Nos. 19-1231, 19-1241

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

PETITIONERS,

V.

PROMETHEUS RADIO PROJECT, *ET AL.*,

RESPONDENTS.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,

PETITIONERS,

V.

PROMETHEUS RADIO PROJECT, *ET AL.*,

RESPONDENTS.

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

Brief of *Amicus Curiae* Public Knowledge

HAROLD FELD
COUNSEL OF RECORD
PUBLIC KNOWLEDGE
1818 N. ST., NW
SUITE 410
WASHINGTON, DC 20036
hfeld@publicknowledge.org
(202) 559-1044

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INTEREST OF AMICUS CURIAE

Public Knowledge[1] is a nonprofit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, including diverse sources of news and information. For almost 20 years, Public Knowledge has participated in media policy issues and spectrum policy issues, ranging from spectrum auction design to promote competition to regulation of legacy media. Staff of Public Knowledge actively participated in the design of the spectrum auction, testifying on multiple occasions before Congress and participating in multiple related FCC proceedings. Members of Public Knowledge have also served on the Department of Commerce Spectrum Management Advisory Committee (CSMAC) and the FEMA advisory committee on the national wireless emergency alert system.

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[1] Pursuant to Supreme Court Rule 37.3(a), Petitioner has provided blanket consent and Respondent has consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Since the Federal Radio Act of 1927, it has been illegal to operate any device that uses the electromagnetic spectrum for communications.[2] Today, the FCC distributed spectrum access in three ways. First, the FCC permits devices approved under Part 15 of its rules to operate on an "unlicensed" basis by anyone for any purpose. In exchange, these devices are granted no protection from interference, must shut down if they cause interference to any licensed service, and must obey all FCC rules under which they are certified. Familiar wireless services such as Wi-Fi and Bluetooth are examples of unlicensed spectrum use. The FCC also licenses certain services "by rule" under Section 307(e). These uses do not require a specific license, but are limited to their stated purpose and receive only limited interference protection. Finally, the FCC grants exclusive licenses. These exclusive licensees are the only users permitted on the frequencies assigned to them, and receive interference protection from any man-made source.[3] Broadcasters fit into this last, and most exclusive category.

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[2] *See National Broadcasting Co. v. United States,* 319 U.S. 190, 210-15 (1943) *(NBC v. U.S.*) *(*detailing history of regulation of spectrum until passage of the Communications Act of 1934).

[3] *See* Harold Feld, "From Third Class Citizen to First Among Equals: Rethinking the Place of Unlicensed Spectrum in the FCC Hierarchy," 15 CommLaw Conspectus 53, 55 (2007). The FCC may also subdivide the exclusivity, for example permitting "secondary" users in the same band. For example, low-power television stations (LPTV) are secondary to full power TV

While exclusive licenses are today distributed by auction,[4] broadcasters largely received their licenses for free in exchange for providing specific services to the public.[5] This bargain – a local monopoly on the use of specific frequencies and a government set limit on the number of potential broadcast competitors in a market in exchange for offering free broadcast programming subject to FCC regulation – is unique in the spectrum ecosystem. Congress and this Court have consistently recognized the important unique roll of broadcasters as distinct from other spectrum licensees in conferring both special benefits and special obligations and restrictions on broadcast licensees.[6]

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stations. An LPTV station is protected from any harmful interference except that caused by a full power licensee, and must not interfere with a full power licensee.

[4] Balanced Budget Act of 1997, Pub. L. 105-33 §3002 (requiring the FCC to use auctions to resolve conflicting applications for licenses).

[5] In 1997, Congress eliminated comparative hearings and required that broadcasters resolve conflicting applications through auctions. *Id.* Broadcast licenses assigned by auction have constituted only a small fraction of overall full power or LPTV licenses.

[6] *See, e.g., Turner Broad. Sys. v. FCC*, 520 U.S. 180, 194 (1996) (*Turner II*) ("Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (*NCCB*) (newspaper/broadcast cross-ownership rule justified as means to increase diversity of mass media).

Most critically, Congress and this Court have repeatedly recognized, the unique role that broadcasters play in providing news, particularly local news, necessary for self-government.[7] To promote the interests of democracy and the First Amendment, the FCC and Congress have imposed limits on broadcast ownership.[8] Broadcasters now come before this Court asking it to maintain all the benefits bestowed on broadcasters, while eliminating the most important safeguard to providing the necessary diversity – ownership limits. The presence of competing sources of information altered the continuing importance of broadcast news, and therefore the importance of diversity of ownership in broadcasting. Especially with the collapse of local newspapers, broadcasters are increasingly the primary local source for daily news and analysis. The flood of raw information pouring in from internet sources, polluted with misinformation and disinformation, does not replace dedicated professional journalists that have earned community trust through long use and habit.[9] But while broadcasters insist on the right to consolidate, they continue to fight equally hard to exclude other would-be spectrum users, or pay for interference protection in the same way that other exclusive licensees pay.

