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* Professors of Communications Law, Policy, and Administrative Law, and Doctors of Economics and Social Science in Support of Respondents

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INTEREST OF THE AMICI CURIAE[1]

This amicus curiae brief is filed by Professors of Communications Law and Policy, and Doctors of Economics and Social Science, Catherine J. K. Sandovál, Associate Professor, Santa Clara University School of Law (SCU Law), Co-Director Broadband Institute of California @ SCU Law (BBIC); Allen S. Hammond, IV, Professor SCU Law, Founder and Co-Director, BBIC; Dr. Carolyn M. Byerly, M.A./Ph.D (Communications), Professor and Chair, Department of Communication, Culture & Media Studies, Howard University; Dr. Peter DiCola, J.D./Ph.D. (Economics), Professor of Law, Northwestern University; Anthony Chase, Associate Professor, University of Houston Law Center; Mark Lloyd, Clinical Professor of Communications, University of Southern California, Annenberg School for Journalism and Communication; Lateef Mtima, Professor of Law, Howard University School of Law; and Dr. Katherine A. McGraw, Research Consultant.

As professors, researchers, former staff of the Federal Communications Commission (FCC) (Professors Sandoval, and Professor Lloyd) and the National

[1] Pursuant to Rule 37.3, counsel of record for all parties listed on the dockets have consented to the filing of this amici curiae brief. Pursuant to Rule 37.6, counsel for amici curiae confirm that no counsel for any party authored this brief in whole or in part. Instructional Telecommunications Foundation, Inc. dba Voqal USA, made a modest contribution to Santa Clara University to support copying and binding expenses for this brief's submission. No other party, counsel, or person contributed money toward the preparation and submission of the brief, apart from the ordinary salaries paid to amici who are university faculty members.

Telecommunications and Information Administration (Professor Hammond), former regulators (Professor Sandoval also served as a Commissioner of the California Public Utilities Commission) and members of the public who have participated in FCC proceedings, we file this amicus brief to promote democratic openness and transparency in FCC decision-making in the public interest as required by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. Each of us has conducted research on communications law and policy including analysis of FCC media ownership rules, community information needs, and minority and female media ownership. Since 1998, several of us have participated in FCC reviews of media ownership rules as a commenter, researcher commissioned by the FCC, or as a former FCC staff member. None of the amici are currently under contract with the FCC, petitioners, or respondents for any studies or other work.

SUMMARY OF ARGUMENT

Amici respectfully urge the U.S. Supreme Court to uphold the Third Circuit's decision in *Prometheus Radio Broad. v. FCC*.[2] The Third Circuit appropriately determined that the FCC's analysis in its three orders adopted between 2016-2018 for its statutory

[2] *Prometheus Radio Project v. FCC*, 939 F.3d 567, 573, 584 (3d Cir. 2019) [*Prometheus IV*] *cert. granted sub nom. Nat'l Ass'n of Broad. v. Prometheus Radio Project*, 207 L. Ed. 2d 1165 (2020).

review of media ownership rules[3] reflected arbitrary and capricious decision-making. Despite four orders from the Third Circuit in the *Prometheus* docket since 2004—and numerous record comments and studies—the FCC failed to properly analyze the effect of its media ownership rules on minority or female FCC license access and ownership. FCC decisions characterize its findings about the effect of its media ownership rules on minorities and women *as a pivotal concern* analyzed to determine whether to retain, repeal, or modify broadcast ownership rules.

Throughout the *Prometheus* docket, the Third Circuit emphasized that the FCC had flexibility to create and articulate the analytical basis or theory for its decision-making and to revise its priorities. The Third Circuit directed the FCC to "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."[4]The Third Circuit ordered the FCC to

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[3] *In the Matter of 2014 Quadrennial Review, Second Report and Order*, 31 FCC Rcd. 9864 (2016) [hereinafter FCC, *2016 Order*]; *In the Matter of 2014 Quadrennial Review, Reconsideration Order, and Notice of Proposed Rulemaking*, 31 FCC Rcd. 9864 (2017) [hereinafter FCC, *Reconsideration Order*]; *In the Matter of Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, 33 FCC Rcd. 7911 (2018).

[4] *Prometheus IV*, 939 F.3d at 587.

complete its analysis of factors the FCC and Congress deemed important—promoting opportunities for minorities and women to procure broadcast licenses, 47 USC 309(i)(j). It also directed the Commission to examine the effect of the FCC's media ownership rules on opportunities for minorities and women. To comply with the Third Circuit's order originally issued in 2011 and reiterated in 2016, the FCC was directed to complete the process the Commission began in 2002—to define a category of "eligible entities" to whom it proposed to give "certain preferences under the ownership rules."[5]

On remand, the FCC's 2016 media ownership order, Reconsideration Order, and Incubator Order, claimed the Commission's analysis was data-driven. Nonetheless, these orders deployed faulty analysis applied to specious and poorly organized data, while the FCC ignored better data in its possession. This irrational decision-making violates the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) and the Communications Act, 47 U.S.C. § 151 *et seq*.

The FCC's poor data management incubates its chronic inability to justify its policy choices or analyze data. Consistent with *Stilwell v. Office of Thrift Supervision*, "agencies do *not* have free rein to

[5] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438–44 (3d Cir. 2011) [*Prometheus II*].

use inaccurate data."[6] Poor data operations hamstring FCC and public analysis that inform its quadrennial reviews—defeating the APA's transparency, openness, and democratic goals.

