Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

REPLY BRIEF FOR CITIZEN PETITIONERS AND INTERVENORS

PROMETHEUS RADIO PROJECT, MEDIA ALLIANCE, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES, FAIRNESS AND ACCURACY IN REPORTING, CENTER FOR DIGITAL DEMOCRACY, CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA

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SUMMARY OF ARGUMENT

The FCC has chosen to defend its *2002 Biennial Review Order* before this Court with broad generalizations about agency line-drawing and balancing of different communications policy objectives. That is because the Commission's analysis, evidence and methodology cannot withstand scrutiny. Despite what the agency's lawyers would like to believe, this appeal is not about the exercise of agency expertise and judgment. Rather, it about the abdication of administrative responsibility and the substitution of ideology and rhetoric for evidence and analysis.

The FCC cannot save itself by looking to the 1996 Act for comfort. In its brief, the Commission disavows the legal analysis it used in the Order, under which it applied a "presumption" against retaining its rules and Section 202(h) was considered to have "upended" traditional administrative law. The Order was clearly based on the FCC's assumption that if proponents of regulation did not affirmatively show the rules were still necessary, the media concentration regulations had to be lifted. Although it does not say so expressly, the FCC evidently now agrees with the Citizen Petitioners and Intervenors ("Citizens" or "CPI") that there is no such burden-shifting in the law. Stripped of that rationale, there is no basis on which the Court can affirm the agency's decision that few of its rules remain "necessary in the public interest."

The fundamental substantive error shared by the FCC and the Deregulatory Petitioners is their reliance on the conceit that an "abundance" of media choices

makes intra-service concentration rules (*e.g.,* radio ownership, local TV ownership, etc.) and inter-service limits (*e.g.,* newspaper-broadcast cross-ownership) are no longer relevant in this age of so-called media plenty. The agency and the industry look to the wrong data and ask the wrong questions. For purposes of media concentration, it is not dispositive that there are now more ***outlets*** (stations, networks, programmers, etc.); what matters most is that there are fewer ***owners.*** Increasing outlets does nothing of itself to advance the controlling policies of viewpoint diversity ("diversity") and responsiveness to local interest and needs ("localism"), as reaffirmed in *Sinclair Broad. Group v. FCC,* 284 F.3d 148 (D.C. Cir. 2002), and once again by the FCC in its Order below. Diversity and localism needs are not met by the existence of the Internet, or the explosion in satellite programming, DVDs and the like, because these nationally distributed sources have nothing to do with independent ownership and local news programming. That is the litmus test for diversity the FCC adopted.

The focus on media outlets obscures the indisputable fact that the concentration of media ***owners*** has increased geometrically in the past decade. The FCC brief and those of its industry supporters never discuss the uncontested record facts on ownership consolidation. Although the Commission equates "viewpoints expressed and the ownership of an outlet," JA0044-45,JA0047-49, the Order under review never once addresses ownership of what it calls the "hundreds of channels" of content "available in every market of the country." JA0040. That is because it cannot do so and still justify liberalization of its historic rules protecting against

media concentration, much less the wholesale evisceration that has taken place in this proceeding.

The FCC also fails the test of consistency in another way. In the *Sinclair* case, the D.C. Circuit reversed the agency's local TV ownership rule on the ground that the FCC had failed to explain the differences in methodology (the definition of "voices" for market structure analysis) between that rule and another applicable to cable systems. Yet, although the Order proudly proclaims that the FCC has developed "a new, comprehensive framework," FCC Br. at 11, 20, it treats each of the rules *seriatim,* without harmonizing their many, serious analytical inconsistencies. At the very least, *Sinclair* requires the reasoned, record-based explanation for this crazy-quilt of regulatory hunches that the FCC did not supply in the Order, and certainly did not defend in its brief to this Court.

Rational decisionmaking also compels the FCC actually to develop a comprehensive approach to media concentration that uses reliable, methodologically sound approaches to market structure for every market the Commission regulates. It makes no sense to bar mergers among both the "top four" local TV stations and broadcast networks because their market share reveals dominance while, at the same time, rejecting such market structure analysis for the newspaper-broadcast cross-ownership rule on the ground that share does not equate to power in the modern broadcast industry. Both propositions cannot be true, and an agency that maintains otherwise has not engaged in reasoned decisionmaking.