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[7] *See, e.g.,* Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385 2(6)-(11); *Columbia Broadcast System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973) *("CBS v. DNC"); NBC v. U.S.*, 319 U.S. at 193.

[8] *See* Consolidated Appropriations Act of 2004, Pub. L. 108-199 §629 (setting national broadcast ownership cap at 39%); *NBC v. U.S.*, *supra* n.2.

[9] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400 (1969).

On March 30, 2017, the FCC concluded Auction 1000, the "Incentive Auction" designed to reduce the number of broadcaster licensees and transfer that spectrum to wireless carriers for advanced mobile services.[10] In addition to being the most complicated spectrum auction in history, the auction was a dramatically transformative event for the broadcast industry. The already scarce and valuable broadcast band was made even more valuable by reducing its size. Fully 15 television channels, from Channel 51 to Channel 37, or roughly one-third of all available channels, were eliminated from the broadcast service nationally. This substantially understates the loss of available broadcast channels available for use by broadcasters, since many channels in the remaining markets are unusable for technical reasons. Not only did this event eliminate 175 active licensees,[11] but it virtually foreclosed the possibility of the FCC issuing new broadcast television licenses in all but the least populated rural markets.

Despite this profound reduction in the number of broadcast media voices, and the accompanying increase in scarcity from the elimination of any potential new broadcast entrants, the Commission in the decision under review refused to examine the impact of the auction on minority and women ownership. Instead, the 2017 Ownership Order stated

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[10] Public Notice, "Incentive Auction and Channels Assignment Public Notice," 32 FCC Rcd 2786 (2017).

[11] "By the Numbers," FCC Incentive Auction Fact Sheet, available at: https://www.fcc.gov/document/fcc-announces-results-worlds-first-broadcast-incentive-auction-0

that it was still "premature" to analyze the impact of the Incentive Auction. *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 32 FCC Rcd 9802 (2017) ("2017 Ownership Order") at ¶85. While acknowledging that the auction was already over and the Commission possessed information to conduct an analysis, the FCC declined to do so until the post-auction repacking of remaining stations and phase out of reclaimed licenses was underway. But the Commission already new which licensees would be eliminated and which would need to rely going forward on being able to renew leasing arrangements with other licensees, as evidenced by their beginning payouts to the impacted broadcast licensees in July 2017.[12] Furthermore, the Commission knew with certainty the number of broadcast channels eliminated. Based on this number, the Commission could determine that women and minority owners would be foreclosed from acquiring new (either full power or low-power) licenses directly from the Commission, and considered the impact of this new reality. This was particularly important given the evidence in the record that minority owned stations were being purchased by spectrum speculators ahead of the auction. Comments of Asian Americans Advancing Justice at 8-11. CA3JA980-83

[12] Public Notice, "Incentive Auction Task Force and Media Bureau and Wireless Telecommunications Bureaus Announce the Commission is Ready to Pay Reverse Auction Winning Bids," 32 FCCRcd 5715 (2017).

SUMMARY OF ARGUMENT

By refusing to make even a good faith effort to consider the impact of this transformative event on diversity of voices generally, and the impact on women and minorities in particular, the Commission "entirely failed to consider an important aspect of the problem." *Motor Vehicles Mfrs. Ass'n. of U.S. v. State Farm Auto Ins. Co.*, 46 U.S. 29, 43 (1983). Nor was the Commission's rationale for this refusal rational. The Commission claimed that waiting on the results of the Incentive Auction repacking would violate the requirement to consider the existing marketplace at the time of the Order. 2017 Ownership Order at ¶85. But the Commission had already met the deadline for the 2016 Review as required by Section 202(h). Issuing the Order on Reconsideration was entirely discretional. Nor did the Commission explain why it anticipated that anything significant would change during the repacking. At any event, the Commission could, at a minimum, have considered the impact of the removal of broadcast channels on diversity going forward. And if the Commission were genuinely uncertain as to the final impact of the repacking on diversity of ownership, the rational response was to maintain the status quo rather than to virtually eliminate the ownership rules to encourage more consolidation.

Part I provides a detailed description of the unique nature of broadcast licenses and the long-time acceptance by broadcasters of what amounts to a multi-billion dollar spectrum subsidy and business model monopoly in exchange offering free programming to the public. This quid pro quo of

regulatory favors in exchange for increasingly modest public interest regulation remains as necessary now as it was when first adopted in 1927. Part II looks specifically at the Incentive Auction, which preserved the special treatment of broadcasters and increased the scarcity of broadcast spectrum. Part II then discusses the details of the Incentive Auction, why it was transformative to the broadcast industry, and why the manner in which the 2017 Ownership Order dealt with the Incentive Auction was arbitrary.

