and broadcast stations are no longer justified to protect viewpoint diversity as the

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[78] *See Second Report and Order*, 31 FCC Rcd at 9920, para. 148.

[79] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, MB Docket No. 15-158, 31 FCC Rcd 4472, 4579-80, App. C (MB 2016) (*Seventeenth Video Competition Report*); *see also* Gray June 28, 2017 *Ex Parte* Letter at 3 (identifying niche cable news channels as alternative sources of viewpoint diversity in local markets).

strength of daily print newspapers has declined significantly since 1975. In the *Second Report and Order*, the Commission failed to credit properly the evidence in the record regarding the challenges facing the newspaper industry and the resulting effects on the ability of print newspapers to serve their readers. Rather than merely modifying the rule's waiver standard and adjusting its carve-outs, the Commission should have acknowledged the diminution of newspapers' voices and concluded that the time has come to eliminate the rule altogether.

24. There was ample evidence in the Commission's record in the 2010/2014 review confirming then-Commissioner Pai's assessment that the "newspaper industry is in crisis."[80] Given that the record is public and extensive, we recount here only a sampling of the comments, which we believe suffices to depict the overall state of the newspaper industry. For example, NAB provided evidence that print newspaper advertising revenue had decreased more than 50 percent since 2008 and

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[80] *Second Report and Order*, 31 FCC Rcd at 10046 (Dissenting Statement of then-Commissioner Pai). Then-Commissioner Pai lamented, among other things, the fact that over 400, or one-quarter, of the country's newspapers had gone out of business since the NBCO Rule was adopted, including in major cities. He pointed to other newspapers that no longer publish on a daily basis. He cited newspapers' declining circulations, decreased advertising revenues, and shrinking newsrooms. He observed that broadcasters and newspapers would make particularly suitable partners given the compatibility of their businesses. *Id.* at 10046-48 (Dissenting Statement of then-Commissioner Pai). Noting newspapers' "well-documented struggles," Commissioner O'Rielly agreed that allowing newspaper/broadcast cross-ownership might provide newspapers with "much-needed relief in the form of committed and knowledgeable investors." *Id.* at 10059-60 (Dissenting Statement of Commissioner O'Rielly).

nearly 70 percent since 2003, newsroom employees were one-third fewer than at their peak in 1989, and only 17 percent of Americans paid for newspaper subscriptions.[81] NAB stated that digital advertising did not compensate for the losses in print advertising, as evidenced by the fact that total newspaper advertising revenues in 2013, including online advertising, were lower than the total advertising revenues in 1954, after adjusting for inflation.[82] Bonneville/Scranton observed that hundreds of newspapers had closed, with 175 closures between 2007 and 2010, 152 closures in 2012, and 114 closures in 2013.[83] NMA reported that classified advertising, which had accounted for 40 percent of print advertising revenue in 2000, plummeted by 71 percent between 2000 and 2010.[84] As NMA noted, decreased revenue has led to lower editorial spending, the shedding of thousands of journalists, and reductions in paper size and the amount of space in a paper devoted to news.[85] NMA remarked that the Information Needs of Communities report warned that the threat to independent reporting, particularly of local affairs, due to the diminished number of professional journalists was

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[81] NAB FNPRM Comments at 32, 35-37, 71; *see also* Bonneville/Scranton FNPRM Comments at 8.

[82] NAB FNPRM Comments at 70-71.

[83] Bonneville/Scranton FNPRM Comments at 7-8 & n.26; *see also* NMA NPRM Comments at 6-7 (noting that most of the newspapers that closed served smaller markets).

[84] NMA NPRM Comments at 5.

[85] *Id.* at 5-6.

having a substantial negative civic impact around the country, particularly in small-to-midsize markets.[86]

25. In light of the long decline of the newspaper industry, the loss of an independent daily newspaper voice in a community will have a much smaller impact on viewpoint diversity than would have been the case in 1975. In addition, as discussed below, repeal of the NBCO Rule will permit newspaper/broadcast combinations that can strengthen local voices and thus enable the combined outlets to better serve their communities.

c. The NBCO Rule Prevents Combinations that Could Benefit Localism

26. The Commission repeatedly has recognized that the NBCO Rule does not promote localism and actually may hinder it by preventing local news outlets from achieving efficiencies by combining resources needed to gather, report, and disseminate local news and information.[87] The Commission nevertheless retained newspaper/broadcast cross-ownership restrictions in order to promote its goal of viewpoint diversity.[88] Because the NBCO Rule is no longer necessary to foster

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[86] NMA NPRM Comments at 7-8 (citing Steve Waldman & the Working Group on Information Needs of Communities: The Changing Media Landscape in a Broadband Age at 10, 21, 24, 43-55 (2011), https:/transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf).

[87] *See, e.g.*, *Second Report and Order*, 31 FCC Rcd at 9928, para. 162; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2032-38, paras. 39-46; *2002 Biennial Review Order*, 18 FCC Rcd at 13753-60, paras. 342-54.

[88] *See, e.g.*, *Second Report and Order*, 31 FCC Rcd at 9928, para. 162; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2038-39, paras.

viewpoint diversity, and the rule can be repealed without harming the public interest, the potential benefits to localism arising from common ownership finally can accrue. We expect that eliminating the NBCO Rule will allow both broadcasters and newspapers to seek out new sources of investment and operational expertise, increasing the quantity and quality of local news and information they provide in their local markets[89]

27. There is ample evidence in the record that eliminating the rule will help facilitate such investment and enable both broadcasters and newspapers to better serve the public. For example, in support of NAB's petition for reconsideration, Cox asserts that collaboration

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47-49; *2002 Biennial Review Order*, 18 FCC Rcd at 13790-91, paras. 432-35.

[89] The argument that newspaper/broadcast cross-ownership promotes localism has been advanced in several media ownership reviews, and it is put forth again in this reconsideration proceeding. *See*, *e.g.*, NAB Petition at 15-16; Cox Reconsideration Comments at 3-5; NMA Reconsideration Comments at 5-6; NMA Reconsideration Reply Comments at 2; Bonneville/Scranton Reconsideration Reply Comments at 3-4; Letter from Danielle Coffey, Vice President, Public Policy, NMA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 (Feb. 27, 2017) (NMA Feb. 27, 2017 *Ex Parte Letter*); *see also* Letter from Mark J. Prak, Counsel to Independent Broadcasters, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al., at 1-2 & Att. (July 12, 2017) (Independent Broadcasters July 12, 2017 *Ex Parte* Letter) (asserting that the NBCO Rule affirmatively harms local journalism and that owners of local media outlets should be allowed to combine properties in order to better serve their local markets); Letter from Kurt Wimmer, Counsel to NMA, Covington & Burling LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 et al. (July 25, 2017) (arguing that the NBCO Rule impedes "newspaper owners seeking investment to fund high-quality, responsible journalism").

and cost-sharing between its television station and its newspaper in Dayton, Ohio, helped them be the first to report on what became a national story about the failures of the Veterans Administration to provide adequate medical services.[90] In addition, Cox previously provided several examples showing how the combination of resources across its commonly owned newspaper, television, and radio properties in both Dayton and Atlanta, Georgia, allowed them to report on breaking news stories more quickly and accurately and to also provide more thorough coverage of events, such as political elections, that involve numerous interviews and in-depth issue reporting.[91] Cox asserts that the common ownership of multiple outlets has enabled its media properties "to vastly improve service at a time when the economics of the newspaper and broadcast business would seem to dictate the opposite."[92]

28. In addition, as the Commission noted in the *Second Report and Order*, NMA provided numerous examples of the benefits to local programming involving cross-owned media outlets in various markets.[93] For example, a cross-owned newspaper/television combination in Phoenix combined resources to report on stories such as the

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[90] Cox Reconsideration Comments at 3-5.

[91] Cox FNPRM Comments at 8-9; Cox NPRM Reply at 12-17.

[92] Cox FNPRM Comments at 9; *see also* Gray June 28, 2017 *Ex Parte* Letter at 3-4 (discussing the high costs of producing local newscasts and the challenging economics of local television today, especially in mid-sized and small markets).

[93] NMA FNPRM Comments at 3-10 (providing examples from various cities, including Phoenix, Dayton, South Bend, Milwaukee, Cedar Rapids, Atlanta, and Spokane, to demonstrate that cross-ownership leads to more comprehensive local news coverage across platforms).

shooting of Congresswoman Gabrielle Giffords and 18 others in Tucson, the Yarnell Hill fire that killed 19 firefighters and destroyed more than 100 homes, and a massive dust storm.[94] In South Bend, Indiana, a commonly owned local newspaper, television station, and two radio stations regularly worked together on issues of local significance, such as uncovering harmful substances in drinking water, hosting town-hall meetings for political candidates and local officials, sending a reporter to Iraq, commemorating the 150th anniversary of the local Studebaker factory, providing weather information, and covering Notre Dame sports.[95] NMA also cited prior Commission studies for the proposition that, on average, a cross-owned television station produces more local news and more coverage of local and state political candidates than comparable non-cross-owned television stations.[96]

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[94] *Id.* at 3-5.

[95] *Id.* at 6-8.

[96] *Id.* at 3. NMA pointed to the finding in one Commission study that cross-owned television stations, on average, air 50 percent more local news than non-cross-owned stations. *See* Jack Erb, Media Ownership Study 4, Local Information Programming and the Structure of Television Markets, 27-28 (2011) (Media Ownership Study 4) (finding that the differential is driven mostly by grandfathered combinations, as opposed to combinations operating under temporary waivers). Media Ownership Study 4 also found that the total amount of local news aired by all television stations in the market may be negatively correlated with newspaper/broadcast cross-ownership. *Id.* at 41. As noted in the *FNPRM*, however, the study authors cautioned that this finding was "'imprecisely measured and not statistically different from zero.'" *FNPRM*, 29 FCC Rcd at 4431, para. 137 (proposing not to accord much weight to the study's finding that the amount of local news at the market level may be negatively cor-

29. The Commission has acknowledged that prior Commission studies have found that cross-owned radio stations are more likely to air news and public affairs programming and are four to five times more likely to have a news format than a non-cross-owned station.[97] Comments in this proceeding bear that out, providing anecdotal evidence, such as that offered by Morris Communications, which explained that its radio stations in Topeka, Kansas, and in Amarillo, Texas, were able to invest more heavily in local news production and in news staff because of their cross-ownership with the local newspaper.[98] Cox argues that newspaper owners have "the skill and resources to increase the quality and quantity of local radio news."[99] Bonneville/Scranton also asserts that newspaper/radio combinations can result in a greater amount of news on radio stations.[100]

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related with newspaper/broadcast cross-ownership). An earlier Commission study cited by NMA found that cross-owned television stations aired between seven to ten percent more local news, which still represents a meaningful increase in the average amount of local news aired on cross-owned television stations. *See* Jeffrey Milyo, FCC Media Ownership Study 6, Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News, 1 (Sept. 17, 2007). This study also found that cross-owned television stations, on average, provide roughly 25 percent more coverage of local and state politics. *Id.* at 1.

[97] *Second Report and Order*, 31 FCC Rcd at 9927-28, para. 161 (citing NAB FNPRM Comments at 83-84, which referenced 2006 Media Ownership Study 4, Sections II, III).

[98] Morris FNPRM Comments at 17-23.

[99] Cox FNPRM Comments at 5.

[100] *See* Bonneville/Scranton FNPRM Comments at 9.

30. As the Commission discussed in the *Second Report and Order*, the record contains support for the proposition that newspaper/broadcast combinations can promote localism by creating efficiencies through the sharing of expertise, resources, and capital that can lead to a higher quantity and quality of local news programming."[101] The Commission "has long accepted that proposition,"[102] but it concluded in its previous decisions that some restrictions remained necessary to promote viewpoint diversity. We conclude now that the potential public interest benefits of permitting newspaper/broadcast combinations outweigh the minimal loss of viewpoint diversity that may result from eliminating the rule. With the elimination of the NBCO Rule these localism benefits can finally begin to materialize.

31. In light of the well-documented and continuing struggles of the newspaper industry, the efficiencies produced by newspaper/broadcast combinations are more important than ever. A report in February 2017 examining the health of small newspapers was cautiously optimistic about the future of publications with a community or hyperlocal focus but acknowledged that their "battle for survival will not be easy" and will re-

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[101] *See Second Report and Order*, 31 FCC Rcd at 9926-28, paras. 160-61. *But see id.* at 9927, para. 160 (discussing comments suggesting that cross-ownership may reduce the total amount of local news available in the market). The limitations with the finding in Media Ownership Study 4 associated with overall reductions in local news in markets with cross-owned combinations is discussed in footnote 96, *supra.*

[102] *Second Report and Order*, 31 FCC Rcd at 9928, para. 162.

quire new approaches and strategies that take advantage of their niche position.[103] Removing the regulatory obstacle of this outdated rule will help financially troubled newspapers carry on their important work. While we recognize that cost-savings gained from common ownership will not necessarily be invested in the production of local news,[104] by allowing newspapers and broadcasters to collaborate and combine resources, our action today creates new opportunities for local broadcasters and newspapers to better serve the local news and information needs of their communities.

d. The NBCO Rule Must be Eliminated

32. Our decision today to repeal the rule reflects the situation as it currently is, not as it was more than 40 years ago. Whereas the Commission determined in 1975 that newspaper/broadcast combinations were no longer necessary to support the growth of the broadcast industry and that the interest in viewpoint diversity required separate ownership of newspapers and broadcast licenses, we now determine that this restriction is no longer necessary to promote viewpoint diversity and can potentially harm localism, and that removing the restriction best serves the public interest.

33. Indeed, even to the extent that eliminating the rule would permit transactions that would reduce the

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[103] Damian Radcliffe and Christopher Ali, *If Small Newspapers Are Going to Survive, They'll Have to Be More Than Passive Observers to the News* (Feb. 2, 2017), http://www.niemanlab.org/2017/02/if-small-newspapers-are-going-to-survive-theyll-have-to-be-more-than-passive-observers-to-the-news/.

[104] *See id.* at 9928, para. 162; *FNPRM*, 29 FCC Rcd at 4431-32, paras. 136-38.

number of outlets for news and information in local markets, the markets will continue to have far more voices than when the rule was enacted. The modern media marketplace abounds with new, non-traditional voices, the number of local broadcasters has increased dramatically, and the strength of local newspapers relative to other media has diminished as a result of the difficulties facing the industry and the rise of new voices. And we expect the number of voices to continue to grow, as the Internet, in particular, has lowered the barriers to entry and provided a publicly accessible platform for individuals and organizations to serve the news and information needs of their local communities. Furthermore, eliminating the NBCO Rule will permit efficient combinations that will allow broadcasters and newspapers to combine resources and enable them to better serve their local communities. On balance, therefore, we conclude that retaining the rule does not serve the public interest.

34. The Commission consistently has recognized that changing circumstances in the marketplace warrant a retreat from a total ban; accordingly, the Commission has attempted to impose various limits on the rule through the years.[105] The Commission's overall direction has been toward a growing acknowledgment that the rule is not always necessary to promote viewpoint diversity and should be modified to reflect changes in the marketplace.[106] Our action today is simply the logical extension of this acknowledgment in response to the radically altered media marketplace.

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[105] *See supra* para. 12.

[106] *See supra* para. 12.

35. As noted in the *2002 Biennial Review Order*, the Commission "must consider the impact of [its] rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets. . . . [M]aximizing the number of independent voices does not further diversity if those voices lack the resources to create and publish news and public information."[107] In *Prometheus I*, the court affirmed the Commission's finding in the *2002 Biennial Review Order* that the NBCO Rule was overbroad and should be relaxed.[108] In the *2006 Quadrennial Review Order*, the Commission took into consideration the imperiled state of the newspaper industry, recounting statistics and data showing that the shrinking newspaper industry had suffered circulation declines, staff layoffs, shuttered news bureaus, flat advertising revenues, rising operating costs, and falling stock prices.[109] These hardships influenced the Commission's finding that the existing ban on newspaper/broadcast combinations continued to be overly restrictive.[110]

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[107] *2002 Biennial Review Order*, 18 FCC Rcd at 13762, para. 360 (noting that both newspapers and broadcasters had seen declining consumer interest).

[108] *Prometheus I*, 373 F.3d 399-400. Though it agreed that the complete ban was no longer in the public interest, the court held that the modified rule adopted in the *2002 Biennial Review Order* was arbitrary and capricious and the court left in place the 1975 ban. *Id.* at 402.

[109] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2026-30, paras. 27-34.

[110] *Id.* at 2039, para. 51. *In Prometheus II*, the court vacated the revised NBCO Rule adopted in the *2006 Quadrennial Review Order* on procedural grounds. *Prometheus II*, 652 F.3d at 445.

36. The newspaper industry had not recovered when the Commission began its 2010/2014 ownership review and, indeed, the hardships continued to mount. In its 2010 *NOI*, the Commission described newspapers' declining circulation and advertising revenues and asked whether relaxing the rule would help newspapers to survive.[111] In the *FNPRM*, the Commission expressed concern for the future of newspapers but disagreed with the suggestion that the NBCO Rule should be repealed or relaxed on that basis alone.[112] The Commission was reluctant to jeopardize viewpoint diversity in local markets in response to assertions that the rule limited opportunities for traditional media owners to expand their revenues.[113] Now, however, we conclude that the continuance of the NBCO Rule is not necessary or appropriate to preserve or promote viewpoint diversity under Section 202(h). We anticipate that both newspapers and broadcasters will benefit from the rule's repeal, as will, ultimately, the public, as we discuss above.

37. The Commission recognized in the FNPRM that the NBCO Rule does not promote viewpoint diversity when a newspaper is in financial distress, and the *FNPRM* proposed an exception to the rule for failed and failing merger applicants.[114] In the *Second Report and Order*, the Commission adopted that exception and explained that allowing such mergers is not likely to harm

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[111] *NOI*, 25 FCC Rcd at 6088-90, 6101, 6112-13, paras. 6-9, 47, 87.

[112] *FNPRM*, 29 FCC Rcd at 4432-35, paras. 139-43.

[113] *Id.*; *see also Second Report and Order*, 31 FCC Rcd at 9928-30, paras. 163-67.