The defects of the Commission's decisionmaking, and the failure of its de-

fense are exemplified by FCC's application of the so-called "Diversity Index." Having spurned demands that it allow informed debate on this controversial methodology, the Commission adopted a measure which is so plainly inadequate that it is rejected by pro and anti-deregulation parties alike. Citizen Petitioners showed that the DI ignores the FCC's finding that ownership is the best proxy for diversity, then uses the wrong variables, and weights them incorrectly, to create a test which is the primary basis for drawing conclusive bright lines that reshape the nature of media ownership in the United States. Before this Court, the Commission says that its legal obligation was met by telling the public that it might develop a diversity index, but does not defend its failure to solicit public comment thereupon. And, rather than defend the inconsistencies and irrational projections of the DI, the agency simply minimizes their significance.

There are a number of other specific issues contested in this complex case, and Citizens address each of them in greater detail in the body of this reply brief. But they all prove these same points. The FCC's data were not relevant to its policies, the agency's explanations were either lacking or plainly insufficient, and the Commission's Order picks and chooses among the record for the evidence and inferences that support the agency's conclusions. That is not the stuff of rational administrative decision-making and should be reversed by this Court.

ARGUMENT

I. THE FCC'S ABOUT-FACE REGARDING SECTION 202(h) DEMONSTRATES THAT THE ORDER APPLIED THE WRONG LEGAL STANDARD, MANDATING REVERSAL AS A MATTER OF LAW.

Citizens challenged the FCC's reading of Section 202(h) as requiring it to employ a presumption in favor of deregulation throughout the Biennial Review decision. For example, speaking about radio market definitions, the FCC said that:

> the Section 202(h) presumption requires us to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it.

JA141.[1]

In an abrupt reversal, the FCC's brief appears to have abandoned this claim. This seismic shift in the Commission's legal position alone requires that the Order be set aside and remanded to the Commission for proper review under the correct

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[1] The Order expressly shifted the burden of proof to opponents of the proposed rule changes to show that increased consolidation is affirmatively harmful. *See, e.g.*, JA0098 (concluding that evidence of "how combinations have harmed local news and public affairs programming . . . do[es] not persuade us that local combinations of television stations will harm localism"); JA0101 (rejecting comments citing examples of harms from television duopolies because the effects of same-market combinations on news production in just three markets are not a sufficient basis for a conclusion about the effects of some 95 same-market combinations on localism); JA0183 ("In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion."); JA0186 ("the record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming"); JA0192 ("These parties have failed to show that the rule remains necessary in the public interest. . . . shared support staff and conservation of resources does not necessarily mean a reduction in local news. . . . Thus, the record does not demonstrate that the current rule specifically promotes localism, or that elimination of the rule would harm it.").

legal standard.

Citizens pointed out in their opening brief that the Commission wrongly relied on *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027 ("*Fox I*"), *modified on rehearing,* 293 F.2d 537 (D.C. Cir. 2002) (*"Fox II"*), and *Sinclair* as authority for a deregulatory presumption because that presumption derived from *Fox I*'s construction of the word "necessary in the public interest" to mean "indispensable." When that *dictum* was deleted on rehearing, the "presumption" went with it. CPI Br. at 26.

Although it does not say so explicitly, the FCC's brief evidently agrees with Citizens on this point. It opposes the Networks' contention that Section 202(h) imposes a higher standard for retaining or modifying than the standard for adopting a rule in the first place. FCC Br. at 23.[2] The FCC argues, as did Citizens, that the word "necessary," as used in Section 202(h), does not mean "indispensable," and that *Chevron* deference is owed to its interpretation. FCC Br. 23-26. It also points

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[2] The FCC correctly rejects the Network Petitioners' claim that *Fox I* and *Sinclair* are "law of the case." FCC Br. at 27 n.6. Not only does the instant appeal involve different rules, different parties, and a different record, but it is well settled that *dictum* such as the *Fox I* Court's statement that Section 202(h) carries a deregulatory presumption are not binding law of the case. *See, e.g.*, *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 210 n.7 (3d Cir. 2003). Whatever interpretion one attaches to the modifications made in the *Fox II* rehearing, it is unquestionably a "supervening event" which renders law of the case doctrine inapplicable:

> [T]he doctrine does not restrict a court's power, but rather governs its exercise of discretion. Therefore, the doctrine does not preclude reconsideration of previously decided issues in "extraordinary circumstances," such as where . . . a supervening new law has been announced.

Southco, Inc. v. Kanebridge Corp., 324 F.3d 190, 194 (3d Cir. 2003) (citing *In re City of Philadelphia Litig.,* 158 F.3d 711, 717-18 (3d Cir. 1998)).

out, as did Citizens, that *Fox II* left open the question of the meaning of 202(h). *Id.* at 26.