ARGUMENT

I. THE UNIQUE ROLE OF BROADCASTERS IN SPECTRUM POLICY.

The early history of broadcast regulation is summarized in this Court's decision in NBC v. United States.[13] Very rapidly in the 1920s, radio broadcasting displaced all other uses of radio in importance. For the first time, nation-wide broadcasting by national networks, called at the time "chain broadcasting," dramatically altered the way in which the country absorbed news and entertainment.[14] While Congress embraced the potential for national and local news and programming reaching millions of American simultaneously, Congress also feared the power of radio to create violent racial divisions, harass individuals, and mislead the public.[15] As a consequence, Congress imposed unique obligations on broadcasters, and directed the FCC to impose further regulation as necessary to "serve the public interest."

A. Emphasis on Localism and Competition Distinct from Other Licensees.

Broadcasters have always known and accepted the bargain offered by Congress: in exchange for free access to broadcast frequencies, and laws limiting the ability of others to enter the market, broadcasters

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[13] *Supra* note 2.

[14] *Id.*

[15] Note, "Radio Censorship and the Federal Communications Commission." 39 *Columbia L. Rev*. 447 (1939).

accept special obligations to serve the public. Specifically, unlike traditional licensing for specific services — such as two-way communications for first responders or for buses or truck fleets – broadcasters received licenses authorized to operate at extremely high power, covering a designated market area, and to make money directly from the use of the free public spectrum resource. Broadcasters alone received their licensees free, to provide service to anyone with the right equipment one-way communications for entertainment or educational purposes, with content left to the discretion of the broadcaster. As history shows, this business model proved immensely popular, profitable and influential.

In addition, because Congress and the FCC expressly limit the availability of broadcast licenses, the market is uncontestable through typical means. While others may broadly compete for eyeballs, the unique position of broadcasters for over 85 years has given broadcasters unique advantages in the local market. As this Court has previously observed:

> Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming

> ranges widely enough to serve the public interest.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).[16] This remains equally true today.

In exchange for these and other enormous market advantages, combined with tremendous liberty to use the spectrum to provide a wide range of programming, broadcasters have accepted unique responsibilities and regulations. Most importantly, Congress and the FCC have regulated to promote media diversity by limiting the number of broadcast outlets or other forms of media broadcasters may own.

Put somewhat poetically, broadcasters are "trustees" of their exclusive licenses, which they operate for the benefit of the local community of record. Broadcasters had (and still have) the shortest license terms for time of renewal of their licenses and – in theory if not in recent practice — continuing requirements to demonstrate their service to the local community beyond specific compliance with all rules as a condition of maintaining their licenses. By contrast, other licensees have lengthier periods of license renewal, and generally need only show

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[16] As discussed in greater detail below, despite the introduction and popularity of other sources of news and programming, broadcasters retain their place as the most trusted source of local news and a valuable source of programming. This position has been enhanced by regulatory benefits conferred by Congress and the FCC.

compliance with rules governing deployment of facilities.[17]

B. Congress, the FCC, and the Courts Have Continued to Reinforce the Unique Role of Broadcasting Despite Constant Changes to the News and Entertainment Market.

In the past, regulations and responsibilities to introduce some measure of competition and ensure service to the local community were extremely intrusive. These included very specific limitations on network operators, preventing them from holding financial interests in broadcast programming, and requiring networks relinquish prime time programming hours.[18] Congress and the FCC formerly prohibited cross-ownership of broadcast outlets with cable systems;[19] required broadcasters to

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[17] Initially, broadcasters were required to renew their licenses every three years, and were subject to challenges from the local community and from rivals arguing that they could provide better service to the local community. *See Office of Com'n of United Church of Christ, Inc. v. FCC,* 359 F.2d 994 (D.C. Cir 1966). Today, broadcasters need only renew their licenses every 8 years, and are no longer subject to competing applications from potential challengers. *See* 47 U.S.C. § 309(k). Nevertheless, broadcast licensees are still obligated to alert listeners/viewers when their licenses are up for renewal, and members of the public may challenge their renewal on public interest grounds. By contrast, most other licenses are renewed every 10-15 years, and licensees must simply show that they have complied with the FCC's rules.

[18] *See Mt Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2nd Cir. 1971).

[19] *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1035 (D.C. Cir. 2002).

maintain local studios to ensure a commitment to local programming;[20] and required broadcasters to assess the needs of the local community and demonstrate that they programed their stations to meet these needs.[21] The FCC previously imposed far stricter limits on ownership than those relaxed or eliminated in the 2017 Ownership Order. For example, the Commission at one time limited ownership to a single station nationwide.[22] All of these measures furthered the fundamental public interest goals of enhancing diversity of views in electronic media from genuinely diverse and antagonistic sources.

As new means of delivering news and programing developed, Congress and the FCC have relaxed or eliminated many of these rules – trusting that competition from these additional sources would require broadcasters to focus on improving the quality of their free broadcasting. At the same time, however, Congress and the FCC have continued to reinforce the unique position of broadcasters in the delivery of free, diverse, local content. Congress has conferred unique benefits on broadcasters, which continue to justify the unique ownership rules imposed on them.