[114] *FNPRM*, 29 FCC Rcd at 4434-35, 4453-54, paras. 142, 188.

viewpoint diversity.[115] In addition, the Commission incorporated into the rule a case-by-case waiver standard for markets of all sizes to account for merger situations that do not pose an undue risk to viewpoint diversity.[116]

38. On reconsideration, we find that the Commission's modifications to the NBCO Rule in *the Second Report and Order* were inadequate. Given the current state of the newspaper industry, it might very well be too late to save a newspaper that would qualify as failed or failing under the exception adopted in the *Second Report and Order*. Our goal should be to keep local voices strong, not to maintain artificial barriers that prevent efficient combinations and then wait until newspapers reach a failed or failing state before providing regulatory relief. In addition, the Commission's case-by-case waiver standard was wholly insufficient because the Commission failed to provide any meaningful guidance on how it would evaluate each waiver request.[117] An exception or a waiver standard may be appropriate when a rule is sound and exceptional circumstances exist, but such mechanisms do not redeem an unsound rule, as we find this one to be.

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[115] *Second Report and Order*, 31 FCC Rcd at 9933-34, paras. 172-75.

[116] *Id.* at 9934-41, paras. 176-89.

[117] *See Second Report and Order*, 31 FCC Rcd at 9934-41, paras. 176-89. By contrast, as discussed below, we are adopting a case-by-case review process in the Local Television Ownership Rule for proposed combinations involving top-four rated stations, and we provide a significant list of factors to help guide parties when making a showing that application of the Top-Four Prohibition is not in the public interest. *See infra* para. 82.

39. In addition, the modified rule inexplicably left in place a definition of "daily newspaper" that is outdated and illogical in that it applies only to newspapers printed at least four days a week.[118] The distinction between print newspapers and digital outlets has become blurred as some newspapers reduce the number of days a week they publish in print and rely more heavily on their online distribution.[119] Indeed, many publishers today continuously update the content of the online versions of their newspapers as they compete with bloggers and social media that rapidly produce and update their own content. Applying the NBCO Rule to newspapers only if they are printed in hardcopy at least four days per week ignores the reality that what defines a "newspaper" has changed and that many consumers access the paper's news and information over the Internet throughout the day. A newspaper's influence should no longer be measured by how many mornings a week it is delivered to the doorstep. Doing so would exacerbate the perverse incentive for a newspaper seeking to combine with a broadcaster to reduce its print editions in order to avoid triggering the rule. Given the current

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[118] *See* 47 CFR § 73.3555, Note 6.

[119] For example, the *New Orleans Times-Picayune* and the *Birmingham News* reduced their print publications to three days a week, while the *Seattle Post-Intelligencer* eliminated its print publications in favor of a digital-only platform. *See Second Report and Order*, 31 FCC Rcd at 10047 (Dissenting Statement of then-Commissioner Pai); *see also 3 Gannett Papers Moving to 3-Day-A-Week Print Editions*, USNews.com (Mar. 9, 2017), https://www.usnews.com/news/best-states/Louisiana/articles/2017-03-09/3-gannett-papers-moving-to-3-day-a-week-print-editions; Andrew Beaujon, *Patriot-News, Post-Standard will reduce print frequency to three days a week*, Poynter.org (Aug. 28, 2012), http://www.poynter.org/2012/patriot-news-will-reduce-print-frequency-to-three-days-a-week/186824/.

media marketplace and the way consumers access content, the rule's reliance on a newspaper's printing schedule makes no sense.

40. As the modified rule adopted in the *Second Report and Order* is not necessary to promote the public interest, we cannot retain it consistent with Section 202(h). We emphasize that the rule's repeal in no way reflects a lessening of the importance of viewpoint diversity as a Commission policy goal. Rather, we conclude that the rule is no longer necessary to promote viewpoint diversity.

41. We find also that the NBCO Rule should be eliminated rather than relaxed. The Commission's previous attempts to relax the rule demonstrate the difficulty in designing an approach that works effectively for the range of market circumstances across the country. Paradoxically, previous attempts at relaxing the rule arguably threatened the greatest harm in small markets where cross-ownership may be needed most to sustain local news outlets.[120] The record does not provide an adequate basis for distinguishing areas where application of the rule could serve the public interest from those where it would not. There was significant

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[120] For example, under the modified NBCO Rule adopted in the *2006 Quadrennial Review Order*, a waiver of the rule was presumed to be inconsistent with the public interest if the proposed newspaper/broadcast combination was located in any market smaller than the top 20 DMAs in the country. 23 FCC Rcd at 2022-23, para. 20.

opposition to the modified rule proposed by the Commission in this proceeding,[121] and only Cox proposed a detailed alternative approach, and the Commission explained why it declined to adopt it.[122] Thus, the record does not support a narrowed restriction. Moreover, as discussed above, we find that it would be outdated and illogical to adopt a rule based on the distinction between print newspapers and digital outlets. Indeed, any modified rule that continues to single out newspapers of any kind cannot be sustained.

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[121] *See FNPRM*, 29 FCC Rcd at 4445-51, paras. 167-181; *NPRM*, 26 FCC Rcd at 17527-29, paras. 105-111. Both Cox and NMA criticized the Commission's modified approach as harmful to small and mid-sized markets where investment in local newsrooms may be needed most. NMA FNPRM Comments at 20-21; NMA FNPRM Reply at 5; Cox FNPRM Comments at 13-18; *see also Second Report and Order*, 31 FCC Rcd at 9937, para. 181.

[122] Cox proposed a presumptive waiver standard that it argued should apply to NBCO waiver requests in all markets. Cox argued that the first part of its proposed two-part test would protect diversity by requiring that at least 20 independently owned major media voices remain in the market following a newspaper/broadcast combination. Cox considered major media voices to include independently owned daily newspapers, full-power television and radio stations, cable and satellite television systems (counted as one voice), and the Internet (counted as one voice). The second part of Cox's test, intended to preserve localism, would require that at least three independent media voices that produce and distribute local news and information programming, other than the combining properties, remain in the market post-transaction. The Commission found that the first prong of the proposed test defined independent media voices too broadly and that the second prong could not be applied or enforced in an objective, content-neutral manner. *See Second Report and Order*, 31 FCC Rcd at 9936-37, 9939, paras. 180, 185; *FNPRM*, 29 FCC Rcd at 4447, para. 171.

42. In light of the significantly expanded media marketplace and the overall state of the newspaper industry, and our conclusion that the rule is not necessary to promote viewpoint diversity, competition, or localism, and may hinder localism, we conclude that immediate repeal is required by Section 202(h) and will permit combinations that would benefit consumers. Our decision will enable all broadcasters and newspapers to attract new investment in order to preserve and expand their local news output.

43. In addition, though we find that the entire NBCO Rule must be eliminated, we find that the record provides an additional and independent justification for eliminating the restriction on newspaper/radio combinations.[123] Opponents of this aspect of the rule argue that evidence in the record does not provide adequate support for the Commission's conclusion that radio is a sufficiently meaningful source of local news and public interest programming such that allowing newspaper/radio combinations could harm viewpoint diversity.[124] We

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[123] *See*, *e.g.*, NAB Petition at 21-25; Bonneville/Scranton Reconsideration Reply at 2, 4-6; Cox Reconsideration Comments at 2, 5-6. Reversing its past position, NABOB now supports elimination of the newspaper/radio cross-ownership restriction in order to help minority-owned broadcasters compete against larger players for audience and advertising revenues. NABOB Feb. 24, 2017 *Ex Parte* Letter at 2-3.

[124] *See Second Report and Order*, 31 FCC Rcd at 9921-26, paras. 150-58. Among other things, commenters point to previous Commission statements, including in the *NPRM* and *FNPRM*, to buttress their position that radio is a less significant source of local news and information. *See*, *e.g.*, NAB Petition at 21-22; Bonneville/Scranton Reconsideration Reply at 4 n.11; *see also NPRM*, 26 FCC Rcd at 17529-30, para. 112; *FNPRM*, 29 FCC Rcd at 4435-38, paras. 144-48.

agree. As discussed in the following section, we are eliminating the Radio/Television Cross-Ownership Rule based on our finding that the diminished contributions of local broadcast radio stations to viewpoint diversity, together with increasing contributions from new media outlets and the public interest benefits of radio/television combinations, no longer justify continued radio/television cross-ownership regulation.[125] For the same reasons relating to viewpoint diversity contributions of radio and the proliferation of alternative media voices, as well as the countervailing public interest benefits of newspaper/radio combinations, we conclude that the restriction on newspaper/radio combinations is not in the public interest and must be eliminated pursuant to Section 202(h).

e. Minority and Female Ownership

44. We find that repealing the NBCO Rule will not have a material impact on minority and female ownership. After seeking public comment on this topic a number of times, the Commission expressed its view that the rule does not promote or protect minority and female ownership.[126] Not only have past debates on this issue not persuaded the Commission that the ban on newspaper/broadcast combinations is necessary to protect or promote minority and female ownership,[127] no arguments were made in this reconsideration proceeding that would lead us to conclude otherwise. On the contrary, two organizations representing minority media owners seek relief from the rule's restrictions. The

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[125] We incorporate by reference the relevant discussion in Section III.A, *infra*.

[126] *FNPRM* 29 FCC Rcd at 4454-55, para. 190.

[127] *See Second Report and Order*, 31 FCC Rcd at 9942-44, paras. 192-97; *FNPRM*, 29 FCC Rcd at 4454-60, paras. 189-99.

National Newspaper Publishers Association (NNPA), a trade organization representing more than 200 Black-owned media companies, claims that the NBCO Rule should be eliminated because it impedes its members, which are "trusted community voices," from competing with large, unregulated rivals.[128] NNPA decries the rule's disincentive for its newspaper members to maximize their publication schedules given that the rule applies to daily newspapers.[129] It argues that the rule "prevents diverse local voices with strong community ties from identifying and investing in new ways to serve their readers, listeners and viewers."[130] In addition, NABOB has reversed its long-held opposition to the elimination of the ban on newspaper/radio cross-ownership, arguing that the broadcast industry—particularly NABOB's minority-owned member stations—should not be constrained from competing for audience share and advertising revenue.[131] According to NABOB, the ban on newspaper/radio cross-ownership has "outlived its usefulness," and we agree.[132]

45. These comments directly refute arguments in the record that repealing the rule will harm small broadcasters, including minority and women broadcasters,

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[128] NNPA Feb 13, 2017 *Ex Parte* Letter at 1.

[129] *Id.* at 2; *see also* 47 CFR § 73.3555, Note 6 (defining a daily newspaper as one that is published at least four days a week, in the dominant language in the market, and circulated generally in the community of publication).

[130] NNPA Feb 13, 2017 *Ex Parte* Letter at 2.

[131] NABOB Feb. 24, 2017 *Ex Parte* Letter at 1-3 (citing its concerns that relaxation of the media ownership rules has contributed to a decline in minority ownership, but supporting the repeal of the newspaper/radio cross-ownership restriction).

[132] *Id.* at 3 (citing NAB Petition at 14-16).

because they are at a competitive disadvantage compared to large media outlets.[133] As the Commission contemplated in the *FNPRM*, merging with a newspaper could boost the ability of a small broadcaster to compete more effectively in the market and to improve its local news offerings.[134] NNPA and NABOB seek-and our action today will provide-the flexibility to do just that.

46. We agree with Bonneville/Scranton that lifting the ban on newspaper/radio combinations is unlikely to have a significant effect on minority and female ownership in the radio market given that the thousands of radio stations across the country offer plenty of purchasing opportunities for minorities and women and at lower cost than most other forms of traditional media.[135] In addition, we do not anticipate that lifting the ban on newspaper/television combinations will lead to a meaningful decrease in the number of minority-owned television stations. Some groups previously expressed concern that minority-owned television stations would be targeted for acquisition if the ban were relaxed to favor waiver requests for certain newspaper/television combinations with stations ranked below the top four television stations in a market—a category that includes

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[133] *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 9943-44, paras. 194-95; *FNPRM* 29 FCC Rcd at 4457-58, para. 195.

[134] *FNPRM* 29 FCC Rcd at 4457, para. 194.

[135] Bonneville/Scranton Reconsideration Reply Comments at 6-8; Bonneville/Scranton FNPRM Reply at 8-9. *But see* WGAW FNPRM Comments at 10- 11 (arguing that eliminating the newspaper/radio cross-ownership restriction would reduce the number of independently owned radio stations and thus decrease ownership diversity because radio is one of the affordable entry points for minorities and women to enter the media industry).

many minority-owned stations.[136] Removing the ban across-the-board will ensure that no artificial incentives are created, and the record provides no evidence that minority- and female-owned stations will be singled out for acquisition, as some commenters have speculated.[137] To the contrary, record evidence demonstrates that previous relaxations of other ownership rules have not resulted in an overall decline in minority and female ownership of broadcast stations, and we see no evidence to suggest that eliminating the NBCO Rule will produce a different result and precipitate such a decline.[138] Ultimately, given the state of the newspaper industry, we expect that broadcasters may be better positioned to be the buyer, rather than the seller, in most transactions that flow from the rule's repeal. Furthermore, NNPA's submission suggests that some minority media owners may be poised to pursue cross-ownership acquisition and investment opportunities.[139] Therefore, eliminating the rule potentially could increase minority ownership of newspapers and broadcast stations.

47. In addition, we reject UCC et al.'s assertion that *Prometheus III* prevents us from repealing or modifying any of our broadcast ownership rules on reconsideration.[140] Contrary to UCC et al.'s argument, the Third Circuit's holding in *Prometheus III* does not require the

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[136] *FNPRM*, 29 FCC Rcd at 4455-57, paras. 192-94.

[137] *See*, *e.g.*, Free Press NPRM Comments at 21-22; Free Press NPRM Reply at 53-54; UCC *et al.* NPRM Comments at 26-27.

[138] *See Second Report and Order*, 31 FCC Rcd at 9894-95, 9911-12, paras. 77, 126.

[139] NNPA Feb. 13, 2017 *Ex Parte* Letter at 1-2.

[140] *See* UCC et al. Opposition at 2-3 (citing *Prometheus III*, 824 F.3d at 49-50).

Commission to adopt a socially disadvantaged business (SDB) definition before it can revise or repeal any rules; rather, the court simply required the Commission to complete its analysis of whether to adopt such a definition.[141] The Commission completed that required analysis in the *Second Report and Order* and declined to adopt an SDB standard.[142]

48. Finally, in the *Second Report and Order*, the Commission stated that the revised NBCO Rule it adopted would help promote ownership diversity.[143] The Commission's comment, however, did not indicate a belief that the rule would promote minority and female ownership specifically, but rather that the rule would promote ownership diversity generally by requiring the separation of newspaper and broadcast station ownership. More-

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[141] *See Prometheus III*, 824 F.3d at 49-50 ("[The Commission] must make a final determination as to whether to adopt a new definition. . . . We do not intend to prejudge the outcome of this analysis; we only order that it must be completed. Once the agency issues a final order either adopting an SDB- or ODP-based definition (or something similar) or concluding that it cannot do so, any aggrieved parties will be able to seek judicial review."); *see also FNPRM*, 29 FCC Rcd at 4454-55 ("Moreover, we reject the argument that the *Prometheus I* decision requires us to take no action unless we can show definitively that a rule change would have no negative impact on minority ownership levels.").

[142] *See Second Report and Order*, 31 FCC Rcd at 9976-10001, paras. 271-316 (readopting a revenue-based eligible entity standard and concluding that the record did not currently support the adoption of an additional race- and/or gender-based standard, such as an SDB standard).

[143] *Id.* at 9944, para. 197 (stating that the rule would "increase the likelihood of a variety of viewpoints and [] preserve potential ownership opportunities for new voices").

over, the Commission made it clear that promoting viewpoint diversity, as opposed to preserving or promoting minority and female ownership, was the purpose of its revised rule.[144] The record does not suggest that restricting common ownership of newspapers and broadcast stations promotes minority and female ownership of broadcast stations, and there is evidence in the record that tends to support the contrary.[145] Thus, fostering minority and female ownership does not provide a basis to retain the rule.

B. Radio/Television Cross-Ownership Rule

1. Introduction

49. We grant NAB's request for reconsideration of the Commission's decision in the *Second Report and Order* to retain the Radio/Television Cross-Ownership Rule.[146] The Radio/Television Cross-Ownership Rule prohibits an entity from owning more than two television stations and one radio station in the same market, unless the market meets certain size criteria.[147] In the

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[144] *Id.*

[145] *See FNPRM*, 29 FCC Rcd at 4456-57, para. 193.

[146] *See* NAB Petition at 14-25; *see also Second Report and Order*, 31 FCC Rcd at 9945-52, paras. 198-215.

[147] 47 CFR § 73.3555(c)(2). Specifically, if at least 10 independently owned media voices would remain in the market post-merger, an entity may own up to two television stations and four radio stations. If at least 20 independently owned media voices would remain in the market post-merger, an entity may own either: (1) two television stations and six radio stations, or (2) one television station and seven radio stations. In all instances, entities also must comply with the local radio and local television ownership limits. The market is determined by looking at the service contours of the relevant

Second Report and Order, the Commission retained the Radio/Television Cross-Ownership Rule with only minor modifications, finding that the rule remained necessary to promote viewpoint diversity.[148] On reconsideration, we eliminate the Radio/Television Cross-Ownership Rule, concluding that the Commission erred in finding the rule necessary to promote viewpoint diversity in local markets. Specifically, we find that we can no longer justify retention of the rule in light of broadcast radio's diminished contributions to viewpoint diversity and the variety of other media outlets that contribute to viewpoint diversity in local markets. In addition, given that the current rule already permits a significant degree of common ownership, we conclude that its elimination will have a negligible effect in most markets, particularly as ownership will continue to be limited by the Local Television and Local Radio Ownership Rules.

2. Background

50. The Commission originally restricted cross-ownership of radio and television stations with "the principal purpose" of promoting viewpoint diversity in local markets.[149] The *Second Report and Order* contains a detailed history of the rule, which we incorporate

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stations. *Id.* § 73.3555(c)(1). The rule specifies how to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems. *Id.* § 73.3555(c)(3)(i)-(iv). The rule applies only to commercial stations.

[148] *See Second Report and Order*, 31 FCC Rcd at 9945, 9948-50, paras. 199-200, 207-10.