The FCC's poor data management and illogical analysis yielded its ill-conceived comparison of incompatible datasets. The FCC drew a fallacious trendline between incomplete National Telecommunications and Information Administration (NTIA) data and the FCC's post 1998 records containing some information about minority and female ownership. The resulting data mishmash "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."[7] Such arbitrary and capricious analysis flunks the APA.

To assess the trends in minority and female ownership and market entry prior to the Telecommunications Act of 1996 ('96 Act) when the market was less consolidated, the FCC need only review its archives at the National Records Center in Suitland, Maryland. More than twenty-two years ago, the FCC dispatched researchers to the Suitland archives to gather information for studies the FCC commissioned

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[6] *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015) (emphasis in the original). *Cf. Stilwell*, 569 F.3d 514, 519 (D.C. Cir. 2009) (requiring an agency to "justify its rule with a reasoned explanation.").

[7] *Prometheus IV*, 939 F.3d at 586.

under Sec. 257 of the '96 Act to identify market entry barriers for small, minority, and women-owned businesses, and rural telecommunications companies. Those archives contain information about FCC license applications and awards for programs conducted prior to 1996 which took minority and female ownership into account.

The FCC's failure to examine and utilize its own data, or to explain its analysis of the record before it, reflects arbitrary and capricious decision-making under the APA and violates the Communications Act. Accordingly, amici respectfully suggest the Supreme Court uphold the Third Circuit's decision in *Prometheus IV*.

ARGUMENT

I. The FCC Failed to Analyze Relevant Data or to Rationally Explain its Analysis, Violating the APA

Through this appeal, Government and Industry Petitioners unlawfully seek to allow FCC rule changes to go into effect without the analysis and explanation required under the APA and the Communications Act. The APA mandates "arbitrary" or "capricious" agency actions be "set aside"[8] because "[t]he touchstone of

[8] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

arbitrary-and-capricious review is reasoned decision making."[9]

In *Prometheus IV*, the Third Circuit appropriately found the FCC's arbitrary and capricious decision-making in its three media ownership rule review orders between 2016-2018 violated the APA.[10] This appeal does not require the Supreme Court to defer to the FCC's goals, judgments, or statutory interpretations. Rather, at issue is the FCC's failure to comply with the APA and the Communications Act during its media ownership rule reviews mandated by Congress under Sec. 202(h) of the Telecommunications Act of 1996 ('96 Act). APA review does "not prejudge the outcome" of the FCC's media ownership rule review but requires that "the Commission must provide a substantial basis and justification for its actions whatever it ultimately decides."[11]

Consistent with our democratic system of government, Congress mandated through the APA "openness, explanation, and participatory democracy" in the rulemaking process.[12] The APA requires a

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[9] *Am. Great Lakes Ports Ass'n v. Zukunft*, 296 F. Supp. 3d 27, 36 (D.D.C. 2017) *aff'd sub nom. Am. Great Lakes Ports Ass'n. v. Schultz*, 962 F.3d 510 (D.C. Cir. 2020).

[10] *Prometheus IV*, 939 F.3d at 573.

[11] *Id.* at 587–588.

[12] *Weyerhaeuser Co. v. Costle,* 590 F.2d 1011, 1027 (D.C. Cir. 1978).

reviewing court to take a "hard look" at an agency's reasoning.[13] An agency must "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."[14] An "'arbitrary and capricious'" regulation receives no *Chevron* deference to an administrative agency's statutory analysis or interpretation.[15]

Throughout its media ownership reviews, the FCC made its findings about the impact of its decisions on minorities and women *a pivotal issue* to determine whether to retain, repeal, or modify its media ownership rules in the public interest.[16] In 2002, in *Fox I*,

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[13] *Am. Great Lakes*, 296 F. Supp. 3d at 36 (citing Harry T. Edwards ET AL., THE REQUIREMENT OF REASONED DECISIONMAKING: ARBITRARY AND CAPRICIOUS REVIEW UNDER THE APA, Ch. XV, *in* FEDERAL STANDARDS OF REVIEW (Thomson West, 2013) (citing *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980)); *Ramirez v. U.S. Immigr. and Customs Enf't*, 471 F. Supp. 3d 88, 98 (D.D.C. 2020).

[14] *Am. Great Lakes*, 296 F. Supp. 3d at 36 (citing *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) ("In the context of notice-and-comment rulemaking, '[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.'")).

[15] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (citing *United States v. Mead Corp.,* 533 U.S. 218, 227 (2001)); *cf. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

[16] *See e.g.*, FCC, *2016 Order*, *supra* note 2, at ¶ 73, (analyzing whether broadcast ownership rules were consistent with "the Commission's goal to promote minority and female ownership of

the D.C. Circuit affirmed that diversity may be a factor the FCC considers in deciding whether to retain, modify, or repeal its media ownership rules, but the FCC must explain the rational basis for its decisions.[17] The FCC's continual embrace of ownership diversity as an essential component of the public interest make it "an important aspect of the problem" the FCC must rationally consider under the APA.[18]

Prometheus IV correctly determined the FCC "did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities."[19] Instead the FCC offered analysis "so insubstantial" the Third Circuit could not "say it provides a reliable foundation for the Commission's conclusions."[20] This failure goes to the heart of the FCC's obligations under the Communications Act. Congress established the FCC to ensure that wireless and wireline communications serve all

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broadcast television stations"); *Id*. at ¶ 75, 82, 124, 126, 134; FCC, *Reconsideration Order*, *supra* note 2, at ¶¶ 15, 44, 54, 64, 69, 83 (reviewing the effect of FCC media ownership rules on minority and female broadcast ownership).

[17] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002) (*Fox I*) *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (*Fox II*).

[18] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) [*State Farm*].