For example, Congress and the FCC have continued to preserve the monopoly right of broadcast licensees to their designated market area. The FCC

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[20] *See* Elimination of Main Studio Rule, *Report & Order*, 32 FCC Rcd 8158 (2017).
[21] *CBS v. DNC*, 412 U.S. at 110-11 (1973).
[22] *NBC v. U.S.*, *supra* n. 2.

prohibits satellite radio from offering local news or local programming that would compete with terrestrial broadcasters.[23] Congress and the FCC continue to protect local broadcasters from the importation of non-local broadcast signals offering competing programming.[24] Congress provided to broadcasters special signal protection rights distinct from copyright, prohibiting anyone from retransmitting the signal of a broadcaster without the express permission of the broadcast licensee originating the signal.[25] At the same time, Congress also permits local broadcasters to require unwilling cable operators to carry local affiliates.[26] In *Turner II*, this Court explained that Congress intended to preserve a robust local broadcasting service for the express purpose of preserving production of competing local news sources necessary for self-governance, "a government purpose of the highest order."[27]

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[23] *See* Mark Lloyd, "The Strange Case of Satellite Radio," American Progress (Feb. 8, 2006) available at: https://www.americanprogress.org/issues/democracy/news/2006/02/08/1829/the-strange-case-of-satellite-radio/

[24] *See* Congressional Research Service, "Copyright Act and Communications Act Changes in 2019 Related to Television," January 13, 2020. Available at: https://crsreports.congress.gov/product/pdf/R/R46023

[25] 47 U.S.C. § 325. *See also ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014).

[26] 47 U.S.C. §§ 534-35.

[27] *Turner II*, 520 U.S. at 190.

C. With the Digital Transition, Congress Explicitly Reaffirmed the Quid Pro Quo of Free Spectrum in Exchange for Free Over the Air Broadcasting and Unique Regulatory Obligations.

In the Telecommunications Act of 1996,[28] Congress directly reaffirmed the continuing bargain with broadcasters that they receive valuable spectrum access rights for free in exchange for accepting unique regulatory obligations designed to promote diversity of views in freely available content. Section 201 of the 1996 Act added Section 336 to the Communications Act to govern the transition from analog television to digital television. Congress would subsequently modify the transition with several amendments, culminating in the mandatory deadline for the transition adopted in 2005.[29] Congress required the FCC to reclaim 108 MHz of spectrum, or channels 69-52, for first responders and to auction for new wireless services. But Congress also guaranteed that all full power broadcast licensees displaced by the transition would receive new advanced television service licenses in the remaining broadcast bands. Congress further required that all initial licenses for advanced television networks would go to existing full power licensees, followed by other secondary broadcast licensees such as LPTV licensees.[30] By doing so, Congress reinforced the scarcity of

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[28] Pub. L. 104-104.

[29] *See* Digital Television Transition and Public Safety Act of 2005, Pub. L. 109-171 Title III.

[30] *See generally* 47 U.S.C. §§336-37.

broadcast channels, ensuring that the expanded capacity of digital television would in the first instance go to existing broadcasters, precluding the use of this expanded capacity for new entry.

At the same time, Congress took explicit steps to ensure that broadcasters remained focused on providing free, locally-oriented, over the air television. Congress permitted broadcasters to offer non-broadcast services over their licensed spectrum not used for free broadcasting. But while most licensees in other services are increasingly given "spectrum flexibility," Congress took substantial steps to limit this ability by requiring that services be "ancillary" to broadcasting. Congress required that the FCC adopt regulations to ensure that broadcasters only provide services "consistent with the public interest, convenience and necessity." 47 U.S.C. §336(a)(2). Furthermore, the FCC's regulations must prevent any offering of ancillary services from "derogating" the offering of free, advanced television broadcast services. 47 U.S.C. §336(b)(2). Congress required the FCC to charge a fee to broadcasters for any revenue or indirect compensation derived from offering ancillary services, in sharp contrast to the free use of the spectrum for providing advanced television services. 47 U.S.C. §336(e). Specifically, Congress instructed the FCC to set the fee to avoid "unjust enrichment" and to "recover for the public a portion of the value of the public spectrum resource made available for such commercial use." 47 U.S.C. §336(e)(2)(A).

The provision for fee collection further underscores the importance of the primary bargain

between Congress and broadcast licensees to provide free spectrum in exchange for free programming. Since 1993, exclusive licensees – with the exception of public safety licensees and non-commercial users – are allocated their exclusive use via auction.[31] As with the fee language in Section 336(e)(2)(A), Congress directs the FCC to design auctions to "recover for the public a portion of the value of the public spectrum resource made available for such commercial use" and "avoid unjust enrichment." 47 U.S.C. § 309(j)(3)(C). But Congress also directs the FCC to provide such licensees with flexible use to the greatest extent feasible. *See* 47 U.S.C. § 303(y). Broadcasters receive their spectrum (including the new digital licenses) for free in exchange for free broadcasting to the public. But any non-broadcast use is subject to the same recovery of public value for the spectrum and avoidance of unjust enrichment as other licensees. Furthermore, for broadcasters, any such flexible use is – and must remain – secondary to the primary purpose of providing the public with free broadcast programming.