[149] *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating To Multiple Ownership of Standard, FM and Television Broadcast Stations*, First Report and Order, 22 F.C.C.2d 306, 313, para. 25 (1970). At the time, the Commission also believed

herein.[150] In relevant part, in the *2006 Quadrennial Review Order*, the Commission retained the rule as adopted in 1999—a decision that the Third Circuit found to be "plausibly justified."[151] However, the Commission tentatively concluded in the *NPRM* that, based on information in the record and changes in the media marketplace, the Radio/Television Cross-Ownership Rule is no longer necessary to promote the public interest.[152] Consistent with past Commission findings, the *NPRM* tentatively concluded that the rule does not promote competition or localism.[153] The *NPRM* also tentatively concluded that the rule is no longer necessary to promote viewpoint diversity.[154] In support of this tentative conclusion, the Commission noted that the media ownership studies (specifically studies 8A and 8B) provided little evidence that radio/television cross-ownership impacted viewpoint diversity in local markets.[155] In addition, the Commission discussed the growth of alternate media outlets (e.g., Internet and cable) as sources of viewpoint diversity.[156]

51. The *FNPRM* sought further comment on the extent to which the Radio/Television Cross-Ownership Rule promotes the public interest.[157] Specifically, the

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that the cross-ownership restrictions would benefit competition. *Id.*

[150] *Second Report and Order*, 31 FCC Rcd at 9945-47, paras. 202-04.

[151] *Prometheus I*, 652 F.3d at 457.

[152] *NPRM*, 26 FCC Rcd at 17532-39, paras. 118-35.

[153] *Id.* at 17535-37, paras. 123-30.

[154] *Id.* at 17537-38, paras. 131-33.

[155] *Id.* at 17537, para. 132.

[156] *Id.* at 17537-38, para. 133.

[157] *FNPRM*, 29 FCC Rcd at 4460-61, 4465-67, paras. 200, 210-25.

Commission sought comment on evidence in the record suggesting that radio stations are not primary outlets that contribute to viewpoint diversity.[158] The Commission reiterated its tentative conclusions that the rule is not necessary to promote competition or to promote localism.[159]

52. Nevertheless, in the *Second Report and Order*, the Commission retained the Radio/Television Cross-Ownership Rule with only minor technical modifications, finding that the rule remained necessary to promote viewpoint diversity.[160] Despite its prior tentative conclusion to the contrary, the Commission concluded that the Radio/Television Cross-Ownership Rule remains necessary given that radio stations and television stations both contribute in meaningful ways to promote viewpoint diversity in local markets.[161] The Commission further claimed that the rule continues to play an independent role in serving the public interest separate and apart from the Local Radio and Local Television Ownership Rules, which are designed primarily to promote competition.[162]

53. In its petition for reconsideration, NAB asserts that the decision in the *Second Report and Order* to retain the Radio/Television Cross-Ownership Rule (with

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[158] *Id.* at 4465-68, paras. 210-17.

[159] *Id.* at 4465, 4468-69, paras. 210, 218-21.

[160] *See Second Report and Order*, 31 FCC Rcd at 9945, 9948-50, paras. 199-200, 207-10. The commission modified the rule only to the extent necessary to update its references to two analog television service contours that became obsolete with the transition to digital television service. *See id.* at 9950-51, paras. 211-14.

[161] *See id.* at 9948-49, paras. 207-09.

[162] *See id.* at 9949, para. 209.

only minor technical modifications) was arbitrary and capricious and contrary to Section 202(h) of the 1996 Act.[163] UCC et al. oppose NAB's request for reconsideration of the rule.[164]

3. Discussion

54. On reconsideration, we eliminate the Radio/Television Cross-Ownership Rule, concluding that it is no longer necessary to promote viewpoint diversity in local markets.[165] We conclude that the Commission erred in finding in the *Second Report and Order* that broadcast radio stations contribute to viewpoint diversity to a degree that justifies retention of the rule, particularly in light of other local media outlets that contribute to viewpoint diversity. We also conclude that, given that the rule already permits a significant degree of common ownership, it is doing very little to promote

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[163] NAB Petition at 14-25.

[164] UCC et al. Opposition at 6-8.

[165] The Commission has previously concluded that Radio/Television Cross-Ownership Rule is not necessary to promote competition or localism, and we affirm that conclusion here. *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 9948, para. 207 n.631; *FNPRM*, 29 FCC Rcd at 4465, para. 210. NAB argues there is evidence that radio/television cross-ownership produces localism benefits and that retention of the Radio/Television Cross-Ownership Rule therefore serves to harm localism. NAB Petition at 15-16. By contrast, UCC et al. argue that the Commission adequately supported its finding that cross-ownership of media outlets harms localism. UCC et al. Opposition 6-7. The record in this proceeding, including the reconsideration pleadings, gives us no cause to disturb the long-standing conclusion that the rule is not necessary to promote localism. We note, however, that elimination of the rule is likely to have a negligible impact in most markets, so any impact on localism—positive or negative—will be similarly negligible. *See infra* para. 62.

viewpoint diversity and its elimination therefore will have a negligible effect. Finally, we find that elimination of the rule is not likely to have a negative impact on minority and female ownership.

55. Contrary to the Commission's findings in the *Second Report and Order*, as discussed below, we find that broadcast radio stations' contributions to viewpoint diversity in local markets no longer justify retention of the Radio/Television Cross-Ownership Rule. As noted above, the Commission tentatively concluded in the *NPRM* that the rule was no longer necessary to promote viewpoint diversity.[166] It then sought further comment on that tentative conclusion in the *FNPRM*.[167] The Commission's approach in the *NPRM and FNPRM* was based on an already robust record—which was strengthened by comments filed in response to the *FNPRM*—demonstrating that local radio stations are not primary sources of viewpoint diversity in local markets and that alternative media outlets are a growing and important source of viewpoint diversity. The Commission, however, reversed itself in the *Second Report and Order*, concluding that the rule should be retained. In doing so, the Commission largely relied on limited evidence, much of it anecdotal or immaterial, to conclude that radio contributes to viewpoint diversity in local markets to a degree sufficient to justify retention of the rule.[168] For example, the comments cited by the Commission primarily discussed format selection, music programming,

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[166] *See NPRM*, 26 FCC Rcd at 17537-38, paras. 131-33.

[167] *See FNPRM*, 29 FCC Rcd at 4465-68, paras. 210-17.

[168] *See Second Report and Order*, 31 FCC Rcd at 9949, para. 209.

and national news content, all of which are aspects of radio programming that do not inform our viewpoint diversity analysis.[169]

56. The Commission also discussed broadcast radio's contributions to viewpoint diversity in the NBCO Rule Section of the *Second Report and Order*.[170] That discussion was equally unpersuasive. The Commission failed to demonstrate that broadcast radio stations are significant independent sources of local news, relied on statistics that failed to distinguish between local and national news content,[171] referenced examples of broadcast content on low-power stations,[172] and relied heavily on

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[169] *See* UCC et al. FNPRM Comments at 35-43; NHMC FNPRM Comments at 6-11. The *2002 Biennial Review Order* contains a lengthy discussion of the five types of diversity—viewpoint, outlet, program, source, and minority and female ownership—including how they are defined and how they relate to the Commission's media ownership analysis. *2002 Biennial Review Order*, 18 FCC Rcd at 13627-37, paras. 18-52. Viewpoint diversity, for example, is measured by independent media outlets that provide local news and information, as opposed to those outlets that primarily offer regional and national content. *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 9914, 9917-26, paras. 135, 142-59 (discussing viewpoint diversity in the context of the NBCO Rule).

[170] *See Second Report and Order*, 31 FCC Rcd at 9924-25, paras. 154-56.

[171] For example, an RTDNA survey cited by the Commission failed to describe the types of content that were included in the category of local news, while a study by the Media Insight Project did not differentiate between local news and news in general. *See id.* at 9924-25, para. 155 & n.426.

[172] *Id.* at 9925, para. 156 n.431. The rule does not apply to low-power stations, and their contribution to diversity is unaffected by the decision to retain or repeal the radio-television cross-ownership rule.

only a handful of anecdotes regarding broadcast radio's contributions to viewpoint diversity.[173] All of these flaws undermine the broad finding that broadcast radio stations contribute to viewpoint diversity to an extent that continues to justify cross-ownership regulation.

57. NAB argues that the Commission failed to justify its departure from its position in the *NPRM* and *FNPRM* that radio stations make only limited contributions to local viewpoint diversity.[174] We agree and find that the Commission's conclusion in the *Second Report and Order* that radio contributes to local viewpoint diversity in "meaningful" ways, such that it justified retention of the rule—clear departure from its earlier, well-supported position—was not supported by the record.[175] The Commission has long maintained that broadcast radio stations are not a primary source of viewpoint diversity in local markets.[176] While the record indicates that broadcast radio stations may contribute to viewpoint diversity in local markets to a certain degree,[177] we find that, in the current media marketplace, these contributions no longer justify restrictions on television/radio cross-ownership.

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[173] *See id.* at 9925-26, 157.

[174] *See* NAB Petition at 21-25. *But see* UCC et al. Opposition 7-8 (arguing that NAB has incorrectly characterized the Commission's decision as an abrupt reversal of a longstanding view).

[175] *See Second Report and Order*, 31 FCC Rcd at 9948, para. 207.

[176] *See id.* at 9921-26, paras. 150-59; *FNPRM*, 29 FCC Rcd at 4465-67, paras. 212-15.

[177] *See*, *e.g.*, UCC et al. FNPRM Comments at 35-43, App. D (Examples of Editorial Programming on Minority-Owned Radio Stations); NHMC FNPRM Comments at 6-11. As noted above, however, these comments rely primarily on issues that are not relevant to our

58. For example, the Commission itself acknowledged that consumers' reliance on radio for some local news and information has declined significantly over time—falling from 54 percent to 34 percent over the last two decades—as has the number of all-news commercial radio stations—down to 30 stations from (the already low) 50 stations in the mid-1980s out of over 11,000 commercial radio stations.[178] Moreover, the overwhelming majority of programming on news-talk stations is nationally syndicated, rather than locally produced.[179] Comments in the record, which the *Second Report and Order* did not address or dispute, support these findings. A Gallup poll found that only six percent of Americans turn to radio as their main news source, and a Pew study found that the percentage of Americans reporting that they got any news from radio on the previous day dropped from more than 50 percent in 1990 to 33 percent in 2012 (consistent with earlier findings cited by the Commission).[180] Only five percent cite radioas a main source for political and arts and cultural information, four percent for crime updates, and three percent or less for information on various other topics.[181] A 2013 Pew study confirmed the overall trend, finding that news programming had been "relegated to an [even] smaller corner of the listening landscape."[182] As we discuss

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viewpoint diversity analysis, such as program diversity or national news content. *See supra* note 169 and accompanying text.

[178] *See FNPRM*, 29 FCC Rcd at 4467, para. 215.

[179] *Id.*

[180] Morris Communications FNPRM Comments at 14.

[181] Morris Communications FNPRM Reply at 4.

[182] *Id.* at 3 (citing PEW Research Center, Audio: Digital Drives Listening Experience 1 (2013), http://stateofthemedia.org/2013/audio-

above, the attempt in the *Second Report and Order* to overcome the record in this proceeding of radio's relatively minor contribution as a source of local news and the Commission's historical recognition of radio's reduced role in promoting viewpoint diversity is unpersuasive.[183] The record supports far better the Commission's tentative conclusions in the *NPRM* and *FNPRM* regarding radio's limited contributions to viewpoint diversity in local markets.

59. In addition, we find that, as NAB contends, the Commission's decision to retain the rule did not properly acknowledge the realities of the digital media marketplace, in which consumers now have access to a multitude of information sources that contribute to viewpoint diversity in local markets.[184] In the *Second Report and Order*, the Commission found that platforms such as the Internet or cable do not contribute significantly to viewpoint diversity in local markets and therefore do not meaningfully protect against the potential loss of viewpoint diversity that would result from increased radio/television cross-ownership.[185] UCC et al. argue that the Commission properly found that cable and satellite programming do not meaningfully contribute to coverage of local issues and that information available online

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digital-drives-listener-experience). Even within this smaller universe, a substantial segment consists of National Public Radio (NPR)-affiliated noncommercial broadcast radio stations, which are not subject to the broadcast ownership limits. At present, NPR has over 900 member stations in the U.S. NPR, NPR Member Stations and Public Media, http://www.npr.org/about-npr/178640915/npr-stations-and-public-media (visited Oct. 11, 2017).

[183] *Supra* para. 56.

[184] *See* NAB Petition at 16-21.

[185] *Second Report and Order*, 31 FCC Rcd at 9948-49, para. 208.

usually originates from traditional media sources.[186] We disagree with UCC et al. We find instead that the Commission erred in discounting the role that non-traditional sources play in the local media marketplace and that the contributions of such outlets result in greater access to independent information sources in local markets. In particular, evidence in the record clearly demonstrates the emergence of online outlets—including many unaffiliated with broadcast or print sources—that now offer local news and information.[187] And as discussed above, we find that the Commission failed to properly credit the local news offerings of cable operators.[188] Even if cable and online outlets are not yet primary sources of local news and information programming, their contributions cannot be overlooked. While the Commission relied on a handful of anecdotes to overcome its earlier, compelling findings regarding broadcast radio's limited contributions to local news and information programming, it refused to give appropriate consideration to more persuasive evidence of the increasing contributions of non-traditional media—a trend the Commission had previously noted, and which has continued.[189]

60. The decline of radio's role in providing local news and information, together with the rise of online

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[186] *See* UCC et al. Opposition at 7.

[187] *See supra* para. 19.

[188] *See supra* para. 19.

[189] *See*, *e.g.*, *NPRM*, 26 FCC Rcd at 17537-38, para. 133 (noting the evidence demonstrating that new media outlets are a growing contributor to viewpoint diversity in local markets); *see also supra* note 187 (citing record evidence of the growing contributions of online local news outlets).

sources, marks a change from the circumstances the Commission faced when it upheld the rule in the *2006 Quadrennial Review Order*.[190] Accordingly, we find that contributions to viewpoint diversity from platforms such as the Internet and cable, while not primary sources of viewpoint diversity in local markets, help mitigate any potential loss of viewpoint diversity that might result from limited increases in radio/television cross-ownership.[191]

61. Importantly, we do not mean to suggest that broadcast radio stations make no contribution to viewpoint diversity in local markets—they do. In order to continue to justify the radio/television cross-ownership limits under Section 202(h), however, we are compelled to consider these contributions in the context of the broader marketplace as it exists today, in which broadcast television, print, cable, and online sources all contribute to viewpoint diversity. Broadcast radio's contributions notwithstanding, the wide selection of sources now available renders the Radio/Television Cross-Ownership Rule obsolete in today's vibrant media marketplace.

62. Moreover, we find that because the rule already permits significant cross-ownership in local markets, eliminating it will have only a minimal impact on common ownership, as parties will continue to be constrained by the applicable ownership limits in the Local

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[190] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2059-60, para. 84 (affirming that, at that time, the public continued to rely on both radio and television for news and that the two therefore served as substitutes for diversity purposes); *see also Prometheus II*, 652 F.3d at 456-58 (finding that the Commission provided "a reasoned explanation" for its decision to retain the rule).

[191] *See Second Report and Order*, 31 FCC Rcd at 9918-21, paras. 145-49.

Television and Local Radio Ownership Rules.[192] For example, pursuant to the Radio/Television Cross-Ownership Rule, in the largest markets, entities are permitted to own, in combination, either two television stations and six radio stations or one television station and seven radio stations. The Local Radio Ownership Rule permits an entity to own a maximum of eight radio stations in a single market. Therefore, in the largest markets, absent the Radio/Television Cross-Ownership Rule, an entity approaching the limits of the existing cap will be permitted to acquire only one additional radio station and remain in compliance with the Local Radio Ownership Rule. Likewise, an entity with one television station already could acquire only one additional station in these large markets under the Local Television Ownership Rule. Thus, the effect of eliminating the radio/television cross-ownership rule will be small and, as discussed above, mitigated by contributions to viewpoint diversity from other media outlets. In addition, the local ownership limits for television and radio, while intended primarily to promote competition, will continue to prevent an undue concentration of broadcast facilities, thereby preserving opportunities for diverse local ownership, and are therefore adequate to serve the goals the Radio/Television Cross-Ownership Rule was intended to promote.[193]

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[192] *FNPRM*, 29 FCC Rcd at 4467, para. 216 (citing *NPRM*, 26 FCC Rcd at 17535-36, para. 126).

[193] In this order, we deny requests to modify or relax the ownership limitations in the Local Radio Ownership Rule, which the Commission retained without change in the *Second Report and Order*, and although we modify the Local Television Ownership Rule, we find that the revised rule remains sufficient to protect against excessive consolidation in local television markets, such that retention of the

63. In light of its limited benefits, we find that the Radio/Television Cross-Ownership Rule no longer strikes an appropriate balance between the protection of viewpoint diversity and the potential public interest benefits that could result from the efficiencies gained by common ownership of radio and television stations in a local market, efficiencies that the Commission has previously recognized.[194] For example, NAB cites numerous Commission studies that found that radio/television cross-ownership produces public interest benefits, including increased news and public affairs programming.[195] Tribune also provides examples of how its co-owned radio/television combinations have been able to improve outreach to their local community and work collaboratively to improve coverage of issues of local concern.[196] The current rule prevents these types of localism benefits from accruing more broadly, without providing meaningful offsetting benefits to viewpoint diversity. As such, we can no longer justify retention of the Radio/Television Cross-Ownership Rule under Section 202(h).[197]

Radio/Television Cross-Ownership Rule is no longer necessary in the public interest.

[194] *See 2006 Quadrennial Review Order*, 23 FCC Rcd at 2060, para. 83 (noting that the Radio/Television Cross-Ownership Rule seeks to strike a balance between "protection of diverse viewpoints and the 'efficiencies' and 'public service benefits' that can result from 'joint ownership and operation of both television and radio stations in the same market.'").

[195] *See* NAB Petition at 15-16 n.38; NAB FNPRM Comments at 85-86.

[196] Tribune NPRM Comments at 77.

[197] In light of the significant common ownership already allowed under the rule, we do not believe it appropriate to modify and retain the rule, having found that the current rule is no longer in the public

64. *Minority and Female Ownership*. Lastly, consistent with our preliminary view in the *FNPRM*, we find that the record fails to demonstrate that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership.[198] While broadcast radio remains an important entry point into media ownership,[199] eliminating this rule will not result in significant additional consolidation because of the constraints of the Local Radio Ownership Rule.[200] Furthermore, there is no evidence that any additional common ownership that would be permitted as a result of eliminating the Radio/Television Cross-Ownership Rule would disproportionately or negatively impact minority- and female-owned stations. Indeed, the analyses within the contexts of the Local Television Ownership Rule and

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interest under Section 202(h). Indeed, the record demonstrates that there is no policy justification—competition, localism, or viewpoint diversity—upon which to base such a revised rule. Because we are eliminating the Radio/Television Cross-Ownership Rule on the grounds discussed herein, we need not reach alternative arguments involving the impact of ownership on viewpoint diversity. *See* NAB Petition at 14-15 (arguing that the Commission failed to establish that diverse ownership of media outlets leads to viewpoint diversity). *But see* UCC et al. Opposition at 6 (arguing that the Commission cited ample evidence of a connection between ownership of media outlets and the content they deliver).