[19] *Prometheus IV*, 939 F.3d at 584.

[20] *Id.*

Americans without discrimination. 47 U.S.C. § 151. Congress charged the FCC with regulating broadcast licensees as "public convenience, interest, or necessity requires[.]" 47 U.S.C. § 303.[21]

Through the '96 Act, Congress added Section 202(h) requiring FCC periodic review of its media ownership rules:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[22]

These reviews, now conducted every four years, mandate FCC examination of its media ownership rules to determine, among other issues, how many licenses a single entity may control in a media market

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[21] *See also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) [*NCCB*] (emphasizing Congress "delegate[d] broad authority to the Commission to allocate broadcast licenses in the 'public interest.'").

[22] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); 47 U.S.C. § 303.

or nationwide. Based on that analysis pursuant to notice and comment rulemaking subject to the APA, the FCC determines whether to retain, repeal of modify its media ownership regulations using the public interest standard as its decision-making touchstone.

The APA has been consistently applied to FCC media ownership reviews since their inception in 1999.[23] This Court should decline Government Petitioner's invitation to judicially create special deference to the FCC's § 202(h) decisions under a theory that the statute demands predictive judgments based on imperfect information, and that the quadrennial review cycle mitigates harmful effects of wrong decisions.[24] The APA accords no deference to agency judgements birthed through flawed analysis embedded in an arbitrary and capricious rulemaking.

The FCC's 2016-2018 media ownership orders claim to be rooted in assessment of past evidence, rather than predictive judgment. On reconsideration, the FCC stated, "we find that the record fails to demonstrate that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership."[25] That determination rested on the same facts, record, and facially inadequate analysis as the opposite decision the FCC reached a year

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[23] *Fox I*, 280 F.3d at 1033.

[24] Gov't Pet'r's Merits Br., 24-27, 43-47, Nov. 2020.

[25] FCC, *Reconsideration Order*, *supra* note 2, at ¶ 64.

earlier."[26] *Fox Television* requires an agency to provide a "more detailed justification" for a change in policy and show "that there are good reasons" for the change.[27] Whatever an agency's policy preferences, they must be based on reasoned decision-making.

The FCC's comparison of incompatible datasets (NTIA data gathered before 2000 and FCC 323 reports gathered after 1998) form the fulcrum of its analysis of the effect of its media ownership rules on minority and female license ownership.[28] "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."[29] As Professors and researchers, we concur with the Third Circuit that the FCC's illogical methodology and analysis flunked the APA.

The FCC recognized in a footnote that "combining older data with more recent data from FCC Form 323

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[26] *Prometheus IV*, 939 F.3d at 587.

[27] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting the APA requires detailed justification when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").

[28] FCC, *2016 Order*, *supra* note 2, at ¶ 77.

[29] *Prometheus IV*, 939 F.3d at 586.

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."[30] The FCC contends that "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."[31] This excuse fails to recognize that the distinct methodologies of the NTIA and FCC Form 323 datasets render longitudinal comparisons spurious.

The FCC's rationalization that it must rely on available data ignores the FCC's archival data stored in Suitland, Maryland at the National Records Center. Those archives contain records of prior FCC license and tax certificate applications and awards including those for programs prior to 1996 that took race and gender into account.[32] More than twenty years ago, for

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[30] FCC, *2016 Order*, *supra* note 2, at n. 211.

[31] *Id*.

[32] *See e.g.*, *Folden v. U.S.*, 379 F.3d 1344, 1347, n. 1 (Fed. Cir. 2004) ("Historically, the Commission conducted "comparative hearings" to determine which applicant would best serve the statutory goals of public interest, convenience, and necessity. In comparative hearings, the Commission examined and compared each applicant based on diversification of media control, integration of management and ownership, previous broadcast experience, character, financial capability, and minority ownership. *See* 47 U.S.C. § 309; *In the Matter of Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 394-399 (1965)"); KPMG, LOGISTIC REGRESSION MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE

its studies to identify market entry barriers for small, minority, and women-owned businesses and rural telecommunications companies under Section 257 of the '96 Act, the FCC dispatched KPMG researchers to the Suitland archives to retrieve and review a sample of FCC comparative hearing data.[33]

To assess the status of minority and female ownership and market entry prior to the '96 Act, the FCC need only examine its own data. This examination can come from current information the FCC has at its disposal:

> "A record of the comparative hearing proceedings is maintained in paper files at the National Records Center in Suitland, MD. These files contain data on the declared minority status of the parties to applications for broadcast licenses that were considered in the comparative hearing process. The files also contain the dispositions or outcomes of the comparative

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FCC, 3, 5-6 (1999) (submitted to the FCC under federal contract), https://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt3.pdf er2.PDF [hereinafter KMPG, *Broadcast License Award Logistic Regression Models*].

[33] KMPG, *Broadcast License Award Logistic Regression Models,* 5-6; KPMG, UTILIZATION RATES, WIN RATES, AND DISPARITY RATIOS FOR BROADCAST LICENSES AWARDED BY THE FCC (1999)(submitted to the FCC under federal contract), https://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt2.pdfalver2.PDF.

> hearings, i.e., a record of which applications have been awarded the licenses."[34]

This data is obtainable.[35] It is available to the FCC. The FCC has opted not to make it effectively available to the public or even to its own staff. Just as Dorothy had the power to go home all along, the FCC had the power during its twenty-two years of media ownership reviews to draw data from its archives to establish the baseline of minority and female license ownership reflected in its programs records that took those factors into account.