Regarding the purported deregulatory presumption, FCC counsel now says that "the *Fox* court also stated that Section 202(h) 'carries with it a presumption in favor of repealing or modifying the ownership rules,' ***but this is true, if at all***, only insofar as the provision 'appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.'" FCC Br. at 26 (emphasis added, citations omitted). The meaning of this sentence is, at best, obscure.

If, as it seems, the FCC is now admitting that there is no deregulatory presumption in favor or repealing or modifying the rules,[3] and therefore does not "upend" the traditional *State Farm* test,[4] then the FCC's Order applied an incorrect

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[3] The argument in the Commission's brief closely resembles what the agency argued in successfully obtaining rehearing in the D.C. Circuit. Its April 15, 2002, *Petition for Rehearing or Rehearing En Banc* in *Fox* urged that:

> The [*Fox*] Court cited no basis for this "presumption" in either the statutory language or in the legislative history of the 1996 Act. If there should be any presumption that is created by the adoption of Section 202(h), it is a presumption in favor of re-examining the agency's media ownership rules on a regular basis to determine if they continue to be in the public interest. The statutory language directing the FCC to "repeal or modify any regulation it determines to be no longer in the public interest" is inconsistent with a statutory presumption in favor of repeal or modification.

rehearing petition, p. 9, n.1. *See also* UCC Br. at 49-53 (demonstrating the nothing in the language or legislative history of the 1996 Act mandates a deregulatory presumption).

[4] *Motor Vehicle Mfgrs. Ass'n v. State Farm Mutual Ins. Co.,* 463 U.S. 29 (1983). Tribune/Media General ("T/MG") suggest in a footnote that the *State Farm* test does not impose a higher standard on an agency that reverses policy to repeal a rule. T/MG Br. at 33 n.19. That is wrong, as the other Deregulatory Petitioners recognize. See NAB Br. at 21 (collecting cites applying *State Farm* for proposition

legal standard and must be reversed. *Townley v. Heckler,* 748 F.2d 109, 112 (2d Cir. 1984) ("Failure to apply the correct legal standards is grounds for reversal."); *accord, Goatcher v. United States Dep't of Health & Human Servs.,* 52 F.3d 288, 289 (10th Cir. 1995). The law is settled that an agency (like a district court) abuses its discretion as a matter of law by applying the wrong legal standard. *E.g., Dam Things From Denmark v. Russ Berrie & Co., Inc.,* 290 F.3d 548, 556 (3d Cir. 2002)*; Schreiber v. Society for Sav. Bancorp*, 11 F.3d 217, 220 (D.C. Cir. 1993)(deeming a district court's ruling "arbitrary" regardless of how well-reasoned if it proceeds from a misapprehension of the relevant legal standard). The APA requires courts to "review the whole record to determine whether the [agency's] factual findings are supported by substantial evidence ***and the correct legal standards were applied.***" *Goatcher v. United States Dep't of Health & Human Servs., supra.* (emphasis supplied).

If, however, the FCC brief ***was*** intended defend the *Order's* use of a deregulatory presumption, it is difficult to understand what the argument is. Neither the brief nor the *Order* even attempt to explain why the *Fox I* "deregulatory presumption" *dictum* survives the modifications in *Fox II.* See CPI Br. at 22-26.

At the very least, the brief's language increases the confusion and ambiguity over what standard the FCC purports to have applied. While Citizens argued that

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that reversal of agency policy is a "danger signal" that requires "heightened" judicial scrutiny"). This also illustrates why the standard is so important, though, because no one – not even the agency – claims the FCC has met the more exacting *State Farm* standard, as applied by the courts, for justifying repeal of its media concentration regulations in this case.

the FCC improperly applied a deregulatory presumption, the Deregulatory Parties do not even agree on what standard the FCC applied. Intervenor NAA, which seeks ***affirmance*** of the Commission's repeal of the newspaper/broadcast cross-ownership rule, nonetheless admits that "[t]he FCC's cursory treatment of the statutory standard question has prompted confusion among various parties as to what the agency itself considers the standard to be." NAA Br. at 6 n.3. Even so, it says the FCC "***correct[ly]*** . . . stat[ed] that Section 202(h) 'carries with it a presumption in favor of repealing or modifying the ownership rules' and 'upends' traditional administrative law principles." *Id.* at 6-7 (emphasis added). Petitioner Clear Channel, however, seeks ***reversal*** of the radio ownership rules because the Commission "reduc[ed] that standard to nothing more than the minimal requirements of ordinary rulemaking," Clear Channel at 17-18, by ***incorrectly*** failing to apply a "presumption" in favor of repeal or modification. *Id.* at 25.[5]