If all of this were not sufficient to demonstrate the unique position of broadcasters, Section 336(d) states:

> Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television

[31] Balanced Budget Act of 1997, *supra*.

> station that provides ancillary or supplementary services, the television licensee shall establish that all of **its program services on the existing or advanced television spectrum are in the public interest.** (Emphasis added).

In other words, nothing about the old bargain changed. Despite Congress' decision to relax several of the ownership rules in light of anticipated changes in the market and development of new outlets for news and entertainment, Congress still mandated the heart of the traditional *quid pro quo* with broadcast licensees. In exchange for enormous subsidies of free spectrum and protection of their local programming market, broadcasters provide the public with free, diverse, locally oriented programming. Ownership limits remain the single most important means by which Congress and the FCC ensure the availability of diversity, mutually antagonistic, news and perspectives to the public.

D. Broadcasters Continue to Jealously Guard Their Privileges, While Simultaneously Seeking to Shed Their Responsibilities.

Broadcasters have remained quite jealous of their privileges, and continued to seek to expand them. Broadcasters have consistently resisted sharing even the unassigned spectrum in "their" band. Broadcasters ferociously resisted the

establishment of the low-power FM service.[32] They have continued to resist use of unassigned, empty television channels (also called "TV white spaces") on a non-interfering basis.[33] At the same time, broadcasters have won approval from the FCC to further expand their spectrum use rights by upgrading to a new digital standard, ATSC 3.0.[34] Broadcasters have petitioned the FCC to expand the reach of their signal well beyond its natural contours by using "Distributed Transmission Systems Technologies."[35]

In all these cases, broadcasters have insisted that they should have no obligation to pay for these expanded spectrum rights, and that the FCC should exclude others from non-interfering uses. Broadcasters have insisted that their existing unique contributions through local programming justify these expansive privileges. At the same time,

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[32] FCC, "FCC Chairman Responds to House Vote to Cut the Number of Community Radio Stations by 80%," April 13, 2000 (criticizing National Association of Broadcasters and National Public Radio for opposing LPFM service). Available at: https://transition.fcc.gov/Speeches/Kennard/Statements/2000/stwek033.html

[33] Harold Feld, "NAB/MSTV Embrace Radio Pirates, Make Up Engineering Data, and Do Whatever Else it Takes to Kill White Space Devices," Wetmachine (October 20, 2008). Available at: https://wetmachine.com/tales-of-the-sausage-factory/nabmstv-embrace-radio-pirates-make-up-engineering-data-and-do-whatever-else-it-takes-to-kill-white-space-devices/

[34] Authorizing Permissive Use of "Next Generation" Broadcast Television Standard, *Report & Order and Further Notice of Proposed Rulemaking*, 32 FCC Rcd 9930 (2017).

[35] *See* Rules Governing the Use of Distributed Transmission System Technologies, Notice of Proposed Rulemaking, MB Docket No. 20-74, 35 FCCRcd 3330 (2020).

broadcasters now come before this Court to demand that they be relieved of even the limited obligation to enhance diversity of views through the existing ownership limits. This Court should reject the arguments of broadcasters and their *amici* that the restraints on broadcast ownership have become obsolete even while they seek to expand their unique wireless privileges. To paraphrase *Red Lion*, it is idle to posit a free market in news and diverse perspectives as long as incumbent broadcasters enjoy billions of dollars in spectrum subsidies and unique regulatory protections.

E. Online News Sources Do Not Replace Broadcasting and Newspapers for Local News.

Scarcity is determined by demand as well as supply. Thus, as this Court has previously explained, "scarcity" refers not to the total number of news sources available to the public, but to the total number of would-be broadcasters denied the opportunity to broadcast.[36] Maximizing the diversity in available news sources by maintaining ownership limits on broadcasters continues to serve the purpose of maximizing the availability to Americans of important diverse and antagonistic sources of news.[37]

By any metric, online sources simply do not provide the same service to the public. This is

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[36] *Red Lion*, 395 U.S. at 389.