"[U]tilizing faulty methodology, and deliberately overlooking available data" violates the APA.[36] "If an agency fails to examine the relevant data—which examination could reveal, *inter alia,* that the figures being used are erroneous—it has failed to comply with the APA."[37] The APA requires that an agency "examine the relevant data and articulate a satisfactory

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[34] KMPG, *Broadcast License Award Logistic Regression Models*, *supra* note 32, at 6.

[35] *Cf. Fox Television Stations*, 556 U.S. at 519 ("It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained…It is something else to insist upon obtaining the unobtainable.").

[36] *See Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987).

[37] *Dist. Hosp. Partners*, 786 F.3d at 57.

explanation for its action."[38] To establish the denominator of minority and female ownership and market entry prior to the '96 Act, the FCC need only review its own archives.

The FCC's 2016-2018 Orders cited no evidence about FCC license ownership by women. Accordingly, the Third Circuit found "any ostensible conclusion as to female ownership was not based on *any* record evidence."[39] The FCC undercuts its excuse that "no data on female ownership was available" through its asserted consideration of racial and gender diversity on remand from *Prometheus III*, "repeatedly framing its conclusion in terms that encompass both areas.[40] Moreover, an agency cannot "fail[ ] to consider an important aspect of the problem" or "offer[ ] an explanation for its decision that runs counter to the evidence" before it.[41]

II. The FCC Failed to Analyze its Own FCC Data, Violating the APA

Commenters for the 2010 and 2014 media ownership reviews including the United Church of Christ

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[38] *Fox Television Stations*, 556 U.S. at 513 (citing *State Farm,* 463 U.S. at 43).

[39] *Prometheus IV*, 939 F.3d at 585 (emphasis in the original).

[40] *Id*.

[41] *Dist. Hosp. Partners*, 786 F.3d at 57 (quoting *Motor Veh. Mfrs. Ass'n*, 463 U.S. at 43).

Office of Communication (UCC), and speakers at the FCC's 2010 Media Ownership Workshop, among them Professors Byerly, and Hammond, and Dean and Professor Leonard Baynes called attention in the record to the FCC's market entry barrier studies. These studies included information drawn from the FCC archives, in addition to qualitative and statistical research.[42] The FCC-Commissioned market entry barrier study by Professors Bachen, Hammond, Mason, and Craft found through quantitative analysis supplemented by qualitative interviews that minority owners "were more likely to tailor their news stories to minority community concerns," linking minority radio license ownership and diversity.[43]

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[42] UCC, *Joint Reply Comments of United Church of Christ, OC Inc. and Common Cause*, MB 14-50, 09-182, 07-294, 3-6 (September 8, 2014), https://ecfsapi.fcc.gov/file/60000979211.pdf; FCC, MEDIA OWNERSHIP WORKSHOP, Transcript, 17, (January 27, 2010), https://ecfsapi.fcc.gov/file/7020395407.pdf (transcribing comments of Professor Leonard Baynes about KPMG's study commissioned by the FCC that "found that there was a lower overall probability of minorities actually getting a license, a winning license, than non-minorities even despite you had, the fact, that you had these minority enhancements during this process.").

[43] Christine M. Bachen, Allen S. Hammond, IV, and Catherine J.K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, *in* MEDIA DIVERSITY AND LOCALISM: MEANINGS AND METRICS 292 (Philip Napoli, ed., L. Erlbaum Assoc., 2007) (citing *See* Christopher Bachen, Laurie Mason, Allen S. Hammond, Stephanie Craft**,** DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM: IS THERE A LINK BETWEEN OWNER RACE OR ETHNICITY AND NEWS AND PUBLIC AFFAIRS PROGRAMMING? Santa Clara

Professor Byerly testified at the FCC's 2010 Media Ownership Workshop that her qualitative research found "women face discrimination in acquiring and operating broadcast stations, what the FCC has framed as 'market-entry barriers.'"[44] Professor Sandoval's study of FCC 11,000 records in 2009 emphasized that records "not included in the [FCC] electronic databases, such as tax certificate transactions, comparative hearings, distress sales, and construction permits granted before 1998, would be necessary to identify other minority broadcasters who sold their radio stations" or a television station prior to the FCC's electronic records.[45]

Government Petitioners argue the Commission "had no affirmative burden to produce additional evidence or to fund new studies itself."[46] *Stilwell* holds

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University (submitted to the FCC under federal contract), 12-14 (Dec. 1999) content_ownership_study.pdf (fcc.gov).

[44] FCC, MEDIA OWNERSHIP WORKSHOP, Transcript, *supra* note 43, at 31-32. *See* Carolyn Byerly, *Behind the Scenes of Women's Broadcast Ownership*, 29 HOW. J. OF COMM. 24 (2011).

[45] Catherine J.K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity, and Service in the Public Interest*, *in* COMMUNICATIONS RESEARCH, IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE (Minna Aslama & Philip M. Napoli, eds., Fordham University Press, 2011).

[46] *Prometheus IV*, 939 F.3d at 587 (citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d at 519).

the "APA imposes no general obligation on agencies to produce empirical evidence," only to "justify its rule with a reasoned explanation."[47] The Office of Thrift Supervision in *Stilwell* imposed regulations on minority shareholders based on its "long experience" in supervising the regulated industry, and support from the commenters.[48]

In contrast, the FCC based its 2016-2018 Orders on faulty data and unsound analysis—not the agency's predictive judgment. For example, to analyze the Local Television Ownership Rule, the 2016 order cited one conclusion from the Free Press 2007 study showing "an increase in minority ownership after the Commission relaxed the Local Television Ownership Rule in 1999."[49] Yet, the FCC ignored the Free Press study's important conclusion: "minority-owned stations thrive in more competitive, less concentrated markets. Even if the size of the market is held constant, markets with minority owners are significantly less concentrated than markets without minority owners."[50]

"[T]here is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in

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[47] *Stilwell*, 569 F.3d at 519.