[198] *FNPRM*, 29 FCC Rcd at 4469-70, para. 222 (noting the lack of evidence in the record to suggest that eliminating the rule would harm minority and female ownership or that the rule has protected or promoted minority or female ownership).

[199] UCC et al. FNPRM Comments at 41-43 (arguing that permitting further consolidation would disserve the public interest because radio provides one of the few entry points into media ownership for minorities and women and that radio stations owned by minorities and women promote diversity).

[200] *See supra* para. 62 & note 193.

the Local Radio Ownership Rule suggest that previous relaxations of those rules have not resulted in reduced levels of minority and female ownership.[201] We find that the record provides no information to suggest that eliminating the Radio/Television Cross-Ownership Rule will have a different impact on minority and female ownership.[202]

65. In the *Second Report and Order*, the Commission found that although the rule could help promote opportunities for diversity in broadcast television and radio ownership, it was not being retained for "the purpose of preserving or creating specific amounts of minority and female ownership."[203] The Commission's comment, however, did not indicate a belief that the rule would promote minority and female ownership specifically, but rather that the rule would promote ownership diversity generally by requiring the separation of radio and television broadcasters. We cannot justify retaining the rule under Section 202(h) based on the unsubstantiated hope that the rule will promote minority and female ownership.

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[201] *See Second Report and Order*, 31 FCC Rcd 9894-95, 9911-12, paras. 77, 126.

[202] We disagree with the general assertion by UCC et al. that the Commission cannot modify any of its media ownership rules without further study of the impact on minority and female ownership. For a discussion of this issue, see paragraph 47, *supra.*

[203] *See Second Report and Order*, 31 FCC Rcd at 9951-52, para. 215.

C. Local Television Ownership Rule

1. Introduction

66. Upon reconsideration, we find that the Local Television Ownership Rule adopted in the *Second Report and Order* is not supported by the record and must be modified. Specifically, we eliminate the requirement that at least eight independently owned television stations must remain in the market after combining ownership of two stations in a market (Eight-Voices Test), as the Commission's rationale for retaining the test was unsupported by the record and we conclude that it is no longer necessary in the public interest. Furthermore, we adopt a hybrid approach to application of the restriction on ownership of two top-four ranked stations in the same market (Top-Four Prohibition) that will include an opportunity for case-by-case evaluation to account for circumstances in which application of the prohibition may be unwarranted given certain factors affecting a particular market or a particular transaction.[204]

2. Background

67. *The Second Report and Order* effectively retained the existing Local Television Ownership Rule (with only a minor technical modification of the contour overlap provision to reflect the transition to digital broadcasting), finding that the rule remained necessary to promote competition. Despite a record replete with evidence of the significant changes in the video marketplace, the Commission's decision left in place ownership

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[204] The text of the revised rule can be found in Appendix A, hereto.

restrictions originally implemented in 1999.[205] Under the rule adopted in the *Second Report and Order*, an entity may own up to two television stations in the same market if: (1) the digital noise limited service contours (NLSCs) of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the market following the combination.

68. NAB and Nexstar filed petitions for reconsideration of the Local Television Ownership Rule, specifically challenging the Top-Four Prohibition and the Eight-Voices Test.[206] ACA and UCC et al. opposed reconsideration, arguing that the petitions failed to identify any material error or omission in *the Second Report and Order* with respect to the Local Television Ownership Rule.[207]

3. Discussion

69. On reconsideration, we adopt a revised Local Television Ownership Rule, finding that the rule adopted in the *Second Report and Order* is no longer "necessary in the public interest as a result of competition."[208] Our revised rule reflects our assessment of both the current video marketplace and the continued importance of broadcast television stations in their local markets.

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[205] *See Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12924-43, paras. 42-91 (1999) (*1999 Ownership Order*).

[206] *See* NAB Petition at 1-9; Nexstar Petition at 4-11.

[207] *See* ACA Opposition at 8; UCC et al. Opposition at 5-6.

[208] 1996 Act § 202(h).

Specifically, we find that the Eight-Voices Test is not supported by the record and must be eliminated. In addition, we modify the Top-Four Prohibition by incorporating a new case-by-case review process to address evidence in the record that the prohibition may be unwarranted in certain circumstances. We find that these modifications to the Local Television Ownership Rule are not likely to have a negative impact on minority and female ownership.

70. In adopting these changes, we reject the argument made by ACA that reconsideration is inappropriate because petitioners rely on arguments that have been fully considered and rejected by the Commission within the same proceeding.[209] Neither the Communications Act nor the Commission's rules preclude granting petitions for reconsideration that fail to rely on new arguments.[210] Commission precedent establishes that

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[209] ACA Opposition at 3-4.

[210] *See* 47 U.S.C. § 405 ("[I]t shall be lawful for . . . the Commission . . . , in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. . . . The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate. . . . "); 47 CFR § 1.429 (i) ("The Commission may grant the petition for reconsideration in whole or in part or may deny or dismiss the petition. Its order will contain a concise statement of the reasons for the action taken."). Likewise, we reject UCC's claim that reconsideration is not warranted unless petitioners present new evidence. Letter From Cheryl A. Leanza, Policy Advisor, UCC OC Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50 et al. (Nov. 9, 2017). UCC's reliance on Section 1.429(b) of our rules is misplaced, as this section does not *require* petitioners to support their claims of Commission error with new evidence. 47 CFR § 1.429(b);

reconsideration is generally appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.[211] While the petitioners repeat some arguments made earlier in this proceeding, they nonetheless provide valid grounds for the Commission to reconsider its previous action.[212] As discussed below, we find that the petitioners have identified material errors in the

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see also infra note 211 (discussing circumstances warranting reconsideration).

[211] *See, e.g., Petition for Reconsideration by Acadiana Cellular General Partnership*, Order on Reconsideration, 20 FCC Rcd 8660, 8663, para. 8 (2006); *Universal Service Contribution Methodology et al.*, Order on Reconsideration, 27 FCC Rcd 898, 901, para. 8 (2012) ("Reconsideration of a Commission's decision may be appropriate when the petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner's last opportunity to present such matters. If a petition simply repeats arguments that were previously considered and rejected in the proceeding, the Commission may deny them for the reasons already provided."). Even if a petition is repetitious, the Commission can, in its discretion, consider it. *See Universal Service Contribution Methodology et al.*, 27 FCC Rcd at 901, para. 8 (Commission "may deny" repetitious petition); *Application of Paging Systems, Inc.*, Order on Reconsideration, 22 FCC Rcd 4602, 4604 n.23 (WTB 2007) (considering repetitious petition on the merits, even though staff could dismiss it); *Sequoia Cablevision*, 58 FCC 2d 669, 672, para. 6 (1976) (decision by the full Commission partially granting a repetitious petition for reconsideration of an order denying reconsideration despite procedural objections because "the language of Section 1.106(k)(3) of the Rules [applicable to petitions for reconsideration of orders denying reconsideration] is permissive, not mandatory").

[212] *See* NAB Petition at 5-6; Nexstar Petition at 9, 11.

Second Report and Order warranting reconsideration of certain aspects of the Local Television Ownership Rule.

71. *Market.* We find that the Commission's decision in the *Second Report and Order* to adopt a rule focused on promoting competition among broadcast television stations in local television viewing markets was appropriate given the record compiled in this proceeding.[213] Commenters in this reconsideration proceeding—and the proceeding in general—express conflicting views on the impact of non-broadcast video sources on the Commission's market definition. NAB and Nexstar urge the Commission to expand the market definition to include non-broadcast video alternatives, such as online and multichannel video programming distributors (MVPD) video programming sources.[214] On the other hand, ACA argues that the Commission properly determined

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[213] *See Second Report and Order*, 31 FCC Rcd at 9872-75, paras. 23-30. The Commission concluded in the *Second Report and Order* that non-broadcast video offerings still do not serve as meaningful substitutes for local broadcast television and that competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community in order to gain market share. *Id.*

[214] NAB Petition at 2-3 (arguing that non-broadcast video sources should be considered in the relevant market because they divert audiences and advertisers away from local television stations despite the national focus of online and cable network programming); Nexstar Petition at 8 (asserting that, regardless of whether these other forms of media focus on local content, new media has an undeniable impact on the competitive realities faced by local television broadcasters).

in the *Second Report and Order* that local broadcast television remains the relevant product market.[215] While the video marketplace has changed substantially since the current television ownership limits were adopted in 1999 and since the last Commission review of these rules concluded in 2008, broadcast television stations still play a unique and important role in their local communities.[216] As such, we believe that, on the current record, a rule focused on preserving competition among local broadcast television stations is still warranted. Thus, we do not include other types of video programming providers within the market to which the restriction applies. We emphasize, however, that this conclusion could change in a future proceeding with a different record.

72. Our finding does not mean, however, that changes outside the local broadcast television market should not factor into the Commission's assessment of the rule under Section 202(h) or that the Commission is free to retain its existing rule without any adjustments that take into account marketplace changes.[217] Indeed,

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[215] ACA Opposition at 8, 11 (stating non-broadcast video offerings are not meaningful substitutes for local broadcast television and that competition within a local market amongst broadcasters motivates broadcast television stations to invest in better programming tailored to local needs and interests).

[216] *Second Report and Order*, 31 FCC Rcd at 9872-75, paras. 23-30. *But see* Nexstar Petition at 7-8 (citing a Pew Internet study that found the Internet ranked as either the first or second most important source of information for the vast majority of local subjects examined).

[217] *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 10060 (Dissenting Statement of Commissioner O'Rielly). We note that the Commission will consider the state of the marketplace in its review

television broadcasters' important role makes it critical for the Commission to ensure that its rules do not unnecessarily restrict their ability to serve their local markets in the face of ever-growing video programming options. Consumers are increasingly accessing video programming delivered via MVPDs, the Internet, and mobile devices.[218] Moreover, the online video distributor (OVD) industry—which includes entities such as Netflix and Hulu—continues to grow and evolve. In addition to providing on-demand access to vast content libraries, many OVDs are now offering original programming and/or live television offerings similar to traditional MVPD offerings.[219] The *Second Report and Order* acknowledged the popularity of these services but failed to properly account for this in its analysis. Accordingly, we reconsider the Local Television Ownership Rule and adopt common sense modifications that will help local

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of the Local Television Ownership Rule in the 2018 Quadrennial Review proceeding.

[218] *See*, *e.g.*, Nexstar Petition at 4-6.

[219] *See*, *e.g.*, *Seventeenth Video Competition Report*, 31 FCC Rcd at 4529, para. 136 ("In 2015, Netflix secured 34 Emmy nominations for its original programming, just behind the 41 nominations received by both NBC and CBS and FX's 38 nominations."); *id.* at 4570, para. 224 ("Sony's PlayStation Vue is a cloud-based streaming service available in seven major U.S. cities offering live TV, movies, and sports through their PS3 and PS4 consoles."). The options for live online streaming services continue to grow. *See*, *e.g.*, Press Release, Hulu, *Hulu Launches New Live TV Streaming Service, Adds Channels from Scripps Network Interactive* (May 3, 2017), https://www.hulu.com/press/hulu-lauches-new-live-tv-steamng-service-adds-channels-fromm-scripps-networks-interactive/; Press Release, AT&T, *The Revolution is Here: AT&T Offers 3 Ways to Stream Premium Video Content* (Nov. 28, 2016), http://about.att.com/story/att_offers_three_ways_to_stream_premium_video_content.html.

television broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace.

73. *Eight- Voices Test.* Upon reconsideration, we find that the Eight-Voices Test is unsupported by the record or reasoned analysis and is no longer necessary in the public interest.[220] Accordingly, we grant the NAB Petition and the Nexstar Petition with respect to this issue.

74. Despite the fact that the Commission has spent years seeking comment regarding the local ownership rule, the record lacks evidence sufficient to support the Commission's decision to retain the Eight-Voices Test. In the *Second Report and Order*, the Commission asserted that competition among stations affiliated with the Big Four networks (often the top-four rated broadcast stations in a local market) and at least four independent competitors unaffiliated with a Big Four network motivates all of the stations in a market to improve their programming, including providing additional local news and public interest programming.[221] Yet the Commission did not provide or cite any evidence to support this argument, even though the Eight-Voices Test has been around since 1999 (more than enough time to observe whether the Eight-Voices Test has been having the expected impact in local markets).

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[220] *See* NAB Petition at 5; Nexstar Petition at 11; Sinclair Reply to Opposition at 3; *see also Second Report and Order*, 31 FCC Rcd at 10053-54 (Dissenting Statement of then-Commissioner Pai).

[221] *Second Report and Order*, 31 FCC Rcd at 9886-87, para. 56.

75. The Commission also failed to explain adequately why the number of independent television stations must be equal to the number of top-performing stations in a market. The Commission stated that a significant gap in audience share persists between the top-four rated stations in a market and the remaining stations in most markets, but it offered no justification for the notion that the dominance of four top-performing stations must be balanced by an equal number of independent, lower-performing stations. The Commission provided no precedent, record evidence, or economic theory to support this notion. Moreover, a significant gap in audience share between the top-four stations and the other stations in a market could also logically justify permitting the common ownership of non-top-four stations to form a stronger competitor to the top-four stations and thus promote competition, even if fewer than eight independent voices remain.

76. Instead, the Commission's primary justification for retaining the Eight-Voices Test apparently stems from the historical use of the number eight as the proper number of voices when the rule was revised in 1999 to permit duopoly ownership in certain circumstances.[222] Notably, that decision relied on viewpoint diversity grounds to determine the appropriate numerical limit.[223] The Commission subsequently determined that the rule was no

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[222] *See 1999 Ownership Order*, 14 FCC Rcd at 12934, para. 67.

[223] *Id.* ("The 'eight independent voice' component of the rule provides a clear benchmark for ensuring a minimum amount of diversity in a market. . . . Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity.").

longer necessary to promote viewpoint diversity and instead relied on competition to support its adoption of the exact same voices limit in the *2006 Quadrennial Review Order*.[224] The Commission, however, offered no empirical evidence to support this line drawing in the *2006 Quadrennial Review Order* as necessary to preserve competition, and as discussed above, we find that the rationale set forth in the *Second Report and Order* was flawed. Although the Commission's decision to retain the Eight-Voices Test in the *2006 Quadrennial Review Order* was upheld in *Prometheus II*,[225] the Commission is obligated under Section 202(h) to justify its broadcast ownership rules based on the existing record and in light of current marketplace realities. On reconsideration, we find no record support for retaining the Eight-Voices Test, and we conclude that retaining it does not serve the public interest. Further, as discussed below, the Eight-

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[224] *2006 Quadrennial Review Order*, 23 FCC Rcd 2010, 2066, para. 101 ("While other outlets contribute to the diversity of voices in local markets, we still find that it is necessary in the public interest to ensure that there are at least eight independently owned local television stations in order to ensure robust competition for local television viewers and the continued provision of video programming responsive to the needs and interest of viewers in local markets."); *see also id.* at 2064 ("[T]the Commission's local television ownership rule promotes competition . . . within local television markets."); *id.* at 2065 ("We conclude that the local television ownership rule is no longer necessary to foster diversity because there are other outlets for diversity of viewpoint in local markets, and a single-service ownership restriction is not necessary to foster diversity.").

[225] *Prometheus II*, 652 F.3d at 459-60.

Voices Test prevents the realization of public interest benefits. Accordingly, it must be eliminated.[226]

77. The Commission not only failed to provide a reasoned basis for retaining the Eight-Voices Test; it also ignored evidence in the record demonstrating that the Eight-Voices Test lacks any economic support, is inconsistent with the realities of the television marketplace, and prevents combinations that would likely produce significant public interest benefits. Indeed, no commenter has produced evidence of any other industry where the government employs an eight-competitor

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[226] We also find that the record fails to support the adoption of a different voice test, e.g., six voices, despite specific requests for comment on alternative voice tests in this proceeding. *See*, *e.g.*, *NPRM*, 26 FCC Rcd at 17506, para. 46. One commenter argued for lowering the voice count in general, and another proposed changing the test to four voices—a proposal we reject because such a restriction would be redundant given our decision, as discussed below, to retain the Top-Four Prohibition. *See* Tribune NPRM Reply at 35; Grant Group NPRM Comments at 9. NAB argued that the Eight-Voices Test should be eliminated and not replaced with an alternative test. NAB NPRM Comments at 28-29 (stating that reducing the voice count to six or seven would not provide adequate relief to broadcasters). No other commenters offered support for a different voice test. We find no justification for relying on an arbitrary voice count to promote competition, and we conclude that the public interest is better served by the revised rule we adopt today, which will allow combinations that will help lower-rated stations better serve their viewers while preserving the restriction that an entity may not own two top-four rated stations in a market unless it can demonstrate that such a combination will serve the public interest and in no event will allow common ownership of more than two stations in a market, subject to the contour overlap provision. We find that this is a more effective way to promote competition and still avoid harms associated with significant concentration in local markets than an arbitrary "remaining voices" test

test. In multiple instances, the Commission acknowledged the potential public interest benefits of common ownership, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community.[227] We find that the Eight-Voices Test denies the public interest benefits produced by common ownership without any evidence of countervailing benefits to competition from preserving the requirement. Furthermore, these markets—including many small and mid-sized markets that have less advertising revenue to fund local programming—are the places where the efficiencies of common ownership can often yield the greatest benefits.[228] Our action in repealing the Eight-Voices Test will enable local television broadcasters to realize these benefits and better serve their local markets. In particular, the record suggests that local news programming is typically one of the largest operational costs for broadcasters; accordingly, stations may find that common ownership enables them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets.[229]

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[227] *See Second Report and Order*, 31 FCC Rcd at 9878, 9881, paras. 38, 44.

[228] *See id.* at 10053 (statement of then-Commissioner Pai highlighting the potential benefits achieved by repealing the Eight-Voices Test); *see also* Nexstar Petition at 14 (identifying adverse consequences of the Eight-Voices Test in small markets); Gray June 28 *Ex Parte* Letter at 4 (arguing that mid-sized and small markets are especially susceptible to the challenges of decreased revenue and increased operational costs).