[37] *See Turner Broad. Sys. v. FCC,* 512 U.S. 622, 647-649 (1994) *("Turner I").* (Recognizing the unique contribution of broadcast television to media landscape justifies legislative steps to ensure its continued survival.)

evidenced by the billions of dollars in advertising revenue paid to local broadcasters – especially during election years when the ability to reach the largest audience within the geographic area is at a premium.[38] Pay TV providers continue to pay ever increasing fees for the privilege of retransmitting local broadcast signals.[39] Americans still list local television and local radio broadcasts – received primarily via over the air transmission rather than via the internet – as the most popular source of local news.[40] As the Court correctly predicted in *Red Lion*, "confirmed habits of listeners and viewers" have continued to confer on broadcasters enormous advantages over new entrants.[41]

This Court previously observed in the indecency context that Congress and the FCC could rationally conclude that given the prevalence of indecent content, it should use its power to regulate broadcasting to create a "safe haven" free from indecent content when children are likely to be in the

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[38] *See* Pew Research Center, March, 2019, "For Local News, Americans Embrace Digital but Still Want Strong Community Connection." Available at: https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/

[39] *See* Carl Weinschenk. "Retransmission Fee Forecast Calls for Another Steep Rise: $11.72 Billion in 2019," Telecompetitor (July 30, 2019). Available at: https://www.telecompetitor.com/retransmission-fee-forecast-calls-for-another-steep-rise-11-72-billion-in-2019/#:~:text=The%20retransmission%20fees%20that%20U.S.,Kagan%2C%20a%20group%20within%20S%26P

[40] Pew *supra* n.38.

[41] *Red Lion*, 395 U.S. at 400.

audience. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529-30 (2009). Similarly, Congress and the FCC could – and did – reasonably establish broadcasting as a unique source of local news and different perspectives. Congress and this Court have consistently recognized this unique role of broadcasters, and nothing has changed to alter that bargain. As discussed below, the Incentive Auction reinforced the scarcity of available broadcast channels. It was therefore arbitrary for the FCC to refuse to evaluate its impact on ownership by women and minorities when it could easily have done so.

II. THE INCENTIVE AUCTION ENHANCED SCARCITY AND REDUCED DIVERSITY.

In 2012, to meet growing demand by mobile providers, Congress authorized the FCC to conduct the first ever spectrum "incentive auction." Because of the physics of spectrum propagation, the spectrum occupied by broadcasters is uniquely suited for offering mobile data services.[42] Congress (or the FCC) could have met this demand by reclaiming additional broadcast spectrum, as it had in the 1996 Act. Instead, Congress further highlighted the unique nature of broadcasters among licensees by creating an auction designed to pay broadcasters to voluntarily relinquish their free spectrum access rights. As explained below, this unusually solicitous

[42] *See* Government Accountability Office, "5G Deployment: FCC Needs Comprehensive Strategic Planning to Guide its Efforts," (2020) at 4. (Explaining differences between spectrum bands)

behavior toward broadcast licensees[43] both preserved the traditional bargain with broadcasters and transformed the broadcast industry.

Petitioner/Appellants Prometheus Radio Project, *et al.*, fully briefed the impact of the Incentive Auction and why the FCC's treatment of the Incentive Auction was arbitrary.[44] Because the Third Circuit found that the Commission generally failed in its obligation to consider the impact of its decision on minority and women ownership, the court below did not discuss this issue in detail,[45] but these issues represent a separate basis for reversal and illuminate the context of the broadcaster's suit.

A. Understanding the Incentive Auction Mechanics.

The theory behind the Incentive Auction is simple. Rather than forcing broadcasters into a smaller band and simply reclaiming the spectrum, Congress permitted broadcasters to voluntarily return their licenses (which they obtained for free) in exchange for a portion of the revenue raised from wireless providers. However, as members of Congress, FCC staff, and stakeholders repeatedly

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[43] *See, e.g.* Expanding Flexible Use of the 3.7-4.2 GHz Band, GN Docket No. 18-122, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343 (2020) (reclaiming 300 MHz of C-Band Spectrum by reducing allocation to satellite users from 500 MHz to 200 MHz).

[44] Reply Brief of Citizen Petitioners at 16.

[45] *But see* Prometheus Radio Project v. FCC, 824 F.3d 33, 54 n.13 (3d Cir. 2016) (Prometheus III) (ordering FCC to consider impact of Incentive Auction on minority and women ownership).

acknowledged, the Incentive Auction was the most complicated auction to design in the history of global spectrum auctions. It required first a "reverse auction" where broadcasters would place bids on how much compensation they would require to take one of three options: surrender their license and exit broadcasting complete ("go dark"); surrender their license and share with a willing broadcaster – which required the broadcasters to negotiate terms and subsequent approval by the FCC; or surrender their existing license and accept a license in the market on Channels 2-14.[46] Wireless bidders in the "forward auction" would then offer bids on their willingness to pay to clear the spectrum. But the FCC could not determine the availability of spectrum until it determined not only how many broadcasters would

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[46] For technical reasons, Channels 2-14 have poor propagation characteristics for digital television. For a general overview of the Incentive Auction, *see, e.g.,* Congressional Research Service, "TV Broadcast Incentive Auction: Results and Repacking," (October 11, 2017) available at: https://www.everycrsreport.com/files/2017-10-11_IF10751_8fab74ce1878616976b187a23cb006b586811265.pdf; Corporation for Public Broadcasting, "Facing the Spectrum Incentive Auction and Repacking Process: A Guide for Public Television Stations and Governing Boards," (July 8, 2014) available at: https://www.cpb.org/sites/default/files/atoms/files/CPB-White-Paper-on-Spectrum-Auction-and-Repacking-Process.pdf; FCC Web Page, "Broadcast Incentive Auction: Primer for Broadcasters," last updated September 9, 2016, available at: https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions/primer-broadcasters; FCC Web Page, "Learn Everything About Reverse Auctions Now (LEARN) FAQs," last updated November 10, 2015, available at: https://www.fcc.gov/auctions/incentive-auctions/learn-everything-about-reverse-auctions-now-learn/learn

surrender their existing licenses, but in what geographic locations. Because broadcasting uses an entirely different band plan and has different spacing requirements (the distance required between transmitters to avoid interference) than the band plan proposed for wireless carriers.