[48] *Id.*

[49] FCC, *2016 Order*, *supra* note 2, at ¶ 77.

[50] S. Derek Turner, *Out of the Picture* 4 (Free Press, 2007) http://www.freepress.net/sites/default/files/fp-leacy/otp2007.pdf.

part."[51] Faulty evidence-based analysis violates the APA and falls short of deference to agency predictive judgment under *Stilwell* and *FCC v. Nat'l Citizens Comm. for Broad. (NCCB).*[52] "[T]here is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part."[53] Failure to rely on creditable methodological evidence to support a decision asserted to be evidence-based violates the APA.[54]

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[51] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (citing *Solite Corp. v. EPA,* 952 F.2d 473, 500 (D.C.Cir.1991) (quoting *Weyerhaeuser,* 590 F.2d at 1031)); *Water Quality Ins. Synd. v. United States*, 225 F. Supp. 3d 41, 69 (D.D.C. 2016) (reversing an agency decision that "ignore[d] critical context" and "cherry-pick[ed] ... evidence").

[52] *Cf. NCCB*, 436 U.S. at 813-8146 (noting where "factual determinations" were "primarily of a judgmental or predictive nature—*e.g.,* whether a divestiture requirement would result in trading of stations with out-of-town owners … and whether new owners would have sufficient working capital to finance local programming … 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."); *Cf. Stilwell*, 569 F.3d at 519.

[53] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d at 237 (citing *Solite Corp. v. EPA,* 952 F.2d at 500 (quoting *Weyerhaeuser,* 590 F.2d at 1031)); *Water Quality Ins. Synd. v. United States*, 225 F. Supp. 3d 41, 68 (D.D.C. 2016) (reversing an agency decision that "ignore[d] critical context" and "cherry-pick[ed] ... evidence").

[54] *Am. Great Lakes*, 296 F. Supp. 3d at 47-48.

Consistent with *Stilwell*, the APA requires reasoned explanation of the agency's decisions. Moreover, "agencies do *not* have free rein to use inaccurate data."[55] Failure to rely on creditable methodological evidence to support a decision asserted to be evidence-based violates the APA.[56]

Government Petitioners contend that if "available data does not settle a regulatory issue," the "agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion."[57] This argument slides past the remainder of *State Farm's* APA analysis which rejects reciting "substantial uncertainty" to justify agency action.[58] Rather, "[t]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'"[59] "Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in

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[55] *Dist. Hosp. Partners,* 786 F.3d at 56.

[56] *Am. Great Lakes*, 296 F. Supp. 3d at 47-48.

[57] Gov. Pet'rs Merits Br., at 22 (citing *State Farm*, 463 U.S. at 52).

[58] *State Farm*, 463 U.S. at 52.

[59] *Id.* at 53 (citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).

a search for further evidence."[60]

Petitioners inappropriately attempt to shift the burden to third parties to produce studies of minority and female media ownership. Through Section 202(h), Congress required the FCC to determine whether to retain, modify, or repeal media ownership rules in the public interest. To this end, the FCC must use sound analytical methods consistent with the APA, and the Commission's duties under the Communications Act. Since more reliable data sits in the FCC archives, the current agency analysis of incomplete data reflects arbitrary and capricious decision-making.[61] As *Prometheus III* directed, if the Commission, "needs more data" to analyze the eligible entity issue the FCC "must get it."[62]

FCC archival records in Suitland, Maryland are currently closed to the public due to COVID-19.[63] Even

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[60] *Id.* at 52.

[61] *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 49 (D.D.C. 2008), *amended in part*, 587 F. Supp. 2d 37 (D.D.C. 2008), *judgment entered*, 587 F. Supp. 2d 44 (D.D.C. 2008) ("Indeed, even the "best available data standard leaves room for error, so long as more reliable data did not exist at the time of the agency decision.")

[62] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (D.C. Cir. 2016) [*Prometheus III*]; *Prometheus IV*, 939 F.3d at 587.

[63] National Archives, https://www.archives.gov/suitland (last visited Dec. 22, 2020).

when the pandemic recedes, members of the public would not be permitted to search raw FCC data in the national archives—much like Indiana Jones searching for the lost ark. Detailed financial and personal data in some of those FCC applications require FCC review and redaction prior to public production.

The FCC's claim that its analysis is based on record evidence—and not theory or predictive judgment—precludes it from seeking refuge under *Stilwell* as a post-hoc justification to excuse its APA violations: "[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action."[64] Longstanding Supreme Court precedent "requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."[65]

III. The FCC Failed to Examine Important Issues Such as Longitudinal Analysis of Minority and Female FCC License Ownership.