It is fundamental administrative doctrine that an agency's explanation must be

[5] Citizens also presented an alternative argument that any "presumption" that might survive *Fox II* is directed to reviewing courts and not to the FCC Br. at 25. See *Fox I*, 280 F.3d at 1048 ("[T]he underlying procedures [for Section 202(h)] differ in at least one important respect that requires a different approach upon judicial review: Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.") Clear Channel says that "If a 'different approach upon judicial review' is required, then *a fortiorari* the agency's approach must be 'different' . . . ." This misses the point. *Fox I* was addressing a purely judicial function- whether to vacate or remand. In the context of *Fox I*, the discussion of the "presumption" can be seen as a recognition that *vacatur*, which is ordinarily disfavored, might be more appropriate than in other circumstances. *See* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L.Rev 108 (2001) ("In the last decade, courts reviewing agency action have increasingly opted to remand the challenged regulation to the agency without vacating.")

sufficiently clear that a reviewing court can understand the underlying reasoning. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3rd Cir. 2001)(a court must remand if it cannot evaluate the challenged agency order); *C.K. v. N.J. Dep't of Health & Human Servs.,* 92 F.3d 171, 182 (3d Cir. 1996); *Florida Power and Light Co. v. Lorion,* 470 U.S. 729, 744 (1985).

Thus, it is, at best, unclear what standard the agency did apply. At bottom, it is evident that the FCC is unwilling, before this Court, to urge the same construction of Section 202(h) that was articulated in its *Order* and on which its analysis of competing evidence therein was clearly based. The FCC either applied the wrong legal standard or was uncertain about what standard it did apply. In either case, reversal and remand for re-analysis of the record using the correct legal standard is required.

II. JUDICIAL DEFERENCE TO ADMINISTRATIVE LINE-DRAWING DOES NOT SHIELD THE FCC'S ABANDONMENT OF ITS OWN POLICIES AND FAILURE TO CONSIDER RELEVANT FACTORS.

The FCC maintains that it was merely "drawing lines" within a spectrum of reasonable alternatives, and on that basis insists that the objections of the Citizen Petitioners (as well as the Deregulatory Petitioners) are subsumed by the judicial deference traditionally accorded to agency exercise of expertise and discretion. *E.g.,* FCC Br. at 17, 21, 23, 39, 53, 85. That is not the point. Citizens are not arguing in this appeal that the FCC simply "picked the wrong numbers," but rather – and more fundamentally – that it asked the wrong questions and abandoned its own policies. Where, as here, a regulator does not consider the appropriate factors and

fashions rules that are patently unreasonable in light of the policies it professes to advance, the resulting decision cannot be saved by the APA's general reservation of "line-drawing" discretion to administrative expertise.

A. The "Abundance" of Media Outlets Is Irrelevant To the FCC's Policy Goals of "Diversity of Ownership" and Localism, Providing No Support for Deregulation.

The Commission and Deregulatory Petitioners characterize Citizens' criticisms as peripheral and isolated. *See, e.g.,* FCC Br. at 73, T/MG Br. at 44. But Citizens' concerns go to the heart of the Commission's own findings. The FCC found independent media owners and local news to be the heart of its diversity and localism policies, but repeatedly ignored those criteria when evaluating the record and crafting its new rules. The Commission cannot properly conclude that viewpoint diversity is premised upon independently-owned outlets and then, as it did here, determine that commonly owned outlets preserve diversity. The FCC cannot properly find that local news is the best measure of diversity and localism and then, as it did here, look to media outlets that do not offer local news to achieve that goal.

1. Ownership and Local News are at the Heart of the Commission's Diversity and Localism Goals.

The FCC cannot deny that "fostering viewpoint diversity" is "at the core" of the Commission's public interest responsibility. FCC Br. at 76; JA 0195. In *Fox*, the D.C. Circuit affirmed the FCC's use of ownership as a proxy for viewpoint diversity. 280 F.3d at 1047. Consistent with its past decisions, the FCC's Order again holds that "there is a positive correlation between viewpoints expressed and

the ownership of an outlet." JA0044-45.