[229] *See*, *e.g.*, Gray June 28 *Ex Parte* Letter at 3-4, 7-8. After the draft order in this proceeding was publicly released, DISH submit-

78. *Top-Four Prohibition.* In contrast to the Eight-Voices Test, we find that the Commission's decision in the *Second Report and Order* to treat combinations of two top-four stations differently from other combinations is supported in the record. We therefore deny the NAB Petition and the Nexstar Petition to the extent each requested complete elimination of the Top-

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ted an economic study based on viewer ratings data applicable to existing combinations of local television stations as compared with ratings data from independently owned stations in DMAs deemed comparable to the DMAs served by commonly owned stations. DISH claims that the study shows that common ownership of local television stations does not produce increased ratings for local programming; therefore, common ownership does not produce higher-quality local programming. *See* Letter from Pantelis Michalopoulos & Stephanie A. Roy, Counsel to DISH, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50 et al. (Nov. 9, 2017). We note that DISH provides no reason it could not have submitted this study earlier in response to broadcasters' claims that relaxation of the rule would lead to more locally responsive and higher quality programming. *See*, *e.g.*, Nexstar Petition at 9 (asserting common ownership of local television combinations leads to an increase in "local news and high-quality programming"). Thus, it is inexcusably late. 47 CFR § 1.429(b), (f). Moreover, based on our review of the study, we find that it suffers from significant methodological issues and fails to provide a sufficient basis upon which to draw any conclusions. For example, the study employs a simplistic analysis covering a small sample size and the results are highly dependent on the selection of data points, such as control DMAs, viewing period, and time slot. Furthermore, the analysis fails to address issues of statistical significance regarding viewership, and the cross-sectional analysis fails to account for other variables that may influence viewership in different markets or otherwise address the cases in the filing for which viewership is higher in duopoly markets. Ultimately, the study does not undermine our finding that efficiencies gained through common ownership can allow broadcasters to invest more resources in producing more and higher-quality locally responsive programming.

Four Prohibition. As discussed below, however, we find that modification of the Top-Four Prohibition to include a case-by-case analysis is appropriate in order to address instances in which the application of the Top-Four Prohibition may not be warranted based on the circumstances in a particular market or with respect to a particular transaction. This hybrid approach will allow for a more refined application of the Local Television Ownership Rule that will help facilitate the public interest benefits associated with common ownership in local markets.

79. The ratings data in the record generally supported the Commission's line drawing, and the potential harms associated with top-four combinations find support in the record.[230] We also find that the data were

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[230] *Second Report and Order*, 31 FCC Rcd at 9880-81, paras. 43-44. The Commission has repeatedly concluded that the Top-Four Prohibition is necessary to promote competition in the local television marketplace. *See*, *e.g.*, *id.*; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2066-67, para. 102; *2002 Biennial Review Order*, 18 FCC Rcd at 13695, para. 194; *see also Prometheus II*, 652 F.3d at 460-61 (upholding retention of the Top-Four Prohibition in the *2006 Quadrennial Review Order* as supported by "ample evidence in the record"). As the Commission has consistently found, there is generally a "significant 'cushion' of audience share percentage points" that "separate[s] the top four stations from the fifth-ranked stations." *Prometheus II*, 652 F.3d at 460 (quoting *2006 Quadrennial Review Order*). In the *Second Report and Order*, the Commission found that this pattern has not changed. *Second Report and Order*, 31 FCC Rcd at 9880-81, para. 43. Thus, top-four combinations would generally result in a single firm's obtaining a significantly larger market share than other stations and reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares. *Id.* at 9881, para. 44.

sufficiently recent and uncontradicted by any newer ratings data in the record, such that it was appropriate for the Commission to rely on the data in reaching its decision.[231] The Commission considered alternative arguments and data in the record and ultimately found that the Top-Four Prohibition, last endorsed in the *2006 Quadrennial Review Order*, continued to be supported.[232] In arguing that the Top-Four Prohibition should be eliminated, NAB notes that evidence in the record demonstrated that the concerns that the Top-Four Prohibition is intended to address may not be present in many markets.[233] NAB also provides additional information demonstrating that some markets do not have a gap between the ratings of the fourth- and fifth-ranked stations or that the gap is larger between second- and third-ranked stations in some markets.[234] The Commission has long conceded that the justification for the Top-Four Prohibition does not apply in all markets.[235] Thus, the rule may prohibit combinations that do not present public interest harms or that offer potential public interest benefits that outweigh any potential harms. To this extent, the bright-line prohibition is over-inclusive. On

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[231] *See* NAB Petition at 8-9. While we do find the data to be sufficiently recent in this context, we note that we are approaching the 2018 Quadrennial Review proceeding, in which the Commission's broadcast ownership rules, including the Top-Four Prohibition, will again be subject to review based on an updated record.

[232] *Second Report and Order*, 31 FCC Rcd at 9880-81, paras. 43-44.

[233] *See*, *e.g.*, *id.* at 9880, para. 43 nn.104 & 106.

[234] *See* NAB Petition at 8-10.

[235] *See*, *e.g.*, *Second Report and Order*, 31 FCC Rcd at 9880, para. 43 n.104; *FNPRM*, 29 FCC Rcd at 4390, para. 44 n.111; *2002 Biennial Review Order*, 18 FCC Rcd at 13694-95, para. 195.

reconsideration, we believe that it is appropriate to modify the rule to allow for more flexibility.

80. In particular, we take steps to mitigate the potentially detrimental impacts of applying the Top-Four Prohibition in certain circumstances. In the *Second Report and Order*, the Commission conceded the potential public interest benefits from allowing additional common ownership, yet found that the harms associated with top-four combinations exceeded these benefits.[236] This logic no doubt holds when the rationale for adopting the Top-Four Prohibition applies, though the benefits could exceed the harms in certain circumstances based on an evaluation of the characteristics of a particular market or a particular transaction.

81. Instead of relying solely on the bright-line application of the Top-Four Prohibition, we are adopting a hybrid approach that will allow applicants to request a case-by-case examination of a proposed combination that would otherwise be prohibited by the Top-Four Prohibition.[237] Such an approach will help mitigate the

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[236] *Second Report and Order*, 31 FCC Rcd at 9881, para. 44. *But see* Nexstar Petition at 9-10 (asserting that the Top-Four Prohibition prevents station combinations that produce public interest benefits, including an increase in local programming and news).

[237] Under a hybrid approach, a rule includes both bright-line provisions and a case-by-case element to allow for consideration of market-specific factors. *See NOI*, 25 FCC Rcd at 6115, paras. 95-96 (seeking comment on whether to adopt a hybrid approach for any or all of the broadcast ownership rules). Such an approach provides certainty and flexibility when determining whether a particular transaction should be granted. Though no party commented on this issue, we find that the record supports our approach. As discussed herein, special scrutiny of combinations of two top-four rated stations is still supported by the record, though the record also demonstrates a

potential drawbacks associated with strict application of the Top-Four Prohibition, while still preserving the ease and efficiency of applying the rule. This revised rule will continue to promote robust competition in local markets while also facilitating transactions, in appropriate circumstances, that will allow broadcast stations to achieve economies of scale and better serve their local viewers.

82. As we have just discussed, the record demonstrates the need for flexibility in the application of the Top-Four Prohibition.[238] Given the variations in local markets and specific transactions, however, we do not believe that applicants would be well served by a rigid set of criteria for our case-by-case analysis. The record does, however, suggest the types of information that applicants could provide to help establish that application of the Top-Four Prohibition is not in the public interest because the reduction in competition is minimal and is outweighed by public interest benefits. Such information regarding the impacts on competition in the local market could include (but is not limited to): (1) ratings share data of the stations proposed to be combined compared with other stations in the market; (2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees;[239] (3) market characteristics, such as

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need for flexibility in addressing circumstances in which application of the Top-Four Prohibition may not be appropriate due to the particular circumstances in a local market. The hybrid approach is well suited for such circumstances.

[238] *See supra* paras. 79-81.

[239] We disagree with the American Television Alliance's (ATVA) contention that affording licensees a case-by-case opportunity to seek approval of top-four combinations cannot "be squared" with the

bright-line rule adopted in the Commission's *2014 Retransmission Consent Report and Order*. Letter from Michael Nilsson, Counsel to ATVA, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 14-50 et al. at 6 (Aug. 17, 2017) (ATVA Aug. 17, 2017 *Ex Parte* Letter) (citing *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order, 29 FCC Rcd 3351 (2014) (*2014 Retransmission Consent Report and Order*)). There, the Commission concluded that the potential competitive harms arising from joint negotiation of retransmission consent by non-commonly owned stations outweighed the potential benefits and determined that a bright-line prohibition would be "more administratively efficient" than case-by-case review because it would provide the bargaining parties with "advance notice of the appropriate process for such negotiation." *2014 Retransmission Consent Report and Order*, 29 FCC Rcd at 3358, 3364, paras. 12, 18. Here, however, the result of the Commission's case-by-case review of proposed top-four combinations will provide bargaining parties with advance notice of whether joint retransmission consent negotiations for the two stations in question will be allowed. Moreover, common ownership of two top-four stations implicates a broader range of potential benefits and harms than a narrow agreement between two top-four stations to jointly negotiate retransmission consent so there is no inherent inconsistency between adopting a bright-line rule in the latter case and a case-by-case review in the former case. Additionally, we reject ATVA's contention that adopting a case-by-case review is inconsistent with the statute. ATVA Aug. 17, 2017 *Ex Parte* Letter at 6. To the extent that the existing Top-Four Prohibition is overbroad given the current state of competition, as we conclude here, then the existing prohibition, absent modification, is "not necessary in the public interest as a result of competition" and should be modified. *See* 1996 Act § 202(h) ("The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."). Moreover, in adopting this approach, we decline to adopt specific criteria related to the issue of retransmission consent, as recently advocated by some commenters. *See* Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA—The Internet Television Association, to Marlene Dortch, Secretary, FCC, GN Docket No. 16-142 et al. (Nov. 6, 2017); Letter from Michael Nilsson, Counsel to ATVA, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 14-50

population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations); (4) the likely effects on programming meeting the needs and interests of the community; and (5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.[240] Applicants are encouraged to

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et al. (Nov. 3, 2017). *But see* Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 14-150 et al. (Nov. 9, 2017) (objecting to inclusion of specific retransmission consent-related criteria). Instead, as discussed herein, we believe that the case-by-case review process will allow parties to advance any relevant concerns-including concerns related to retransmission consent issues-in the context of a specific proposed transaction if such issues are relevant to the particular market, stations, or transaction. Similarly, we reject Independent Television Group's recommendation that we adopt a presumption in favor of top-four combinations in small and mid-sized markets. *See* Letter from Jack N. Goodman, Counsel to the Independent Television Group, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-50, at 4-5 (Nov. 8, 2017). ITG provides no evidence sufficient to support such a presumption. It simply relies on NAB's assertion in its 2014 comments that in some markets, there may have been significant disparities in audience share among some of the top-four rated stations. The case-by-case analysis is not weighted in favor of transactions in any particular market, and applicants in small and mid-sized markets will be able to provide market-specific evidence supporting their requests.

[240] *See*, *e.g.*, Gray June 28 *Ex Parte* Letter at 2-6 (identifying circumstances where factors such as revenue data, operation costs, market size, and lack of local news in some markets may inform consideration for relief from common ownership prohibitions in smaller markets). Gray proposes that, at least in smaller markets, two stations be permitted to combine ownership if one of the stations has not produced a local newscast in the previous two years. *Id.* at 6.

provide data over a substantial period (e.g., the past three years, similar to the requirement in the failing/failed station waiver test) to strengthen their request and to help avoid circumvention of the Top-Four Prohibition based on anomalous data over a short period of time or manipulation of program offerings prior to the proposed transaction. In the end, applicants must demonstrate that the benefits of the proposed transaction would outweigh the harms, and we will undertake a careful review of such showings in light of the record with respect to each such application.[241]

83. *Minority and Female Ownership*. We find that the modifications we adopt to the Local Television Ownership Rule are not likely to harm minority and female ownership. As noted in the *Second Report and Order*, data in the record demonstrate that relaxation of the Local Television Ownership Rule in 1999 did not have a negative impact on overall minority ownership levels.[242] In this lengthy proceeding, no party has presented contrary evidence or a compelling argument

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We find, however, that market characteristics and the state of local programming, including local news offerings, are better considered in our case-by-case analysis at this time. We anticipate that any transactions processed under this case-by-case approach will help inform any consideration of specific criteria that could be included in any future revision of the Local Television Ownership Rule, which will be reviewed again in the forthcoming 2018 Quadrennial Review proceeding.

[241] *See* Letter from Representatives Anna G. Eshoo and Michael F. Doyle to Ajit Pai, Chairman, FCC (Nov. 8, 2017) (expressing concerns regarding the case-by-case approach).

[242] *See Second Report and Order*, 31 FCC Rcd at 9894-95, para. 77 (showing an overall increase in minority ownership in the years following relaxation of the rule).

demonstrating why relaxing this rule will have a different impact. Indeed, consistent with the *Second Report and Order*, we find that the record does not support a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels.[243]

84. In the *Second Report and Order*, the Commission stated that ensuring the presence of independently owned broadcast television stations in the local market indirectly increases the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants. The Commission's comment, however, did not indicate a belief that the rule would promote minority and female ownership specifically, but rather that the rule would promote ownership diversity generally by limiting common ownership of broadcast television stations. This statement will continue to be true with respect to the revised rule that we adopt today. Under Section 202(h), however, we cannot continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership.[244]

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[243] *See id.* at 9895, para. 78.

[244] 1996 Act § 202(h). In addition, we disagree with the general assertion by UCC et al. that the Commission cannot modify any of its media ownership rules without further study of the impact on minority and female ownership. For a discussion of this issue, see paragraph 47, *supra*. We also disagree with assertions by MMTC and NABOB that the rules can be retained based on promoting news coverage of specific issues. *See* Letter from David Honig, President

85. *Incentive Auction.* We reiterate that it remains premature to analyze the implications of the incentive auction on the Local Television Ownership Rule.[245] Contrary to the position of certain parties, the Commission cannot—and did not in the *Second Report and Order*—*use* the auction as an excuse for delaying action and refusing to fulfill its obligations under Section 202(h).[246] While we find fault today in the prior Commission's decision to retain the existing television ownership restrictions without modification, the incentive auction was not a factor in that decision. Instead, the Commission properly found that it could not delay a decision on its rules because of the auction nor could it adopt changes to its rules based on speculation as to the final results of the auction. We agree. Section 202(h) compels the Commission to act on the record before it and

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Emeritus and Senior Advisor, MMTC, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50 et al. (Nov. 9, 2017) (MMTC/NABOB Nov. 9, 2017 *Ex Parte*) (submitted on behalf of MMTC and NABOB with accompanying Fact Sheet).

[245] *Second Report and Order*, 31 FCC Rcd at 9895-96, paras. 79-81.

[246] *See* UCC et al. Opposition at 3-4 (arguing that the Commission may not repeal or significantly alter the local television rule until it can determine how the incentive auctions will affect minority and female ownership). *But see* NAB Reply to Oppositions at 6 (arguing that Section 202(h) does not include a "wait and see" exception and that the Commission erred in not modifying the rule to account for the reduction in television stations likely to result from the incentive auction); NMA Reconsideration Reply Comments at 2-3 (disputing the claim that the Commission may not reconsider any of its media ownership rules until it conducts a study of the impact of any changes on minority and female ownership and assesses the results of the television incentive auction); Nexstar Reply to Oppositions at 9 (pointing out that Congress did not include an exemption or delay to the Commission's quadrennial review duties when enacting the incentive auction legislation).

determine whether to retain, repeal, or modify the Local Television Ownership Rule based on the realities of the current marketplace, which we have done.[247] Though the auction has finished, it is still too soon to evaluate its impacts on the television marketplace.[248] As noted in the *Second Report and Order*, the Commission will evaluate the broadcast marketplace post-auction, and we expect that these issues will be considered in the forthcoming 2018 Quadrennial Review proceeding.[249]

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VI. DIVERSITY/INCUBATOR PROGRAM

A. Introduction

121. We grant in part and deny in part NAB's request for reconsideration regarding the Commission's decision in the *Second Report and Order* not to adopt an incubator program on the current record.[356] We agree that the Commission should adopt such a program and decide today that we will do so. However, we also find

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[247] *See* 1996 Act § 202(h).

[248] While there is still time for stations to change their post-auction channel sharing elections, the initial results of the auction suggest that the auction may not have a significant impact in the context of the Local Television Ownership Rule, as the overwhelming majority of commercial, full-power winning bidders have elected to channel share once they surrender their spectrum. *See Incentive Auction Closing and Channel Reassignment Public Notice*, Public Notice, DA 17-314, Appx. A (MB/WTB Apr. 13, 2017) (detailing channel sharing elections of winning bidders in reverse auction). We will continue to monitor these elections as part of our continuing efforts to assess the impact of the auction on the television marketplace.

[249] *Second Report and Order*, 31 FCC Rcd at 9896, para. 81.

[356] NAB Petition at 25; *see also Second Report and Order*, 31 FCC Rcd at 10002, para. 321.

that the underlying record fails to provide sufficient guidance on how best to structure such a program. Accordingly, we adopt today a Notice of Proposed Rulemaking seeking comment on how we should structure the incubator program.

B. Background

122. As explained in greater detail in the accompanying Notice of Proposed Rulemaking, an incubator program would provide an ownership rule waiver or similar benefits to a company that establishes a program to help facilitate station ownership for a certain class of new owners. The concept of an incubator program has been discussed since at least the early 1990s.[357] Yet, despite general support for the concept, the Commission has never undertaken the creation of a comprehensive incubator program.[358] Most recently, the Commission sought comment in the *NPRM and FNPRM* on whether to adopt an incubator program and, if so, how to structure

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[357] *See*, *e.g.*, *Revision of Radio Rules and Policies*, Memorandum Opinion & Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387, 6391, 6391-92, paras. 22, 24-25 (1992).