Record comments include amici's repeated calls on the FCC to engage in longitudinal analysis of the

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[64] *Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019) (citing *Temple Univ. Hosp. v. NLRB*, 929 F.3d 729, 734 (D.C. Cir. 2019) (quoting *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012)); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[65] *Mozilla Corp.*, 940 F.3d at 62.

relationship between FCC media ownership rules and FCC license entry by minorities and women.[66] Additionally, the FCC's 2014 Further Notice of Proposed Rulemaking (FNPRM) for its Media Ownership review proceeding cited Professor Sandoval's study of more than 11,000 FCC records documenting minority commercial radio broadcasters in 2009.[67]

Her study highlighted the role of a less consolidated media market to encourage minority ownership

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[66] Allen S. Hammond ET AL., THE IMPACT OF THE FCC'S TV DUOPOLY RULE RELAXATION ON MINORITY AND WOMEN OWNED BROADCAST STATIONS 1999-2006, FCC Docket 06-121 Study 8 (submitted to the FCC under federal contract) (2006); https://www.fcc.gov/media/media-ownership-2006-research-studies-archive; *See also* Sandoval, *Minority Commercial Radio Ownership in 2009*, *supra* note 44, at 92. *See* FCC, 2014 and 2014 *Quadrennial Regulatory Review of Media Ownership Rules*, Further Notice of Proposed Rulemaking (FNPRM), MB 14-50, 09-182, 07-294, 04-256, FCC 14-28, 29 F.C.C. Rcd. 4371, 4503 (2014) (citing Professor Sandoval's study which finds a strong link between minority radio ownership and certain types of formats). Sandoval, *Minority Commercial Radio Ownership in 2009* study cited in MB 14-50, 09-182, 07-294, 04-256 media ownership proceeding record by: Diversity and Competition Supporters (DCS), *Further Comments*, 4 (Dec. 26, 2012), https://ecfsapi.fcc.gov/file/7022092100.pdf; DCS, *Initial Comments,* 4, 6-7, 27 (March 5, 2012), https://ecfsapi.fcc.gov/file/7021898416.pdf; Professor Stacy Hawkins, Esq., Visiting Assistant Professor, Rutgers School of Law, *Reply Comments*, 8 (April 2012),; NABOB, *2014 Quadrennial Review, FCC Media Ownership Rules*, Comments, 8, 16 (Aug. 2014), https://ecfsapi.fcc.gov/file/7521751014.pdf.

[67] FCC, *FNPRM*, *supra* note 63, at ¶ 296.

entry. Of "the 324 minority commercial radio *owners* in mid-2009, 172 or 53% were awarded their *first license prior to the 1996 Act*. Of the 815 minority commercial radio *stations* still held in mid-2009, 287 or 35% were obtained before the 1996 Act."[68] Fewer minority owners who held licenses "in mid-2009 *entered* the commercial radio field after 1996, as compared to those who entered between 1978 and 1995."[69] "Analysis of first license acquisition is critical to understanding the effect of the FCC's media ownership rules and other policies on the ability of minorities, women, and others to enter into the broadcast marketplace," Professor Sandoval testified to Congress in January 2020.[70]

Derek Turner's 2007 report for Free Press found "minority-owned stations thrive in more competitive, less concentrated markets. Even if the size of the market is held constant, markets with minority owners are significantly less concentrated than markets

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[68] Sandoval, *Minority Commercial Radio Ownership in 2009*, *supra* note 45, at 96 (emphasis in the original).

[69] *Id*.

[70] Catherine J.K. Sandoval, *Testimony to the House Energy & Com. Comm. S. Comm. of Commc'n. & Tech. Hearing on "Lifting Voices: Legislation to Promote Media Marketplace Diversity" Media Diversity Protects Democracy and the Public Interest*, 116th Cong. (2020), https://docs.house.gov/meetngs/IF/IF16/20200115/110373/HHRG-116-IF16-Wstate-SandovalC-20200115.pdf.

without minority owners."[71] The National Assn. of Black Owned Broadcasters (NABOB) August 2014 comment recommended the study questions Professors Sandoval, Byerly, and Folami, suggested in their 2006 comments to the FCC, including examining "the effect of consolidation on minority and female ownership" and asking "[i]n consolidated markets, has minority or female ownership increased or decreased?"[72]

In 2006, the FCC-commissioned study led by Professor Hammond discussed the importance of longitudinal analysis to analyze the linkage between license ownership opportunities and FCC licensing rules. This study observed that the FCC's data-keeping practices frustrate rational analysis:

> To properly document the impact of the FCC's multiple, minority and female ownership as well as spectrum allocation policies on minority and female ownership of broadcast stations one would have to engage in a longitudinal study. Such a study would track the policy changes and their impact across the time period beginning with the identification of the lack

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[71] Letter from Public Interest Advocates to Tom Wheeler, Chairman, FCC (July 29, 2016), https://ecfsapi.fcc.gov/file/10805087651877/Public%20Interest%20Advocates%20NBCO%20Letter%207-29-2016.pdf (citing Turner, *supra* note 49, at 4).

[72] NABOB, *supra* note 66, at 15-16.

> of diversity of viewpoint that lead to the creation of the minority ownership and women ownership policies from 1968 and 1978 respectively until today.
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> Unfortunately, minority and female ownership data are not available for the roughly 37 years from 1970 to 2007. The larger database would have permitted a full longitudinal study of the impact of the various changes arguably wrought by each of the FCC's ownership rule and policy changes (as well as those of Congress) on minority and/or female ownership from 1970 to 2007."[73]

Much of that data on minority and female ownership from 1970 to 2007 reside in the FCC archives, in paper and electronic form.

"The FCC databases are so cumbersome that the Commission itself does not rely on the agency's databases for rulemaking, turning instead to private sources that put that same data in a format more conducive to analysis."[74] As researchers, we concur that the FCC's fragmented, incomplete, and often

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[73] Hammond ET AL., *supra* note 63, at 12.