The Commission's decision at great length reviews, analyzes and adopts the principle – not challenged by any party to this appeal – that localism and diversity require numerous independently-owned outlets that offer local news. The Order rejects "the principal record evidence purporting to demonstrate a lack of connection between ownership and viewpoint" (the Pritchard study) because it contained a significant methodological flaw, and instead "adhere[d] to [the FCC's] longstanding determination that the policy of *limiting common ownership* of multiple outlets is the most reliable means of promoting viewpoint diversity." JA0047 (emphasis added). "A larger number of *independent owners* will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners." *Id.* (emphasis added); JA0049 (diversity premised on "multiple independently owned firms").[6]

The Commission likewise determined that local news and information is the key component of diversity. The Order concluded it would "measure viewpoint diversity . . . through news and public affairs programming." JA0048. "Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of

[6] *See also* JA0047 ("outlet *ownership* can be presumed to affect the viewpoints expressed on that outlet" and "A larger number of *independent owners* will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners."); JA0048 ("evidence from a variety of researchers and organizations appears to disclose a *meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s)*")(emphasis added).

facilitating robust democratic discourse in the media." *Id.* The Order expressly recognized that "diversity of viewpoints by national media on national issues" is not a surrogate for local news diversity, JA0048-49, pointing out that "the vast array of *national* news sources" are "available on the Internet, cable television and DBS." *Id.* (emphasis added); *see also* JA0212 (diversity focuses "on local, not national, viewpoint market(s)").

Nonetheless, in arguing in support of its rules in its brief and in the Order, the Commission deserted its own findings and focused almost exclusively on outlets, not owners, and national, not local, news programming. *See, e.g.*, FCC Br. at 32, 73-74. The Order heralds what it terms the "tremendous growth" in media outlets and the "abundance" of programming available nationally. JA0065, 0074, 0080. Like the FCC, Petitioners Tribune/Media General and the National Association of Broadcasters ("NAB") also cite the absolute growth in media outlets, but disregard the corresponding – and far more relevant – ownership numbers. *E.g.,* T/MG Br. at 41-43; NAB Br. at 57.

This fundamentally mischaracterizes the record on the issue of the media "abundance." The FCC and the Deregulatory Petitioners count outlets, not owners, to incorrectly claim that the explosive growth of new multimedia sources of programming and entertainment (such as satellite television) of itself renders broadcast ownership limits unsustainable. FCC Br. at 85. Yet the record below is in fact uncontradicted that media ownership has become ***massively more concentrated*** in recent years. In its Newspaper Broadcast NPRM, for example, the

Commission noted that the number of radio owners had dropped by 25 percent from 5,100 to 3,800 and television owners dropped from 543 to 360. JA2464.[7]

The uncontested fact, not challenged by either the FCC or the Deregulatory Petitioners, that the concentration of owners of media in the United States has increased considerably contrasts markedly with the FCC's glib observation that "Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before." JA0040.[8]

For these reasons, Tribune/Media General is profoundly in error when it argues that any limit on cross media ownership is arbitrary because common ownership has no "adverse effect" on diversity. T/MG Br. at 47-48. At best, the Commission concluded that the amount of commonly-produced news would increase through common ownership, JA0101, but it did not and could not find that diversity was so served.[9]

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[7] The FCC's own staff studies below showed that "an increase in concentration in broadcast media industries may lead to a decrease in the total amount of non-advertising broadcasting," and that there is "a positive relationship between consumer welfare and the number of firms in the broadcast industry." MOWG No. 6, Executive Summary, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A11.pdf.

[8] Citizens of course recognize that entertainment choices available in America today, especially cable networks and satellite TV programming, have expanded significantly. But that "hundreds of channels of video programming are available in every market of the country," JA0040, does not of itself suggest, let alone prove, that these sources represent the same variety in viewpoint or its proxy, ownership.

[9] Tribune/MG ignore the caveats inherent in the conclusion that "commonly owned newspapers and broadcast stations do not *necessarily* speak with a single, ***monolithic*** voice." T/MG Br. at 47 (citing Order at ¶361, JA0181-82). To state that the commonly owned outlets are not a monolith does not mean that they

Neither the FCC nor the Deregulatory Petitioners has provided any indication that what they characterize as outlet and programming "abundance" has increased either viewpoint diversity or responsiveness to local needs and interests among broadcast licensees.

2. Notwithstanding its Stated Goals, the Commission Ignores Ownership.

In light of the admitted fact that media ownership has consolidated substantially, the FCC's assertion that the "abundance" of media outlets available today obviates the need for limits on ownership limits (JA0065-66, 0080; FCC Br. at 11) does not consider the "relevant factors" as required by the APA. *State Farm,* 463 U.S. 29, 43 (1983). While the Order recognizes that "independent ownership of outlets by multiple entities" is key to "the goal of promoting viewpoint [diversity]," JA0049, it improperly looks to what the Order calls the "tremendous growth in . . . media outlets" and "[t]he number of outlets per market" in holding that the FCC's rules are no longer in the public interest. *Id.* JA0080. Yet the existence of multiple outlets is ***immaterial*** to the issues of diversity and localism. Those twin objectives are completely unrelated to the absolute number of media outlets available or to the quantity of "entertainment programming" available from satellite and cable networks, VHS/DVD rentals and the like.