[358] The Commission has adopted a limited program that provides a duopoly preference to parties that agree to incubate or finance an eligible entity. *See Second Report and Order*, 31 FCC Rcd at 9982-83, para. 285 (reinstating the program following the reinstatement of the revenue-based eligible entity standard); *see also Diversity Order*, 23 FCC Rcd at 5943, para. 56 (originally adopting the duopoly preference). In adopting this general policy preference, however, the Commission did not provide details regarding the structure and operation of the incubation activities. As such, we do not believe that this limited policy preference serves as an effective basis upon which to design a comprehensive incubator program.

such a program.[359] In the *FNPRM*, in particular, the Commission highlighted administrative concerns and structural issues that needed to be addressed before such a program could be adopted.[360] While there was general support for an incubator program, and some suggestions on how to structure certain aspects of such a program, the Commission found in the *Second Report and Order* that the record failed to address the specific concerns detailed in the *FNPRM*; accordingly, the Commission declined to adopt an incubator program.[361]

123. NAB sought reconsideration of the Commission's rejection of NAB's recommendation for an incubator program.[362] According to NAB, the Commission could create an incubator program based on the overcoming disadvantages preference (ODP) standard, which the Commission rejected in the *Second Report and Order*, or the "new entrant" criteria in the broadcast services' auction rules.[363] The petition otherwise fails to address the many other issues of concern highlighted by the Commission in this proceeding. Bonneville/Scranton supports NAB's petition for reconsideration.[364] In op-

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[359] *See FNPRM*, 29 FCC Rcd at 4514-16, paras. 312-14; *NPRM*, 26 FCC Rcd at 17554-56, para. 169.

[360] *FNPRM*, 29 FCC Rcd at 4515-16, paras. 313-14.

[361] *Second Report and Order*, 31 FCC Rcd at 10001-02, paras. 319-21; *see also* NAB FNPRM Comments at 92-93; NMA FNPRM Comments at 15; Alliance for Women in Media FNPRM Reply Comments at 2; Bonneville/Scranton FNPRM Reply at 9. *But see* UCC et al. FNPRM Reply at 25 (opposing the incubator program).

[362] NAB Petition at 25.

[363] *Id.*

[364] Bonneville/Scranton Reconsideration Reply Comments at 8.

position, UCC et al. restate their concerns that an incubator program would create a loophole in the Commission's ownership limits and highlight the unresolved administrative and structural issues identified in this proceeding.[365]

C. Discussion

124. On reconsideration, we agree with NAB that the Commission should adopt an incubator program and decide here that we will do so. Despite UCC et al.'s objections noted above, there is support for an incubator program from many industry participants and advocacy groups. And we agree with these supporters that adopting an incubator program would promote new entry and ownership diversity in the broadcast industry by helping address barriers to station ownership, such as lack of access to capital and the need for technical/operational experience.[366] In this proceeding, however, the Commission has identified various, specific concerns regarding how to structure and monitor such a program.[367] We find that the comments and recommendations in the record—including those made by NAB and Bonneville/Scranton-fail to adequately address all of these issues. While certain suggestions may have merit in regards to specific aspects of the program, we are not yet at the point where we can finalize the overall

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[365] UCC et al. Opposition at 10-11.

[366] *See*, *e.g.*, Bonneville/Scranton Reconsideration Reply Comments at 8; MMTC Comments, MB Docket Nos. 14-50, 09-182, 07-294, and 04-256 at 6-9 (Apr. 17, 2017) (MMTC Apr. 17, 2017 Comments); NAB Petition at 25; NABOB Feb. 24, 2017 *Ex Parte* Letter at 3-4.

[367] *See FNPRM*, 29 FCC Rcd at 4515-16, paras. 313-14.

structure and method for implementation of the program. Therefore, we require additional comment on how to structure the incubator program.

125. We are initiating a new proceeding in the accompanying Notice of Proposed Rulemaking that will seek additional comment on how best to implement the Commission's incubator program. Initiating a dedicated proceeding will allow the Commission to focus its efforts on getting this program up and running, and we anticipate that our consideration of this issue will be assisted by the newly established Advisory Committee on Diversity and Digital Empowerment.[368]

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[368] *See* The Advisory Committee on Diversity and Digital Empowerment was officially chartered on July 5, 2017, after Chairman Pai initially indicated his intention to establish the committee on April 24, 2017. Press Release, FCC, Chairman Pai Announces Plan to Form Advisory Committee on Diversity (Apr. 24, 2017), https://www.fcc.gov/document/chairman-pai-announces-plan-form-advisory-committee-diversity. The Commission sought nominations for committee chairperson and membership on June 7, 2017. *FCC Seeks Nominations for Membership on Advisory Committee on Diversity and Digital Empowerment*, Public Notice, 32 FCC Rcd 4761 (MB 2017) (establishing the committee for a period of two years). The committee held its initial meeting on September 25, 2017. *FCC Announces the Membership, First Meeting, and Docket Number of the Advisory Committee on Diversity and Digital Empowerment*, Public Notice, DA 17-857 (MB Sept. 8, 2017).

APPENDIX D

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

MB Docket No. 17-289

IN THE MATTER OF RULES AND POLICIES TO PROMOTE NEW ENTRY AND OWNERSHIP DIVERSITY IN THE BROADCASTING SERVICES

Adopted: Aug. 2, 2018
Released: Aug. 3, 2018

REPORT AND ORDER

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Roseworcel dissenting and issuing a statement.

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I. INTRODUCTION

1. With this Report and Order, we establish the requirements that will govern the incubator program that the Commission previously decided to adopt to support the entry of new and diverse voices into the broadcast industry.[1] Last year, the Commission decided to adopt an incubator program with the goal of creating ownership opportunities for new entrants and small businesses, thereby promoting competition and diversity in the broadcast industry. We recognize the need for more innovative approaches to encourage access to capital, as well as technical, operational, and management training, for those new entrants and small businesses that, without assistance, would not be able to own broadcast stations. Thus, the incubator program is de-

[1] *See 2014 Quadrennial Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9859, para. 126 (2017) (*Order on Reconsideration and NPRM*).

signed with those specific entities in mind—small businesses, struggling station owners, and new entrants that do not have any other means to access the financial assistance and operational support the incubator program seeks to provide. In keeping with that goal, the program requirements we adopt today will enable the pairing of small aspiring, or struggling, broadcast station owners with established broadcasters. These incubation relationships will provide new entrants and struggling small broadcasters access to the financing, mentoring, and industry connections that are necessary for success in the industry but to date have been unavailable to many.

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IV. DISCUSSION - INCUBATOR PROGRAM

A. Services Eligible for Incubator Program

11. The incubator program we outline today will apply to full-service AM and FM radio broadcast stations,[14] as we find that the radio industry provides the best opportunities for successful incubation relationships and the best opportunity for an appropriate reward. In the *NPRM*, the Commission sought comment on whether its incubator program should be focused on radio, as the proposal was initially conceived, or should apply to television as well.[15] The *NPRM* further queried whether the Commission should adopt a phased approach, whereby the incubator program would be implemented on a trial basis in radio and then evaluated for

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[14] *See* 47 CFR § 73.14 *et seq.* (AM broadcast station); *id.* § 73.10 *et seq.* (FM Technical Definitions).

[15] *NPRM*, 32 FCC Rcd at 9863, para. 139.

possible expansion to the television market.[16] Based on the record of this proceeding, we find that the radio market has several advantages over the television market as an incubation setting.

12. Perhaps most importantly, the cost of obtaining a radio station is significantly lower than the cost of obtaining a television station.[17] Indeed, the cost of acquiring a television station is generally many times that of a radio station. For example, in 2016 the average sales price of a radio station on the secondary market was approximately $1 million, and the average price of a television station was $53 million.[18] Due to their lack of broadcasting experience and financial collateral, new entrants and small broadcasters often face significant difficulties in accessing the capital needed to purchase broadcast stations in the secondary market or to partic-

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[16] *Id.*

[17] *See* ACDDE Comments at 5, 31, 50 (suggesting that full-service TV and major market FM stations are "high value" properties and that acquiring a TV station requires more capital than acquiring a radio station); *see also* Letter from DuJuan McCoy, President and CEO, Bayou City Broadcasting, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 2, n.2 (filed May 22, 2018) ("BCB *Ex Parte*") (stating that the average sales price for a full-service TV station is over $20 million); Letter from W. Lawrence Patrick, Managing Partner, Patrick Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (June 4, 2018) ("Patrick Communications *Ex Parte*") (stating that new entrants today are often looking at deals ranging from $1-3 million for purchasing a single station or at best an AM/FM combination).

[18] SNL Kagan, State Summary of 2016 Full Power Radio Station Sales, S&P Global Market Intelligence, 2018; SNL Kagan, State Summary of 2016 Full Power Television Station Sales, S&P Global Market Intelligence, 2018.

ipate in Commission broadcast auctions for new construction permits.[19] Indeed, the record reveals that access to capital is most often the barrier to broadcast station ownership.[20] Furthermore, given the larger numbers of radio stations in the country (11,371 commercial,

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[19] ACDDE Comments at 2, 19, n.43. The predecessor diversity advisory committee also noted the financial barriers to broadcast ownership: "The current state of financing for media transactions is dire." Report and Recommendations of the Funding Acquisition Task Force of the FCC Federal Advisory Committee on Diversity in the Digital Age (Dec. 3, 2009), https://www.fcc.gov/diversity-committee-adopted-recommendations. The committee also noted that "the inability to access capital is a primary market entry barrier." *Id.* *See also* Letter from Diane Sutter, President/CEO, ShootingStar Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 16, 2018) (ShootingStar *Ex Parte*) ("Banks are also often less inclined to take a chance on a first-time station owner and broadcast properties offer little tangible collateral."); Patrick Communications *Ex Parte* at 2 ("[Many banks] do not like to loan to parties with an unproven track record of past ownership or senior, multi-station management experience."); Letter from Hugues Jean to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 18, 2018) ("[W]ithout some form of collateral, it will be very difficult to secure a loan [to purchase a radio station]."); Letter from Lyle Banks, Vice President and General Manager, WGCL/WPCH, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-189, at 1 (filed June 6, 2018) (Banks *Ex Parte*) ("I found that national banks were only interested in financing deals for entities with significant physical assets to collateralize their loans."); Letter from Trila Bumstead, Chief Executive Officer and President, Ohana Media Group, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 14, 2018) (Ohana Media *Ex Parte*) ("Minority and female owners are at a significant disadvantage [when obtaining financing] . . . because they often lack sufficient personal assets to collateralize the loan.").

[20] *See*, *e.g.*, National Association of Broadcasters (NAB) Comments at 5 (NAB Comments) (stating that access to capital is the greatest barrier to entry for prospective owners of broadcast stations); Skip

full-service AM and FM stations) versus television stations (1,377 commercial, full-service stations), we find that radio is a more accessible entry point than television.[21] In addition, the operating costs of running a radio station are significantly lower than those for operating a television broadcast station. As a going concern, radio is less cash flow intensive, requires fewer personnel to operate, and requires programming resources that are less costly than those for television stations.[22] For these reasons, we find that transitioning from a qualifying incubation relationship to independent ownership will be more feasible for incubated entities in the radio service than in television. Consequently, for entities

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Finley Comments at 3 (stating that access to capital has remained the largest impediment to ownership); ShootingStar *Ex Parte* at 1 (stating that access to capital is one of the primary challenges that new entrants face in the broadcasting industry); Ohana Media *Ex Parte* Letter at 2 (stating that access to capital is a significant barrier for new entrants and small broadcasters seeking to grow); Letter from James Z. Hardman, Chief Executive Officer and President, Hardman Broadcasting, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 1 (filed May 22, 2018) (Hardman Broadcasting *Ex Parte*) (stating that access to capital is the greatest barrier to station ownership); Letter from Francisco R. Montero, Managing Partner, Fletcher, Heald & Hildreth, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 2 (filed May 15, 2018) (stating that many small businesses, particularly minority- and women-owned businesses, fail to secure financing and never get a foothold in the broadcast marketplace).

[21] Press Release, FCC, Broadcast Station Totals as of June 30, 2018 (July 3, 2018), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[22] *See Order on Reconsideration*, 32 FCC Rcd at 9836, para. 77 (stating that "the record suggests that local television news programming is typically one of the largest operational costs for broadcasters").

with already limited capital resources and operational experience, we conclude that radio is a significantly more accessible entry point into the broadcasting industry than television.

13. We expect that implementing an incubator program focused on the radio market will also motivate the participation of incumbent broadcasters, who are key to the success of the program, as they have the power to ensure that the new entrants and small businesses attracted to the radio industry are able to acquire, operate, and grow a broadcast station. As noted above, we anticipate that the inducement of a waiver of the Commission's Local Radio Ownership Rule will provide sufficient incentive for incumbent broadcasters to participate in the program. That is, we expect that radio station group owners will seek to incubate a new entrant or small broadcaster in order to obtain permission to exceed the applicable ownership limit in a market. In reaching this conclusion, we note that the local radio numerical limits and the AM/FM service caps have remained unchanged since they were prescribed by Congress over 20 years ago in the Telecommunications Act of 1996.[23] Thus, the existing Local Radio Ownership

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[23] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b), 110 Stat. 56, 110 (1996). Subsequently, in the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and AM/FM subcaps from the 1996 Act but revised the rule to use an Arbitron Metro market definition, attribute certain radio station Joint Sales Agreements (JSAs) toward the brokering licensee's permissible ownership totals, and include noncommercial stations when determining the number of radio stations in a market for purposes of the rule. *See 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*,

Rule has restricted the ability of incumbent broadcasters to grow larger in any given market for over two decades. In addition, Joint Sales Agreements (JSAs) for greater than 15 percent of a station's time remain attributable in radio.[24] Accordingly, given the longstanding strictures remaining on radio ownership, we believe a waiver of the Local Radio Ownership Rule will provide an effective incentive for incumbent broadcasters to incubate either new entities seeking entry into the broadcasting industry or small broadcasters.

14. By contrast, the Commission has recently revised the rules governing local television ownership, including eliminating the attribution of television JSAs; eliminating the eight voices test, which required that at least eight independently owned television stations remain in the market after combining ownership of two stations in a market; and, adopting a hybrid approach to application of the top-four prohibition, permitting case-by-case review of the restriction on ownership of two top-four ranked stations in the same market. In light of these changes and the state of the record in this proceeding as it pertains to television station incubation, we do not believe that it would be appropriate at this time to offer a waiver of the Local Television Ownership Rule as a reward for incubating a television station. However, we do not foreclose the possibility of reaching a different conclusion following the completion of our next quadrennial review depending on the record that is compiled regarding the local television marketplace in that proceeding. Additionally, were Congress to provide an

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Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13712-13, 13724-28, 13742-46, paras. 239, 273-81, 316-25 (2003).

[24] *See* 47 CFR § 73.3555, Note 2(k).

alternative benefit for incubating broadcasters, we would be strongly inclined to expand the program to include television stations.

15. Based on our consideration of the record and the current broadcast marketplace, including the existing broadcast ownership rules, we conclude that an incubator program has the greatest likelihood of success in the radio industry. Although some commenters, including NAB, advocate for an incubator program for both radio and television broadcast services,[25] for the reasons stated in this section, we determine that the better approach at this time is to focus our program on the radio market. We note, however, that the "leg up" provided to these new and small broadcasters via the incubator program, by allowing them to establish a track record of successful station ownership and providing them increased access to capital, may ultimately position them to add television stations to their radio holdings. For all the reasons provided above, we determine that our initial foray into the use of an incubator program as a mechanism to increase broadcast ownership diversity should be limited to full-service radio. As we gain more experience with the program and assess evolving market and regulatory trends in the television sector, we will be able to analyze whether it is appropriate to expand the program to television.

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[25] NAB Comments at 7-8, 13. NAB asserts that the incubator program should be designed to provide maximum flexibility and incentives for incubating entities to participate. NAB Comments at 13, n.32; *see also* Gray Television, Inc., Reply at 1, 3 (Gray Television Reply) (supporting NAB); Bonneville International Corporation Reply at 1, 3-4 (Bonneville Reply) (supporting NAB).

B. Defining Entities Eligible for Incubation

16. In this section, we establish the eligibility criteria governing which entities may qualify for incubation under our program. Our criteria consist of both a numeric limit on the number of stations a potential incubated entity may own prior to entering into a qualifying incubation relationship (based on our existing new entrant bidding credit), as well as a revenue cap (based on our existing eligible entity definition). Additionally, as discussed below, we adopt certain safeguards to ensure further that a potential incubated entity genuinely lacks the necessary resources that would have enabled it to enter or succeed in the broadcast industry absent the incubation relationship. Finally, we also address alternative eligibility criteria that were proposed in our record.

17. The *NPRM* sought comment on how to determine eligibility for participation in the incubator program[26] and put forth several options, including the new entrant bidding credit model,[27] a revenue-based eligible

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[26] *NPRM*, 32 FCC Rcd at 9861, para. 131.

[27] The new entrant definition is used for the bidding credit eligibility definition applicable in the broadcast auctions context. *See* 47 CFR § 73.5007(a). A 35 percent bidding credit is awarded to a qualifying new entrant who has no attributable interest in any other media of mass communication, while a 25 percent bidding credit is awarded to a qualifying new entrant who holds an attributable interest in no more than three mass media facilities. *Id.*

entity standard,[28] a socially and economically disadvantaged businesses (SDB) model,[29] and an Overcoming

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[28] An eligible entity under this definition is any commercial or non-commercial entity that qualifies as a small business consistent with the SBA revenue grouping according to industry, in this case broadcast radio. The Commission's rules require that an eligible entity hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the licenses is a publicly traded corporation. *See id.* § 73.3555, Note 2(i)(2)(ii); *see also Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (the Commission re-adopted a revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

[29] The SDB standard is based on the definition employed by the SBA. Pursuant to the SBA's program, persons of certain racial or ethnic backgrounds are presumed to be disadvantaged; all other individuals may qualify for the program if they can show by a preponderance of the evidence that they are disadvantaged. *See* 13 CFR §§ 124.103(b)-(c), 124.104(a). To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. *See id.* § 124.105; *see also* U.S. Small Business Administration, Small Disadvantaged Businesses, https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses (last visited May 8, 2018). The SDB standard is explicitly race-conscious and, therefore, subject to heightened constitutional review. In the *Second Report and Order*, the Commission determined that evidence in the record was not sufficient to satisfy the constitutional standards to adopt the SDB standard or any other race- or gender-conscious definition of an eligible entity for certain preferential regulatory policies. *Second Report and Order*, 31 FCC Rcd at 9987-88, 9999-10000, paras. 297, 315-16.