[74] Phil Napoli, *Does the Red Lion Still Roar? Public Interest Media Regulation Forty Years After Red Lion Broadcasting, Co. v. FCC, Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation*, 60 ADMIN. L. REV. 801, 808 (2008).

inaccessible databases frustrate qualitative and longitudinal analysis by the FCC and commenters in its proceedings. The FCC's databases are broken into several dozen pieces.[75] Even if one knows how to assemble the information into a single database, that database would lack key variables like programming format and network affiliation.[76] Data about when a license holder acquired its first FCC license remains challenging to find. Systematic analysis of this question is not possible without archival access.

The FCC's poor data management practices incubate—and frankly, encourage—its chronic inability to justify its policy choices or analyze data. The FCC bears responsibility for maintaining its own data, consistent with the Data Quality Act, and the Communications Act's mandates to regulate wireless and wireline communication.[77] Consequently, the FCC's data management practices hamstring FCC and public

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[75] *See e.g.*, FCC, *LMS Public Database Files*, https://enterpriseefiling.fcc.gov/dataentry/public/tv/lmsDatabase.html (last visited Dec. 14, 2020).

[76] *See* Peter DiCola, FALSE PREMISES, FALSE PROMISES: A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY *16* (Dec. 13, 2006), http://www.futureofmusic.org/article/research/false-premises-false-promises.

[77] *See generally* FCC, *Data*, https://www.fcc.gov/reports-research/data (last visited Dec. 17, 2020); Data Quality Act, Section 515(a) of the Treasury and Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000), *reprinted at* 44 U.S.C.A. § 3516 Historical and Statutory Notes ("Data Quality Act"); 47 U.S.C. § 151.

analysis that inform its quadrennial reviews—defeating the APA's transparency, openness, and democratic goals.[78]

Every television and radio station in the U.S. must earn a license from the FCC. The FCC has the right to collect information from licensees.[79] The FCC can choose to organize such information in a single, useable database accessible to FCC staff, researchers, and the public. The FCC collects such a paucity of information and organizes it so poorly that for decades the Commission purchased and relied on commercial third-party media ownership databases to conduct studies.[80]

Yet, the FCC did not begin requiring licensees to report their minority or female ownership status until 1998. The FCC contends its post-1998 form 323 reports and its "snapshot" reports of broadcast ownership "collectively, should provide a reliable factual

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[78] *Weyerhaeuser,* 590 F.2d at 1027.

[79] *See* 47 U.S.C. §§ 308(b), 310(d) (allowing the FCC to consider and evaluate licensing applications, which implies an ability to collect information).

[80] *See e.g.*, BIA Advisory Services, BIA's Media Access Pro Database, http://www.biakelsey.com/data-platforms/media-access-pro/ (last visited Dec. 22, 2020) (database sold and maintained by BIA Advisory Services (formerly BIA Financial Networks). A subscription to BIA's Media Access Pro database costs thousands of dollars, even after discounts for non-profits and academics).

underpinning for future analysis of trends concerning ownership of broadcast stations by minorities and women."[81] Instead, those reports contain no data on the year of license acquisition, failing to analyze a key issue that would connect media ownership rules and market entry.[82]

UCC expressed concern about the FCC's Form 323 ownership diversity data collection process prior to the 2016 Media Ownership Decision. UCC "noted the Commission had not even released final data from the data collection from last December. While the Bureau suggests raw data is available, the practical use of raw data—as opposed to final data—is meaningless."[83] UCC emphasized the FCC's "323 data is incomplete" and "the FCC's data collection misses almost 40% of licensees."[84] The wealth of Form 323 data in the FCC's possession is effectively locked up in old formats not machine-readable across databases. This prevents the

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[81] FCC, *FNPRM*, *supra* note 63, at ¶ 261.

[82] *See e.g.*, FCC, FOURTH REPORT ON OWNERSHIP OF BROADCAST STATIONS FCC FORM 323 AND FORM 323-E OWNERSHIP DATA AS OF OCTOBER 1, 2017 (2020)., https://docs.fcc.gov/public/attachments/DA-20-161A1.pdf.

[83] Letter from UCC, OC Inc., to Marlene H. Dortch, Secretary, FCC, *ex parte* disclosure, MB in 14-50, 09-182, 07-294 (July 7, 2016), https://ecfsapi.fcc.gov/file/10708060001974/UCC%20OC%20Inc%20and%20Grossman%20Ex%20Parte%20QR2014%207-7-16.pdf.

[84] *Id*.

creation of an accessible database for the FCC, researchers and the public.

In the record below, the UCC submitted a "checklist" and a summary of studies to the FCC suggesting a process to examine minority and female ownership, and viewpoint diversity issues pursuant to the *Prometheus III* remand.[85] Nonetheless, the FCC failed to examine the effect of its media ownership rules on minority and female license ownership. "Arbitrary agency action becomes no less so by simple dint of repetition … [a]nd longstanding capriciousness receives no special exemption from the APA."[86]

IV. The FCC's Analysis of "Eligible Entities" it Exempted from Media Ownership Rules is Arbitrary and Capricious.

To promote its goals of "diversity, competition, and localism," the FCC has debated for more than eighteen years whether to adopt a category of "eligible entities" exempt from certain FCC ownership rules. This debate has centered on whether to define such entities by firm revenue or to include factors such as race,

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[85] UCC OC Inc., *Checklist*, *Ex Parte*, MB 14-50, 09-182, 07-294 (July 20, 2016), https://ecfsapi.fcc.gov/file/107200000700222/UCC%20OC%20Inc%20QR2014%20Positions.pdf..