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contribute to diversity. "[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." *FCC v. NCCB*, 436 U.S. 775, 797 (1978). And, in fact, the Commission found expressly the opposite. Order at ¶27 ("outlet ***ownership*** can be presumed to affect the viewpoints expressed on that outlet.").

By focusing on outlet availability instead of ownership diversity, the FCC's analysis improperly failed to apply the policy considerations it held were relevant. Its rules are therefore not "based on rational weighing of competing policies," *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 596 (1981), because the Commission has allowed outlet "abundance" to trump its professed policies of diverse, local ownership. The FCC and the Deregulatory Petitioners improperly rely on outlets, not owners; entertainment, not news and information; and national, not local, programming.

The FCC conceivably might have determined that ownership was not a good proxy for viewpoint diversity and focus instead on the number of media outlets available. But, having decided to accord primacy to ownership diversity over mere outlet availability, the agency was required to conduct its analysis accordingly. It did not, a failure that is fatal under the APA. By disregarding ownership concentration, the FCC "entirely failed to consider an important aspect of the problem" and "offered an explanation for its decision that runs counter to the evidence before the agency," classically reversible APA conduct. *State Farm,* 463 U.S. at 43, 46-51, 54-57; *Sinclair*, 284 F.3d at 162.

3. The Commission Ignores Local News.

The abundance of national media choices is also irrelevant to media concentration in light of the Commission's determination that diversity and localism

is to be assessed by local news.[10] The FCC's brief blithely ignores the fact that the Commission's Order often relies on outlets that do not offer local news to further their localism and diversity goals, particularly when concluding that change is warranted. *See, e.g.,* FCC Br. at 32, 70.

As demonstrated in detail below, the Commission made no findings that the Internet is a significant *independent, local* news source. *See infra* at Section IV.B. Similar to its dismissive attitude about outlets, the Commission waives its hands at the Internet and presumes abundant local news sources without foundation. This is so despite the fact that the Commission's Newspaper Broadcast NPRM pointed out the implausibility of considering the Internet as course of "local" news. JA2464 ("The growth of news-oriented websites likewise might not be considered particularly significant, because many do not focus on local news and information, and those that do are often operated by existing local media, such as broadcast stations and newspapers.") In defense of its Order, the agency is forced to argue feebly on brief that Web sources "could be expected to provide" local news. *See* FCC Br. at 74.

Whether there are sufficient original and unique (non-duplicative) sources of content on the Internet for it to be counted as a source of local news is, at the very

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[10] *See also* JA0048 ("viewpoint diversity is most easily measured through news and public affairs programming"); JA0199 ("focuse[d] on availability of sources of local news and current affairs,"); JA0212 ("consistent with our past practice and precedent, we focus . . . on local, not national, viewpoint market(s)."); JA0061 ("the selection of programming responsive to local needs and interests, and local news quantity and quality.")

least, in dispute. Nonetheless, the Order conducts no analysis of this question. There is no data that shows that the Internet is a meaningful independent source of news. No case studies, no data surveys support the Commission's conclusions.[11] And the FCC did not even attempt to analyze the data that was submitted. In making its "local" Internet findings, the FCC simply asserted there was local news on the Internet without pointing to anything in support of that finding. Rhetoric this broad simply cannot substitute for analysis.[12]

As a consequence of its unsupported conclusions about the Internet, the Commission includes it in the diversity index. This error is starkly evident when one compares the Commission's treatment of Internet with its treatment of cable. The Order excludes cable operators in developing the diversity index and its new Cross-Media Limits on the ground that cable network programming is virtually all national, but includes the Internet as a source of local news and information relying on virtually identical evidence. *See* FCC Br. at 73, *see also infra* Section IV.B.[13]

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[11] As Citizens explained, CPI Br. at 43, n.19, and the Commission did not contest, FCC Br. at 81, n.43, the study upon which the Commission relied to weight media in the Diversity Index "***did not have data***" on the most important factor, namely a citizen's primary source of local news. JA0201(emphasis added). *See* T/MG Br. at 43, stating ***without any citation*** that the Internet includes "virtually every local organization, school, government or other outlet for participation in public affairs."

[12] The FCC argues on brief that its expert report finding that the Internet is "inherently nonlocal" does not matter because that conclusion related only to the ability to access the Internet in a geographically-indifferent manner. FCC Br. at 74 n.39. But that is precisely the point. Because the Internet makes instantaneous access to global information possible, the current affairs content on virtually all Internet web sites is largely devoted to national and international news.