Disadvantages Preference (ODP) standard.[30] The *NPRM* also sought comment on which of these standards best aligns with the Commission's goal of facilitating ownership opportunities for entities that lack access to capital and operational experience and, thereby, best promotes competition and viewpoint diversity in local markets.[31]

18. The ultimate goal of the incubator program is to encourage new entry into the broadcast industry, an industry which—as our record demonstrates—is extremely capital-intensive.[32] The Commission has previously recognized, and the record here confirms, that new entrants and small businesses have had longstanding difficulties accessing the needed capital to participate in broadcast ownership.[33] For example, Diane Sutter, President of ShootingStar Inc., notes that "[t]he size of a deal is extremely important to most banks. Many en-

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[30] The ODP standard would employ various criteria to demonstrate that an individual or entity has overcome significant disadvantage. The *Second Report and Order* declined to adopt an ODP standard, citing concerns with the approach, including administrability and First Amendment concerns. *Second Report and Order*, 31 FCC Rcd at 9993-94, para. 306.

[31] *NPRM*, 32 FCC Rcd at 9862, para. 132.

[32] *See supra* note 19.

[33] *See supra*, note 20; *see also 2014 Quadrennial Regulatory Review—Review of Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4470, para. 224 (2014) (*2014 FNPRM and Report and Order*) (stating, "[w]e recognize the presence of many disparate factors, including most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting.").

trants are limited to purchasing smaller broadcast stations, given their resources; however, banks often consider it not worth the potential risk to finance smaller deals for a new owner."[34] For our incubator program to redress the lack of access to capital, as well as to facilitate operational, managerial, and technical support, it is critical that our eligibility criteria properly identify those entities that are most likely to benefit from program participation and, thereby, increase diversity in the broadcast sector.

19. After careful consideration of the record in this proceeding and the various standards discussed in the *NPRM*, we adopt today a two-pronged eligibility standard that combines a modified version of the existing new entrant bidding credit standard,[35] long used in the context of broadcast auctions, with the revenue-based eligible entity definition contained in our broadcast rules.[36] As detailed below, under the first prong, the potential incubated entity, including its attributable interest holders, may hold attributable interests in no more than three full-service AM or FM radio stations and no TV stations.[37] The ownership limit of three full-service radio stations does not include the radio station to be incubated. Under the second prong of our standard, the

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[34] *See* ShootingStar *Ex Parte* at 2.

[35] *See* 47 CFR §§ 73.5007-.5008(b). Note that the new entrant bidding credit applied in the broadcast auction context looks to ownership of "a medium of mass communications," which includes ownership of a daily newspaper, a cable television system, or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder.

[36] *See id.* § 73.3555, Note 2(i)(2)(ii).

[37] The incubated entity is not restricted from owning low-power FM and/or FM translator stations.

entity must also qualify as a small business consistent with the SBA standards for the radio industry based on annual revenue, currently $38.5 million or less.[38]

20. *New Entrant Prong.* With respect to the first prong of our standard, we find that modifying the new entrant eligibility standard for this purpose by limiting permissible interests to three full-service AM or FM radio broadcast stations (licenses or unbuilt construction permits) and no TV stations will focus the program on entities that are new or comparatively new to the broadcasting industry (i.e., those with no existing broadcast interests) and small broadcasters (i.e., those with three or fewer full-service radio stations, and no TV stations). The record reflects that individuals seeking to purchase their first or second broadcast station are the ones that often face the most challenging financial hurdles.[39] Thus, the eligibility standard we adopt today is targeted specifically to benefit those small entities seeking to enter the broadcast industry for the first time and to help

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[38] Under 13 CFR § 121.201, radio stations (North American Industry Classification System code 515112) that are considered small businesses have an annual revenue of up to $38.5 million. *See* 47 CFR § 73.3555, Note 2(i)(2)(ii) (revenue-based eligible entity definition); *see also Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

[39] *See*, *e.g.*, Ohana Media *Ex Parte* at 2 ("[A]ccess to capital is a significant barrier to entry for those trying to purchase their first broadcast stations and for small broadcasters trying to acquire additional stations. Regulatory reforms that create incentives for established broadcasters to provide needed financial and technical support to new entrants will help foster a more diverse broadcast industry.").

broadcasters with one, two, or three radio stations to secure the toehold they have obtained in the industry. While we acknowledge that an entity with interests in four or more radio stations or a television station may not necessarily be considered a large or established broadcaster, we expect that a broadcaster with such interests will have more access to traditional financing and capital resources available, such that the resources anticipated to flow through the Commission's incubator program would not be as critical to their entry or survival. Consequently, limiting the eligibility criteria to those who have no more than three radio stations (consistent with the current new entrant bidding credit rule's limitation to "three mass media facilities"), and no TV stations, best promotes the purposes of the program.[40]

21. Moreover, analyses of Commission broadcast auctions data provided in the record show that the new entrant bidding credit—a modified version of which we adopt herein—has increased successful participation of

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[40] We note that the ACDDE's comments seem to suggest that the Commission's new entrant bidding credit rule allows ownership of up to three media of mass communications in each market. ACDDE Comments at 10, n.27. In fact, however, the new entrant bidding credit limits a new entrant to holding interests in three media of mass communications in total anywhere in the country. *See* 47 CFR § 73.5007(a) ("No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, *or* if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities." (emphasis added)). We follow this convention here, and under the standard we adopt today applicants will be restricted to holding attributable interests in three or fewer full-service radio stations.

small businesses owned by women and minorities in the auction of construction permits for AM, FM, and TV stations. NAB performed an analysis of the Commission's broadcast auctions data and found that winning bidders relying on the Commission's new entrant bidding credits were more likely to have indicated that they were owned by women and minorities than winning bidders who did not use the credit. NAB's analysis focused on nine FM broadcast auctions that utilized the new entrant bidding credit.[41] Its study concluded that winning bidders relying on new entrant bidding credits were 93 percent more likely to be women, and 40 percent more likely to be minorities, than winning bidders who did not use the credit.[42] In addition, NAB found that collectively winning bidders using new entrant bidding credits were 64 percent more likely to be minorities or women than other winning bidders.[43]

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[41] Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 2 (filed Mar. 26, 2018) (NAB Mar. 26 *Ex Parte*). Specifically, NAB evaluated the demographic data that are voluntarily provided on the FCC Form 175 by applicants interested in participating in broadcast auctions. *Id.* at 3. FCC Form 175 seeks information regarding the applicant's gender, race, ethnic origin, and new entrant bidding status.

[42] NAB Mar. 26 *Ex Parte* at 4.

[43] *Id.* Free Press asserts that the use of the new entrant bidding credit to induce successful auction bidding is greatly dependent upon each auction's specific circumstances. *See* Letter from Jessica J. González, Deputy Director and Senior Counsel, and S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, at 4 (July 3, 2018) ("Free Press July 3, 2018 *Ex Parte*"). Free Press does not, however, address the evaluation of 20 broadcast auctions performed by the ACDDE. *See infra* para. 22. Free Press

22. We note that the ACDDE also found that the use of the "new entrant" standard in auctions revealed a statistically significant improvement in female and minority participation after its review of 20 FCC broadcast auctions, more than twice the number evaluated by NAB.[44] The ACDDE determined that these auctions attracted a total of 2,531 applicants, of which 1,681 were determined to be qualified bidders. Of the 1,681 qualified bidders, the ACDDE found that 1) 1,457 were new entrants (i.e., held three or fewer mass media interests); 2) qualified minority new entrants (12.4 percent) were more prevalent than qualified minority-owned applicants who were not new entrants (8.7 percent); and 3) qualified women-owned new entrants (10.8 percent) were more prevalent than qualified women-owned bidders who were not new entrants (7.9 percent).[45] Based on this review, the ACDDE agrees that, while not its

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and UCC contend that the applicability of NAB's new entrant bidding credit analysis to other situations "is limited," and that the Commission makes an "unsupported analytical leap" to conclude that the success of the new entrant bidding credit in broadcast auctions is directly applicable to the successful completion of an incubator program. *Id.*; *see also* Letter from Cheryl A. Leanza, Policy Advisor, UCC, et al., to Marlene H. Dortch, Secretary, FCC at 4 (July 26, 2018) ("UCC et al. July 26, 2018 *Ex Parte*"). The significance of the experiences with the "new entrant bidding credit" criterion in the auction context for purposes of the incubator program, however, is merely that the criterion provides a known mechanism for identifying smaller entities and that entities that indicated eligibility for the bidding credit often also indicated that they were minority or female owned businesses. Because use of the criteria in the auction context appears to have led to greater female and minority participation, we anticipate similar results in the instant context.

[44] ACDDE Comments at 10, n.27.

[45] *Id.* at 10-11, n.27.

preferred approach, the new entrant definition "might have some utility" as a means of determining eligibility for participation in the incubator program.[46]

23. Commission staff also evaluated data from a number of Commission broadcast auctions conducted over the past several years, and that data reveal that the new entrant bidding credit has increased successful participation of small businesses owned by women and minorities in the auction process for AM, FM, and TV construction permits. The Commission collects data on information voluntarily filed by auction participants utilizing FCC Form 175.[47] Staff analysis of auctions data for 20 auctions[48] shows that of the 2,534 total applicants

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[46] *Id.* The ACDDE prefers adoption of an ODP standard and expresses concern about the difficulty in preventing abuse of a "new entrant" definition, recommending that the Commission consider omitting legacy applicants (e.g., spouses or the children of broadcasters) if it adopts a "new entrant" definition. *Id.* We address this concern in the section on safeguards applicable to entities eligible for a qualifying incubation relationship.

[47] *See* FCC Form 175, Application to Participate in an FCC Auction, http://transition.fcc.gov/Forms/Form175/175.pdf. Although eligibility for the new entrant bidding credit must be specified in an applicant's Form 175 application, applicants are not required to provide information about their race, ethnicity, or gender. Rather, applicants have the option of indicating that the business is minority-owned or woman-owned, or both. As the provision of this information is voluntary and not detailed further on the auction application, the ability to make definitive statements about the participation of minorities and women in Commission broadcast auctions is limited, as the Commission has noted in the past. *See 2014 FNPRM*, 29 FCC Rcd at 4507-08, n.917.

[48] Staff reviewed data for AM, FM, and TV Broadcast Auctions 25, 27, 28, 32, 37, 62, 64, 68, 70, 79, 80, 81, 82, 84, 88, 90, 91, 93, 94, and 98.

for those auctions, 1,457 of them, or 57.5 percent of the applicants, indicated that they qualified for the new entrant bidding credit. A total of 408 new entrant bidders were successful in their auction. The percentage of winning bidders that used a new entrant bidding credit and identified as women-owned was three times larger (12 percent) than the percentage of bidders that won without a new entrant bidding credit and were women-owned (4 percent). Similarly, the percentage of winning bidders that used a new entrant bidding credit and identified as minority-owned was almost three times larger (14 percent) than the percentage of bidders that won without the new entrant bidding credit and were minority-owned (5 percent).[49]

24. NAB's and the ACDDE's evaluations of the Commission's broadcast auctions data, like the Commission staff's analysis, suggest that the Commission's use of the new entrant bidding credit standard has been effective in diversifying the pool of successful bidders in the broadcast auctions context. Our assessment encompassed twice as many auctions as those reviewed by

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[49] We reject UCC et al.'s assertion that the Commission may not rely on its own simple analysis of broadcast auction data because it has not first placed a "study or data" into the record. *See* UCC et al. July 26, 2018 *Ex Parte* at 3. The Commission did not conduct any complex or technical study, nor did it introduce any new methodology. Instead, it merely tallied the responses of bidders in specified FCC broadcast auctions from information that is publicly available on its website, in a manner similar to that of two commenters in the proceeding. The Commission's analysis was supplementary information that expanded on and confirmed the findings of the other two analyses of broadcast auction data in the record and provided additional support, and—in any event—UCC has not demonstrated any prejudice from the Commission's use of that analysis in its decision-making.

NAB, and the overall results of those evaluations were similar—that the percentage of winning bidders who used a new entrant bidding credit and identified as either women-owned or minority-owned consistently exceeded the percentage of winning bidders who did not use a new entrant bidding credit and were women-owned or minority-owned. Thus, we expect that use of a similar new entrant eligibility standard will be an effective means to diversify the applicant pool for the incubator program, by targeting those small broadcasters most in need of the support provided by the incubator program, including minority and female applicants.

25. *Small Business Prong.* The second prong of our eligibility standard requires that incubated entities also qualify as small businesses consistent with the SBA standards for their industry grouping, based on annual revenue, currently $38.5 million or less for radio.[50] NAB supports use of a revenue-based eligible entity standard in combination with a new entrant standard.[51] The ACDDE objects to a revenue-based standard standing alone, asserting that this type of definition "has little or no value in advancing ownership diversity in the broadcast context."[52] We conclude, however, that the revenue cap, in conjunction with the first eligibility prong as well

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[50] *See* 13 CFR § 121.201 (North American Industry Classification System code 515112); *see also* 47 CFR § 73.3555, Note 2(i)(2)(ii) (revenue-based eligible entity definition); *see also Second Report and Order*, 31 FCC Rcd at 9983, para. 286 (re-adopting revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies).

[51] NAB Comments at 19.

[52] ACDDE Comments at 11, n.28.

as other safeguards discussed herein, will assist in identifying entities that are more likely to be in need of incubation by established broadcasters.[53] The combination of the new entrant eligibility criteria and the small business revenue standard will narrow the scope of eligible applicants to those applicants most in need of assistance via our incubator program. In this way, we expect to achieve our overarching goal of increasing ownership diversity by facilitating entry and developing broadcast expertise amongst new and small broadcasters.

26. After close review of the record, we find that the eligibility standard set forth above is the best means for identifying incubated entities whose lack of access to capital and operational experience has impeded their ability to participate successfully in the broadcast sector. We expect that pairing such entities with established incumbent broadcasters who can provide the necessary capital, knowledge, and operational support will

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[53] *See* NAB Comments at 18. In a joint filing, the Office of Communication, Inc., of the United Church of Christ (UCC), Free Press, Communications Workers of America, and Common Cause erroneously claim that the small business prong of our eligibility standard is meaningless given our estimate that 99.9 percent of commercial radio stations had annual revenues of $38.5 million or less as of June 22, 2018. *See* UCC et al. July 26, 2018 *Ex Parte* at 2. This assertion disregards the fact that the eligibility standard for our incubator program applies to entities, not individual radio stations, and thus it would exclude entities with attributable interests in multiple radio stations that, in aggregate, have more than $38.5 million in annual revenues. For instance, staff review of S&P Global Market Intelligence data show that iHeartMedia, Inc., owned over 700 radio stations in 2017 and had $2.2 billion in radio station ad revenues. *See* S&P Global Market Intelligence, 2017 Top Radio Station Owners Ranked by Total Radio Station Ad Revenue (2018).

ultimately promote competition and viewpoint diversity in local markets. The combination of a numerical cap on broadcast interests and a revenue limitation will ensure that incubated entities participating in the program are truly new or small broadcasters.[54]

27. Moreover, drawn from existing Commission rules, the standard we adopt today provides a clear, objective metric that is familiar to broadcasters. Use of an objective standard has the advantage of being straightforward and transparent for potential applicants, as well as administrable for the Commission without application of significant additional processing resources. Furthermore, unlike some of the other proposals contained in the record, because the new entrant bidding credit standard is race and gender neutral, it does not raise constitutional concerns.[55]

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[54] In the absence of such limits, the incubator program might allow those who do not truly need incubation to benefit from the program, squeezing out potential opportunities for others. *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket 17-289 et al., at 4, n.4 (filed Apr. 25, 2018) (NAB Apr. 25 *Ex Parte*) (raising the prospect of an "unusual circumstance" where a "broadcaster operates radio or television stations in twenty markets and wishes to enter into an incubation relationship in all of its markets with the *same incubated entity*" (emphasis added)).

[55] *See supra* note33. Commenters have not identified changes to proposed race- or gender-based definitions that would address previous concerns expressed by the Commission or provided analysis that persuades us that such a standard could withstand a constitutional challenge. *See NPRM*, 32 FCC Rcd at 9862, para. 132.

28. *Other Proposals*. We decline to adopt an Overcoming Disadvantage Preference (ODP) standard.[56] The ACDDE advocates for such a standard, which it describes as a "race-and-gender-neutral preference" focused on the experiences and efforts of an individual person that affords a preference to those who strived, through superior individual efforts, to attempt to overcome major impediments to success.[57] According to the ACDDE, "success or failure in overcoming obstacles is not pertinent;" rather, what would matter is "effort, the steps the person took to persevere."[58] We note the concerns raised by NAB that a standard such as ODP will require the Commission to make subjective decisions on the qualifications of candidates proposed to be the incubated entity, which could be time-consuming, complex, and subject to disputes.[59]

29. The Commission has previously assessed ODP and articulated its concern that the agency lacks the resources to conduct the individualized reviews recommended as a central component of implementing ODP.[60] In

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[56] *See* ACDDE Comments at 20 (stating "the Commission should not institute a bright-line test defining the extent of the disadvantage that has been overcome. Instead the Commission could compare the net socioeconomic status of the applicant to the net socioeconomic status of other persons who have experienced a similar substantial disadvantage.").

[57] *Id.* at 13. At the same time, however, the ACDDE adds that it "may be that members of minority groups and women will be more likely than others to obtain a preference, but that would only be because they tend to face more disadvantages." *Id.* at 15.

[58] *Id.* at 18.

[59] NAB Reply Comments at 10.

[60] *2014 FNPRM*, 29 FCC Rcd at 4507, para. 300.

the broadcast licensing context, the Commission indicated that the type of individualized consideration that would be required under an ODP standard could prove to be "administratively inefficient, unduly resource intensive, and inconsistent with First Amendment values."[61] We do not find the ACDDE's current filing to have assuaged those concerns. In the Part I Competitive Bidding Rules proceeding, the Commission stated that "it is not clear what proof should be required from those individuals or entities seeking to receive such a preference or how to apply the ODP on a neutral basis. We are also concerned that our review of such a claim would involve a costly and lengthy process.[62] While the ACDDE did offer suggestions for the administration of an ODP standard, the standard remains inherently subjective and, we believe, inappropriate for the broadcast licensing context.[63] Consequently, we affirm our earlier decisions regarding the administrative infeasibility

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[61] *Id.; see also In the Matter of Updating Part I Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7551, para. 138 (2015) (stating concerns about the complexity of implementing such a preference).