[86] *Judulang v. Holder*, 565 U.S. 42, 61 (2011).

ethnicity, or gender.[87] In 2016 the Third Circuit concluded that the FCC had "unreasonably delayed action on its definition of an "eligible entity"—a term it has attempted to use as a lynchpin for initiatives to promote minority and female broadcast ownership" and remanded the eligible entity definition "with an order for it to act promptly."[88]

The Commission has set out for itself the obligation to pursue ownership diversity by minorities and women spurred on by Congressional direction. Resp. Br. 4-7; *Prometheus III*, 824 F.3d at 480.In 2016 on remand from *Prometheus III*, the FCC concluded that it "should reinstate the revenue-based eligible entity standard and apply it to the regulatory policies set forth in the [2007] *Diversity Order*…to serve the public interest by promoting small business participation in the broadcast industry and potential entry by new entrepreneurs."[89] The 2016 Order "reinstate[s] 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."[90] The

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[87] *Prometheus III*, 824 F.3d at 37; FCC, *2016 Order*, *supra* note 2, at ¶ 231.

[88] *Prometheus III*, 824 F.3d at 37.

[89] FCC, *2016 Order*, *supra* note 2, at ¶ 235.

[90] *Id.* at ¶ 5.

eligible entity definition allows those who fall within this category to enjoy exemptions from various FCC rules as defined in the 2007 *Diversity Order*..[91]

The FCC's 2016 Order does not address the APA concerns raised in 2011 in *Prometheus II*. "First and foremost, the *Diversity Order* does not explain how the eligible entity definition adopted would increase broadcast ownership by minorities and women."[92] The FCC's 2016 order evades remand instructions by not explaining whether it believes helping small businesses and new entrants will promote licensing opportunities for minorities and women. Neither does it declare the Commission dropped that goal, despite the mandates of 47 U.S.C. §§ 309(i), (j) to promote ownership by minorities and women.

Absent this explanation, the Third Circuit in 2019 appropriately ordered the FCC on remand to "ascertain on record evidence the likely effect of any rule

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[91] *Id.* at¶235; *Id.* at¶285 ("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.")(citing *In the Matter of 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*].

[92] *Prometheus II*, 652 F.3d at 470.

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."[93] "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." This application of the APA did not "prejudge the outcome" but requires that "the Commission must provide a substantial basis and justification for its actions whatever it ultimately decides."[94]

The FCC explained that "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."[95] The FCC's 2016 Order did not explain whether its finding that small businesses would foster viewpoint diversity applied to small business owned by minorities and women. This lack of explanation violates the APA.[96]

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[93] *Prometheus IV*, 939 F.3d at 587.

[94] *Prometheus IV*, 939 F.3d at 587-588.

[95] FCC, *2016 Order*, *supra* note 2, at ¶ 281.

[96] *See* Rob Frieden, *Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277, 279 (2010) (citing *State Farm*, 463 U.S. at 43 ([A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its

The FCC's prior review of the proposed merger of Comcast and NBC Universal required analysis of whether that transaction was consistent with the FCC's media ownership rules and in the public interest. In 2011 the FCC examined whether that proposed merger promoted the Commission's viewpoint diversity goal which "advances the values of the First Amendment," and "rest[s] on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[97] The FCC gave Comcast credit for contributing to viewpoint diversity by allocating some its channel capacity to independent broadcasters and through its programming on its predominantly Spanish-language network Telemundo.[98]

The FCC awarded Comcast/NBCU's viewpoint diversity credit based on its promised contributions to programming and format diversity. Yet, the FCC's 2016 order failed to explain why it apparently determined that minority or women-owned broadcasters' contributions to programming and format diversity were distinct from viewpoint diversity contributions

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action including a rational connection between the facts found and the choice made.")).

[97] *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 F.C.C. Rcd. 4238, 4316 (2011) [hereinafter *Comcast/NBC Universal*] (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[98] *Id.*

by Comcast or by small businesses.[99] "[U]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[100]

The FCC failed to explain the assumptions that underly its assessments about the eligible entity definition, a key issue on remand from *Prometheus III*. The FCC's failures to explain whether the revenue-based eligible entity standard it adopted would promote opportunities for minorities and women consistent with its goals, render it arbitrary and capricious under the APA. An agency may neither bury notice nor reasoning under the APA, that is "just the sort of obscuration that the APA abjures."[101]

The FCC's judgments about the value of promoting viewpoint diversity or how to measure those contributions are not at issue in this case. The FCC's arbitrary and capricious decision making never opened the door to *Chevron* deference to agency judgment. The FCC's failures to address or explain these issues indicate that the FCC's faulty analysis did not offer enough

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[99] *Cf.* FCC, *2016 Order*, *supra* note 2, ¶¶ 281, 297.

[100] *Encino Motorcars*, 136 S.Ct. at 2126 (*citing Nat'l Cable & Telecomm. Assn. v. Brand X*, 545 U.S. 967, 981 (2005)).

[101] *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1174, n. 3 (D.C. Cir. 1996) (citing *MCI Telecommunications Corp. v. FCC,* 57 F.3d 1136, 1142 (D.C.Cir.1995)).

explanation, evidence, or theoretical basis to cross the porch to reach the door to *Chevron* deference.

"In order to permit meaningful judicial review, an agency must "'disclose the basis'" of its action."[102] The Court "may not supply a reasoned basis for the agency's action that the agency itself has not given."[103] "[D]eference cannot fill the lack of an evidentiary foundation" for an agency's conclusions."[104] Neither is it due when an agency has engaged in arbitrary and capricious rulemaking.[105]

CONCLUSION

The Third Circuit's judgment should be upheld.

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[102] *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (citing *Burlington Truck Lines,* 371 U.S. at 167-169).

[103] *State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. at 196).

[104] *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986).

[105] *Encino Motorcars*, 136 S. Ct. at 2125-2156.

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