Congress further complicated this already highly complex and interrelated set of auctions by adding additional protections for broadcasters. The Incentive Auction statute required the FCC to use "all reasonable efforts" to maintain the same broadcast area for each relocated licensee, which severely complicated the repacking effort. The statute prohibited any involuntary transfer of licensees to Channels 2-14, and prevented the FCC from modifying existing broadcast licenses prior to the auction to facilitate the auction or repacking.[47] Congress also created a special fund from the auction revenues to cover broadcaster expenses associated with repacking.[48]

To run the auction, the FCC therefore needed to know and approve the selection of participating broadcast licensees prior to the beginning of the reverse auction. The FCC needed a significant number of broadcasters to surrender their licenses in the most populous and densely crowded areas for the incentive auction to work. The FCC therefore knew going in that a successful auction would have significant implications for diversity of ownership.

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[47] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96 § 6403.
[48] *Id.*

Even if a licensee chose to negotiate with another licensee and share a channel, that would mean the loss of an autonomous licensee. The licensee surrendering the license would need to renegotiate on a regular basis with the broadcaster retaining their license.

Finally, Congress mandated that the FCC keep confidential the identity of broadcasters participating in the auction until after the auction.[49] Broadcasters interested in participating in the auction feared that those broadcaster and broadcast networks which opposed the auction as an existential threat to broadcasting would seek to dissuade or retaliate against interested broadcasters. Indeed, the FCC did not release the full details of participation by broadcasters until April 2019.[50] Commenters in 2017 therefore did not have complete information to submit comments to the FCC on the full impact of the Incentive Auction on diversity. It must be stressed, however, that the FCC, and the FCC ***alone***, had full access to all relevant information on the impact of the Incentive Auction at the time it issued the 2017 Order on Reconsideration.

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[49] *Id.*

[50] Public Notice, "Incentive Auction Task Force Announces of Information Related to Non-Winning Bids in Auction 1001," 34 FCC Rcd 2376 (2019).

B. The Incentive Auction Highlighted the Value of the Broadcaster's Free Spectrum Subsidy, and Enhanced the Scarcity of Available Broadcast Channels.

Even before release of the losing bid information in 2019, many impacts of the Incentive Auction were immediately apparent in 2017. First, the FCC "forward auction" grossed nearly $20 billion dollars for the 84 MHz of broadcast spectrum cleared.[51] This is consistent with the approximately $20 billion raised in the auction of reclaimed broadcast spectrum in 2008 as part of the digital transition.[52] This gives some estimate of precisely how much value to assign to the free spectrum subsidy given broadcasters in exchange for providing free over-the-air television.

Additionally, those broadcasters which either declined to participate or did not get their asking price to vacate the spectrum reaffirmed their assent to the traditional bargain between broadcasters and the federal government. In exchange for free spectrum valued at billions of dollars, broadcasters agree to provide free over-the-air programming to their community of license subject to FCC rules and obligations. Any broadcaster who found these conditions unduly onerous had the opportunity to trade their free licenses for cash.

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[51] By the Numbers, *supra* n. 11.

[52] *See* FCC Auction 73, https://www.fcc.gov/auction/73

The clearance of 84 MHz of spectrum via the Incentive Auction made the remaining broadcast spectrum more scarce – and more valuable – than ever. At the conclusion of the auction, the FCC knew the repacking plan and could project exactly how many available opportunities for either full power or low power TV stations remained, and in which markets. The FCC also knew, no later than July 20, 2017, the elections of each of the winning reverse auction broadcasters and therefore knew (or could have determined) the impact of the Incentive Auction on ownership by women and minorities.[53]

C. The FCC's Refusal to Consider the Impact of the Incentive Auction on Minority and Women Ownership Was Arbitrary.

As noted above, Petitioners Prometheus Radio Project, *et al.* raised the issue of the impact of the Incentive Auction before the FCC, and fully briefed the matter before the Third Circuit panel. Because the Third Circuit found that the Commission had generally failed to consider the impact of relaxing the rules on women and minority ownership, it made no specific finding with regard to the failure to consider the impact of the Incentive Auction. Petitioners have

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[53] On July 20, 2017, the FCC issued a Public Notice that it was ready to provide payment to all winning bidders in the reverse auction. Public Notice, "Incentive Auction Task force and the Media Bureau and the Wireless Telecommunications Bureau Announce the Commission is Ready to Pay Reverse Auction Winning Bids," 32 FCC Rcd 5715 (2017). To pay the winners, the FCC would need to know both their market area and their election.

preserved the argument in their merits brief, and it is therefore properly before the Court.