[13] Tribune/Media General challenge the exclusion of cable, asserting that cable in fact provides an independent source of local new and information, by citing

The questions of inclusion of the Internet and exclusion of cable are significant because when these sources are considered properly for localism purposes, the modification of the local TV rule, the repeal of the newspaper-broadcast rule, and development of the new cross-media rules are impossible to justify. *See, e.g.,* FCC Br. at 32, 70, 78. For example, the local TV rule adopted the "moderately concentrated" HHI standard of 1800 because of "the competitive pressures exerted on broadcast television by the cable networks" FCC Br. at 32 n.11. Yet if, as the FCC correctly found, cable provides little in the way of local news and information programming, it cannot satisfy the Commission's localism policy and could not properly have been used to liberalize the concentration index for local TV ownership.

Moreover, as discussed further below, without inclusion of the Internet, the Commission's Diversity Index analysis and resulting CML rules would be dramatically different, because the Internet was given a huge weighting of 12.5% – equivalent for instance to the top eight TV stations in the New York market. JA0306. CPI Br. at 42. And the Commission does not contest Citizens' showing

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to the number of "regional non-broadcast [cable] networks" and specifically to "32 regional and local news networks." T/MG Br. at 42. The idea that these relatively few regional cable networks convert cable television into a substantial source of local news is absurd. As the Commission recognized in its Newspaper Broadcast NPRM, regional cable news networks might "not be considered especially important in terms of diversity analysis, because more than half of them are owned by co-located broadcast stations or newspapers." JA2466. Moreover, even if Tribune/Media General were correct, their own data show that there are only 32 networks out of 210 nationwide cable markets – a scant 15% – that even arguably offer local news coverage. *Id.*

that fewer than half of television stations offer local news, CPI Br. at 36, therefore calling into question those stations' inclusion in the diversity index. In short, if it has only included media that offered local news, the Commission would have been forced to classify many more markets as "at risk" under the CML and thus maintain a far broader prohibition on cross-ownership transactions.

B. The FCC Has Not Merely Updated Its Rules, but Has Fundamentally Deregulated the Media Industry in a Patently Unreasonable Fashion.

It is astonishing that the FCC not only accepts Citizens' projections for media concentration in Philadelphia under the new rules, *see* CPI Br. at 34, but shrugs them off as "reasonable and well-within the FCC's discretion." FCC Br. at 85. While the FCC claims its new rules are "balanced" and do not "eviscerate" media concentration limits, FCC Br. at 20, their consequences are plainly revolutionary.

A near total ban on the cross-ownership of TV stations and newspapers in the same market has been replaced with a rule that grants blanket approval to TV-newspaper cross-ownership in all markets with more than four TV stations and allows waivers for merges in markets with fewer than three stations. This comprises virtually the entire United States: more than 179 markets accounting for more than 97% of all Americans. CPI Br. at 14-15, 34. Likewise, the prior local TV rule would have permitted about 100 duopolies in markets serving 50% of the country; it has been replaced with a rule allowing triopolies in markets serving about 25% of the country and several hundred duopolies in markets accounting for another 50% of the nation. CPI Br. at 15.

The Commission's and Deregulatory Petitioners' attempts to minimize Citizens' examples of consolidation in Philadelphia are flawed, like the Order, by their focus on outlets. *E.g.,* FCC Br. at 85; T/MG Br. at 47-48. The Commission tries to reassure the Court that there will remain in Philadelphia 12 commercial and five noncommercial television stations, thirty-five radio stations, and two competing newspapers under the new rules. FCC Br. at 85. In fact the Commission's rules would allow all of these outlets to be owned by *seven owners*. While currently there are 17 owners in Philadelphia, under the FCC's new rules these could be reduced by almost 60 percent. Not only this, but as Citizens' opening brief explained, CPI Br. at 34, 53-54, 59, the largest owner could control 42 percent of the television market,[14] 49 percent of the radio market,[15] and both daily newspapers, comprising one hundred percent of the newspaper market.

Even where they involve "quintessentially matters of line drawing invoking the Commission's expertise in projecting market results," *Sinclair*, 284 F.3d at 162, courts will reverse agency decisions if "the lines drawn are . . . 'patently unreasonable, having no relationship to the underlying regulatory problem.' *Cassell*

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[14] All of the following could be owned by a single entity: KPVI-TV (26% share), WPHL-TV (9% share), WPSG (7% share). *BIA Financial Network*, Television Market Report, DMA Rank: 4 (2nd ed. 2003).