[62] *Id.*

[63] ACDDE Comments at 23. The ACDDE recommends that the Commission construct a multi-tiered system of review, beginning with a team of three Commission employees to evaluate the applications. At the first stage of the selection process, according to the ACDDE, the candidate's qualifications to control a license would count for 33 percent of the score given by the evaluators; the remaining 67 percent would be awarded based on the severity of the disadvantage. The ACDDE concedes that there is "necessarily some subjectivity concerning determinations of the severity of a disadvantage and a person's degree of success in overcoming it." After

of an ODP standard.[64] For all of the reasons stated above, we decline to implement an ODP standard for the incubator program.

30. In addition to advocating for the use of ODP as the eligibility standard, the ACDDE also proposes that "mission-based entities"[65] and Native American Nations[66] be automatically presumed to be eligible for incubation.[67] Although the ACDDE's incubator proposal and the benefits that it would provide incubators—namely the award of tax certificates for stations donated to a mission-based entity or Native American Nation—are not the same as the incentives that we adopt today, we share the ACDDE's goal of including diverse participants in our incubator program. We encourage them to apply and establish clearly in their certified supplemental statements how their participation in the incubator program is consistent with the goals of the program.

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scoring, the ACDDE proposes that the applicants would be permitted to make oral presentations of 30-60 minutes to the committee. *Id.* at 22-24.

[64] *Second Report and Order*, 31 FCC Rcd, at 9987, para. 294; *2014 FNPRM*, 29 FCC Rcd at 4507, para. 300.

[65] The ACDDE describes "Mission-Based Institutions" as Historically Black Colleges and Universities, Hispanic Serving Institutions, Asian American Serving Institutions, and Native American Serving Institutions. ACDDE Comments at 27. The ACDDE states that these institutions are defined by their missions of multicultural education, and not by the race of their students; thus, the ACDDE asserts that they are regarded as race-neutral for equal protection purposes. *Id.*

[66] The ACDDE defines a "Native American Nation" as a self-governing Indian territory recognized by the federal government pursuant to a treaty. *Id.* at 28, n.60.

[67] *Id.* at 27-29.

We recognize that, unlike small, aspiring, and struggling broadcasters, many mission-based entities and Native American Nations have broader missions that encompass much more than broadcasting and thus these entities may be less likely to learn of our incubator program absent education and outreach by the Commission. Therefore, the Commission will conduct outreach to help encourage participation in the incubator program by mission-based entities and Native American Nations that meet the program's eligibility requirements.[68] We decline, however, to adopt the proposed automatic presumption of eligibility.[69]

31. *Safeguards Associated with Eligibility Standard.* We recognize that the ACDDE has raised concerns about the potential for abuse of an eligibility standard based on the Commission's new entrant bidding credit.[70] In particular, the ACDDE references the Commission's comparative broadcast hearings, long since discontinued, in which the ACDDE asserts spousal and parent-child relationships were used to "game the system and defeat minority new entrants."[71] The ACDDE

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[68] *See* Letter from David Honig to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289 et al., at 1 (filed July 26, 2018) (Honig July 26, 2018 *Ex Parte*) (urging the Commission to conduct outreach to "mission-based entities" and Native American Nations to encourage them to participate in the incubator program).

[69] *See id.*

[70] *Id.* at 10, n.27. Free Press also raises concerns about the need for transparency in the relationship between the incubated entity and the incubating entity, stating that the incubating entity will have 100 percent control over whom they choose to incubate, and they may have a "strong incentive" to incubate "a cousin of the owner or a banker friend." Free Press July 3, 2018 *Ex Parte* at 5.

[71] ACDDE Comments at 10, n.27.

acknowledges, however, that the new entrant definition might be useful in promoting minority and female broadcast ownership if the Commission were able to address these "legacy applicant" concerns.[72]

32. To address such concerns, we adopt certain safeguards in conjunction with our two-pronged eligibility standard. As part of the application process, which is described in greater detail below,[73] potential incubated entities must demonstrate that they have met both the numeric and revenue limitation for the preceding three years. Thus, an entity must not only comply with the eligibility standard at the time it applies to participate in a qualifying incubation relationship, but also for the three years prior to its application. NAB proposed a one-year certification period, which would require that applicants certify that, for the year prior to applying for participation in the incubator program, they have met the applicable eligibility standards in terms of the number of stations owned.[74] Such a certification would, in NAB's view, help to discourage any potential manipulation of the program by applicants who dispose of financial interests in additional broadcast properties prior to applying for participation in the incubator program.[75] NAB further proposes that program applicants be required to certify compliance with

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[72] *Id.* Similarly, on reply, 22 members of the ACDDE (22 ACDDE Members) state that if the Commission ultimately prefers a new entrant definition, a modified definition "should be considered." 22 Members of the ACDDE Reply at 3 (22 ACDDE Members Reply).

[73] *See infra* Section E. 1 (Bureau Review of Incubation Proposals).

[74] NAB Comments at 18.

[75] *Id.*

any revenue eligibility standards that are adopted.[76] We concur with NAB that a certification requirement will safeguard our eligibility concerns; however, we find that a longer 3-year period is more likely to deter any fraud or manipulation than a shorter timeframe.

33. In addition, as part of the incubator program application process, we will require a potential incubated entity to include in its application a certified statement attesting that it would be unable to acquire a station, or continue to operate successfully a station proposed for incubation that it already owns, absent the proposed incubation relationship and the funding, support, or training provided thereby. The Commission, in its discretion, may investigate the accuracy of the certification if it is made aware of information that suggests that the potential incubated entity does not, in fact, need the incubation relationship to purchase and operate a broadcast radio station. All applicants will further be required to detail any attributable interests in broadcast stations held by family members pursuant to FCC Forms 301, 314, and 315, thereby revealing any familial or spousal relations as part of the application process.[77] If at any

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[76] *Id.* at 18-19.

[77] FCC Form 301, Application for Construction Permit for a Commercial Broadcast Station, https://transition.fcc.gov/Forms/Form301/301.pdf; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, https://transition.fcc.gov/Forms/Form314/314.pdf; FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, https://transition.fcc.gov/Forms/Form315/315.pdf.

point the Commission determines that the certified statement contained misrepresentations,[78] both the incubated and incubating entities may suffer negative consequences. Pursuant to the Commission's *Character Policy Statement*, we would examine the qualifications of both parties to hold or retain broadcast licenses.[79]

34. The incubator program is designed to assist those new or small broadcasters who do not have access to the necessary capital or technical expertise absent a qualifying incubation relationship. Thus, an individual who provides evidence of a meager bank account and attests to limited resources might subsequently be disqualified from the program, while also being subject to any penalties associated with making misrepresentations to a federal agency, if it is later determined that this individual also had access to a large personal trust fund designed to assist him or her in business ventures. Likewise, the incubating entity affiliated with this incubation relationship may find its reward waiver withheld or revoked, depending on whether it knew, or should reasonably have known, about the incubated individual's access to such a trust fund or other assets. We expect that the possibility of negative consequences for both the incubated and incubating entities for any misrepresentations regarding the incubated entity's need for the

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[78] *See* 47 CFR § 1.17 (requiring the submission of factually correct information to the Commission); *id. §* 73.1015 (providing that statements of fact relevant to determining whether a broadcast application should be granted or denied are subject to Section 1.17 of the Commission's rules).

[79] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179, 1180, para. 2 (1986).

program should serve as a sufficient deterrent against such behavior.

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-1107, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943, & 18-3335

PROMETHEUS RADIO PROJECT

*NATIONAL ASSOCIATION OF BROADCASTERS
**COX MEDIA GROUP LLC, INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT, PETITIONERS IN NO. 17-1107, 18-1092, 18-2943

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNSEL AND NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., PETITIONERS IN 17-1109, 18-1670, 18-3335

THE SCRANTON TIMES, L.P., PETITIONERS IN 17-1111

INDEPENDENT TELEVISION GROUP, PETITIONER IN 18-1669

FREE PRESS; OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND

TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA; COMMON CAUSE, PETITIONERS (NO. 18-1671)

*BENTON FOUNDATION; COMMON CAUSE; MEDIA ALLIANCE; MEDIA COUNCIL HAWAII; NATIONAL ASSOCIATION OF BROADCASTERS EMPLOYEES AND TECHNICIANS COMMUNICATIONS WORKERS OF AMERICA; NATIONAL ORGANIZATION FOR WOMAN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST INC., INTERVENORS

*(PURSUANT TO THE CLERK'S ORDER DATE 1/18/17)
** (PURSUANT TO THE CLERK'S ORDER DATED 2/7/17)

(AGENCY NO. FCC 16-107, ET AL)

Filed: Sept. 27, 2019

ORDER

Present: AMBRO, SCIRICA and FUENTES, Circuit Judges

1. Joint Motion by Petitioners to File Supplemental Appendices in support of Reply Briefs of Petitioners;

2. Response by Intervenors News Media Alliance, Fox Corporation, National Association of Broadcasters, News Corporation, Sinclair Broadcast Group Inc., Bonneville International Corporation, The Scranton Times L.P., and Connoisseur Media LLC in Opposition to Joint Motion to File Supplemental Appendices;

3. Reply by Petitioners Multicultural Media, Telecom and Internet Council and National Association of Black Owned Broadcasters in Support of Joint Motion to File Supplemental Appendices;

4. Joint Reply by Petitioners in Support of Joint Motion to File Supplemental Appendices;

5. Joint Motion by Petitioners to re-style Motion to File Supplemental Appendices as Motion for Leave to File Addenda in Support of Reply Briefs of Petitioners;

6. Letter Motion by Petitioners Requesting Joint Appendices in Prior Cases (Nos. 08-3078 and 15-3863) be Made Available Electronically in Current 10 Cases.

Respectfully,

Clerk/eaf

The motion for leave to restyle the motion to file supplemental appendices as a motion for leave to file addenda in support of the reply briefs of Petitioners is granted. The motion to file the addenda is hereby granted with filing of the addenda as of April 12, 2019.

The letter motion requesting that the joint appendices in prior cases, Nos. 08-3078 and 15-3863, be made available electronically in the current 10 cases is granted in part. To the extent the Court needed to review any materials from the appendices filed in Nos. 08-3078 and 15-3863 that were cited in the parties' briefs for these 10 cases, the electronic version of the materials was reviewed. The appendices for Nos. 08-3078 and 15-3863 will not be re-docketed in the above 10 cases.

By the Court,

/s/ THOMAS L. AMBRO
THOMAS L. AMBRO
Circuit Judge

Dated: Sept. 27, 2019
MS/cc: All counsel/parties of record

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-1107, 17-1109, 17-1110, 17-1111

PROMETHEUS RADIO PROJECT

*NATIONAL ASSOCIATION OF BROADCASTERS
**COX MEDIA GROUP LLC, INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT, PETITIONERS IN NO. 17-1107

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNSEL AND NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., PETITIONERS IN 17-1109

THE SCRANTON TIMES, L.P., PETITIONERS IN 17-1110

BONNEVILLE INTERNATIONAL CORPORATION, PETITIONERS IN 17-1111

* PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT; BENTON FOUNDATION; COMMON CAUSE; MEDIA ALLIANCE; MEDIA COUNCIL HAWAII; NATIONAL ASSOCIATION OF BROADCASTERS EMPLOYEES AND TECHNICIANS COMMUNICATIONS WORKERS OF AMERICA; NATIONAL ORGANIZATION FOR WOMAN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST INC., INTERVENORS

*(PURSUANT TO THE CLERK'S ORDER DATE 1/18/17)
** (PURSUANT TO THE CLERK'S ORDER DATED 2/7/17)

Nos. 18-1092, 18-1669, 18-1670, 18-1671,
18-2943 & 18-3335

PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT, PETITIONERS (NO. 18-1092, 18-2943)

INDEPENDENT TELEVISION GROUP, PETITIONERS (NO. 18-1669)

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.; NATIONAL ASSOCIATION OF BLACK-OWNED BROADCASTERS, PETITIONERS (NO. 18-1670, 18-3335)

FREE PRESS; OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA; COMMON CAUSE, PETITIONERS (NO. 18-1671)

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

Filed: Nov. 20, 2019

On Petition for Review of An Order
of the Federal Communications Commission
(FCC Nos. FCC-1: FCC-16-107;
FCC-17-156; FCC-18-114)

SUR PETITION FOR REHEARING

Before: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS,

PORTER, MATEY, PHIPPS, SCIRICA* and Fuentes* Circuit Judges

The petitions for rehearing filed by Respondents and Intervenors in support of Respondents in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court *en banc* are denied.

By the Court,

/s/ THOMAS L. AMBRO, Circuit Judge
THOMAS L. AMBRO

Dated: Nov. 20, 2019
MB/arr/cc: All Counsel of Record

* Senior Judges Scirica and Fuentes are limited to panel rehearing only.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-1107, 17-1109, 17-1110, 17-1111

PROMETHEUS RADIO PROJECT

*NATIONAL ASSOCIATION OF BROADCASTERS
**COX MEDIA GROUP LLC, INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT, PETITIONERS IN NO. 17-1107

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNSEL AND NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., PETITIONERS IN 17-1109

THE SCRANTON TIMES, L.P., PETITIONERS IN 17-1110

BONNEVILLE INTERNATIONAL CORPORATION, PETITIONERS IN 17-1111

* PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT; BENTON FOUNDATION; COMMON CAUSE, MEDIA ALLIANCE; MEDIA COUNCIL HAWAII; NATIONAL ASSOCIATION OF BROADCASTERS EMPLOYEES AND TECHNICIANS COMMUNICATIONS WORKERS OF AMERICA; NATIONAL ORGANIZATION FOR WOMAN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST INC., INTERVENORS

*(PURSUANT TO THE CLERK'S ORDER DATE 1/18/17)
** (PURSUANT TO THE CLERK'S ORDER DATED 2/7/17)

Nos. 18-1092, 18-1669, 18-1670, 18-1671,
18-2943 & 18-3335

PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT, PETITIONERS (NO. 18-1092, 18-2943)

INDEPENDENT TELEVISION GROUP, PETITIONERS (NO. 18-1669)

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.; NATIONAL ASSOCIATION OF BLACK-OWNED BROADCASTERS, PETITIONERS (NO. 18-1670, 18-3335)

FREE PRESS; OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA; COMMON CAUSE, PETITIONERS (NO. 18-1671)

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

Argued: June 11, 2019
Filed: Sept. 23, 2019

On Petition for Review of An Order
of the Federal Communications Commission
(FCC Nos. FCC-1: FCC-16-107;
FCC-17-156; FCC-18-114)

JUDGMENT

Before: AMBRO, SCIRICA, and FUENTES, Circuit Judges

These causes came on to be heard on the record from the Federal Communications Commission and were argued on June 11, 2019.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that:

1. The 2016 Report & Order and the Reconsideration Order are vacated and remanded in their entirety, and the Incubator Order is vacated and remanded as to its definition of eligible entities.
2. The panel retains jurisdiction over the remanded issues.
3. All other petitions for review and requests for relief are denied.

All of the above in accordance with the opinion of this Court. The parties to bear their own costs.

ATTEST:

/s/ PATRICIA S. DODSZUWEIT
PATRICIA S. DODSZUWEIT
Clerk

Dated: Sept. 23, 2019

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-1107, 17-1109, 17-1110, 17-1111

PROMETHEUS RADIO PROJECT

*NATIONAL ASSOCIATION OF BROADCASTERS
**COX MEDIA GROUP LLC, INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT, PETITIONERS IN NO. 17-1107

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNSEL AND NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., PETITIONERS IN 17-1109

THE SCRANTON TIMES, L.P., PETITIONERS IN 17-1110

BONNEVILLE INTERNATIONAL CORPORATION, PETITIONERS IN 17-1111

* PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT; BENTON FOUNDATION; COMMON CAUSE, MEDIA ALLIANCE; MEDIA COUNCIL HAWAII; NATIONAL ASSOCIATION OF BROADCASTERS EMPLOYEES AND TECHNICIANS COMMUNICATIONS WORKERS OF AMERICA; NATIONAL ORGANIZATION FOR WOMAN FOUNDATION; OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST INC., INTERVENORS

*(PURSUANT TO THE CLERK'S ORDER DATE 1/18/17)
** (PURSUANT TO THE CLERK'S ORDER DATED 2/7/17)

Nos. 18-1092, 18-1669, 18-1670, 18-1671,
18-2943 & 18-3335

PROMETHEUS RADIO PROJECT; MEDIA MOBILIZING PROJECT, PETITIONERS (NO. 18-1092, 18-2943)

INDEPENDENT TELEVISION GROUP, PETITIONERS (NO. 18-1669)

MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.; NATIONAL ASSOCIATION OF BLACK-OWNED BROADCASTERS, PETITIONERS (NO. 18-1670, 18-3335)

FREE PRESS; OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA; COMMON CAUSE, PETITIONERS (NO. 18-1671)

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

Argued: June 11, 2019
Filed: Sept. 27, 2019

On Petition for Review of An Order
of the Federal Communications Commission
(FCC Nos. FCC-1: FCC-16-107;
FCC-17-156; FCC-18-114)

AMENDED JUDGMENT

Before: AMBRO, SCIRICA, and FUENTES, Circuit Judges

These causes came on to be heard on the record from the Federal Communications Commission and were argued on June 11, 2019.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that:

1. The Reconsideration Order and the Incubator Order are vacated and remanded in their entirety, and the 2016 Report and order is vacated and remanded as to its definition of eligible entities.
2. The panel retains jurisdiction over the remanded issues.
3. All other petitions for review and requests for relief are denied.

All of the above in accordance with the opinion of this Court. The parties to bear their own costs.

ATTEST:

/s/ PATRICIA S. DODSZUWEIT
PATRICIA S. DODSZUWEIT
Clerk

Dated: Sept. 27, 2019

APPENDIX I

1. 5 U.S.C. 706 provides:

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.

2. 47 U.S.C. 161 provides:

Regulatory reform

(a) Biennial review of regulations

In every even-numbered year (beginning with 1998), the Commission—

(1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) Effect of determination

The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

3. 47 U.S.C. 303 provides in pertinent part:

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided*, *however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

* * * * *

BROADCAST OWNERSHIP

Pub. L. 104-104, title II, § 202, Feb. 8, 1996, 110 Stat. 110, as amended by Pub. L. 108-199, div. B, title VI, § 629, Jan. 23, 2004, 118 Stat. 99, provided that:

"(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 39 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.

"(3) DIVESTITURE.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not

apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

"(4) FORBEARANCE.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);[.]

"(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 [Feb. 8, 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 quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. 161] 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. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

"(i) ELIMINATION OF STATUTORY RESTRICTION.—[Amended section 533(a) of this title.]"

* * * * *

4. 47 U.S.C. 309(a) provides:

Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.