The Incentive Auction was a transformative event for the broadcast industry. It eliminated one-third of available broadcast channels nationwide, and 175 full power broadcasters surrendered their existing licenses.[54] Even before the Incentive Auction, commenters warned that purchases by speculators were negatively impacting ownership by minorities.[55] In *Prometheus III*, the Third Circuit directly instructed the FCC to address the impact on the Incentive Auction on women and minority ownership.[56]

Nevertheless, the *2017 Recon Order* addressed the impact of the Incentive Auction in the most arbitrary and cursory way possible. In a single paragraph, the Order declines to address the impact of the Incentive Auction until the completion of the repacking in 2018. 2017 Ownership Order at ¶85. The Order states that considering the impact of the Incentive Auction would amount to "refusing to fulfill its obligations under Section 202(h)" and that "202(h) requires the Commission to consider on the record before it."

Bluntly, this reasoning makes no sense. As an initial matter, the Commission had already completed its obligation to act under 202(h) by issuing the 2016 Quadrennial Review Order. Grant of

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[54] By the Numbers, *supra* n.11.
[55] Comments of Asian Americans Advancing Justice at 8-11. CA3JA980-83
[56] *Prometheus III*, 824 F.3d at 54 n.13.

a Petition for Reconsideration is entirely discretionary. Even if the Commission had been missing relevant data from the Incentive Auction, the Commission could have waited to grant the Petition for Reconsideration until it could fully assess the impact of the Incentive Auction as the Third Circuit had previously instructed – or simply deferred permitting additional consolidation until the next Quadrennial Review.

More importantly, the Commission ***did not*** address the information available to it — despite repeated requests by Petitioners that it do so. The Commission already had the necessary information to assess the impact of the Incentive Auction. At a minimum, the Commission knew that it had become substantially more difficult for women or minorities to win new full power or low-power TV licenses because of the significant reduction in available channels – particularly in the largest and most desirable markets. The Commission could also assess the number of returned licenses belonging to women or minorities using the same data it used to conclude that consolidation would not harm ownership diversity. Far from justifying refusal to consider the impact of the Incentive Auction, the Commission's reasoning that winning bidders in the reverse auction might change their elections did not mean the Commission should eschew all analysis. The Commission knew the total potential reduction in diversity based on the auction results. Whether stations planning to go dark elected to stay on the air, or stations initially electing to stay on the air in some capacity elected to go dark, the FCC could certainly assess the maximum potential impact. To the degree

any uncertainty remained, the Commission should have waited before relaxing the rules. Further consolidation cannot be easily reversed.

Finally, the Commission's error is particularly egregious in light of the direct instruction in *Prometheus III* to consider the impact of the Incentive Auction, and because the Commission alone had possession of all the relevant information. But even without the confidential information known to the Commission, the Commission could certainly have assessed the impact of the enhanced scarcity of broadcast channels and the reduction of future opportunities for women and minorities to acquire licenses as a consequence.

CONCLUSION

For almost 85 years, broadcasters have enjoyed unique privileges among exclusive spectrum licensees. In exchange for these privileges, broadcasters agree to abide by the FCC's rules and policies promoting diversity in media markets. The unique value and power of broadcast licenses in providing diverse sources of news and different viewpoints remains critically important to the public today. Before relaxing the ownership rules, the FCC had a responsibility to assess the impact of its decision on ownership by women and minorities – and obligation reinforced by the Third Circuit's remand in Prometheus III. Nevertheless, the FCC refused to consider the impact of the Incentive Auction — the single most transformational event on broadcast ownership in a decade. It's stated reasons for this refusal are both inadequate and irrational.

The FCC was uniquely situated to consider the impact of the Incentive Auction. It simply refused to do so. That consideration alone, in addition to the other errors identified below, warranted reversal.

WHEREFORE the Court should affirm the judgment below.

Respectfully submitted,

HAROLD FELD
COUNSEL OF RECORD
PUBLIC KNOWLEDGE
1818 N. ST., NW
SUITE 410
WASHINGTON, DC 20036
(202) 559-1044

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IN THE SUPREME COURT OF THE UNITED STATES

No. 19-1231, 19-1241

Federal Communications Commission, *et al.,*
Petitioners
v.
Prometheus Radio Project, *et al.*,
Respondents

National Association of Broadcasters, *et al.*,
Petitioners
v.
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Respondents

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief of Amicus Curiae Public Knowledge contains 6984 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2020

/s/ Harold Feld
COUNSEL OF RECORD
PUBLIC KNOWLEDGE
1818 N. ST., NW
SUITE 410
WASHINGTON, DC 20036
(202) 559-1044