[15] Currently, for example, petitioners Clear Channel and Viacom each own five radio stations in the Philadelphia Arbitron market, together capturing more than 50% of the listening audience. BIA Financial Network, Radio Market Report 2001, Metro Rank, 5. Under the Commission's new rules, one company could own even more, placing almost 50% of the market share under *one* roof: WBEB 101.1 FM (7.7% share), WDAS 105.3 FM (7.1% share), WYSP 94.1 FM (6.6% share), WUSL 98.9 FM (6.3% share), WIOQ 102.1 FM (6.1% share), KYW 1060 AM (7.6% share), WPEN 950 AM (4.3% share), and WIP 610 AM (3.5% share). *Id.*

v. FCC, 154 F.3d 478, 485 (D.C.Cir.1998) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C.Cir.1977))." *Id.* The Commission has determined the underlying regulatory problem lies with diversity of ownership. Its attempts at line drawing based on outlets are therefore "patently unreasonable."

Moreover, the Deregulatory Petitioners are incorrect to imply that the Citizens inflexibly seek to maintain the status quo indefinitely. NAB Br. at 56-59; NAA Br. at 41. To the contrary, Citizens recognize that in some markets, there have been increases in ownership (hence viewpoint) diversity and that some TV and radio mergers will likely have no adverse affect on competition, localism or diversity. The answers to these questions, however, should be based on some coherent, analytically rational and empirically sound methodology. Whether the number of commonly owner local TV stations permitted should be four, six, eight or something else needs to be based on more than the mere intuition and pseudo-science employed by the FCC here.

The "elusive" nature of the diversity objective, FCC Br. at 80; *FCC v. NCCB,* 436 U.S. 775, 796-97 (1978), does not suffice to supplant need for reasoned, record-based judgment of media concentration limits. As Judge Sentelle explained in his concurring opinion in *Sinclair,* "[t]here is no suggestion as to how much diversity is enough, how much is too little, or how much is too much. . . . The FCC offers us only truisms, stating that it has struck the right balance, without explaining why. The Commission should define its diversity goal [with precision] rather than simply quoting boilerplate on the 'elusiveness' of diversity." *Sinclair,* 284 F.3d at

170 (Sentelle, J., concurring and dissenting in part).[16]

III. THE DIVERSITY INDEX DICTATED THE COMMISSION'S CROSS MEDIA RULES AND SHOULD HAVE BEEN SUBJECT TO ADEQUATE NOTICE.

Both the Anti-Deregulatory Petitioners and several of the Deregulatory Petitioners agree that the diversity index ("DI") is irrational, inconsistent with the record and represents the application of guesswork rather than any rigorous expert analysis. *See, e.g.,* T/MG Br. at 16 ("a contrived 'Diversity Index' analogized from the very different world of antitrust analysis and completely ungrounded in *any* record evidence"); *id.* at 46 ("pseudoscience . . . designed merely to impart a false precision to the FCC's arbitrary cross-ownership limits"). The Court is thus faced with a rare instance where parties that are adverse on nearly every other issue agree that the cross media limits should be vacated because of the Commission's reliance on the flawed diversity index.

That both sides are unhappy with the agency's work should not be taken as an indication that the FCC has acted in some sort of Solomonic fashion, displeasing everyone equally. FCC Br. at 81, 83. Rather than simply cutting the baby down the middle, King Solomon used wisdom, a trait that none of the petitioners believes the FCC applied in this case, and which an examination of the Commission's 258-page Order reveals is clearly lacking from its statutory, policy and factual analysis.

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[16] Circuit Judge Sentelle dissented only to the extent that the majority in Sinclair remanded the local TV ownership rule to the FCC for further consideration rather than vacating the rule outright.

A. The Practical Impact of the Diversity Index Undermine the FCC's Claim That It is Simply A "Tool" the Deficiencies of Which are Immaterial to this Appeal.

The FCC insists that the Court should not consider objections to the Diversity Index ("DI") because it was just "one element of the agency's process" of fashioning the CML. FCC Br. at 83; *cf.* NAA Br. at 44 ("blunt tool"). But ***neither the Order nor the FCC's brief identifies anything else.*** The Commission itself states that the DI provides the CML with an "empirical footing" and was the "methodological foundation" of the FCC's "analysis of the record." FCC Br. at 78, 80. It argues that the CML is "[b]ased on a detailed analysis of the record" but cites to nothing except the Order's decisions on what to include (newspapers, TV, radio and Internet) and what to exclude (magazines, low-power TV) ***in the DI itself*** as examples of this analysis. *Id.* at 78-79, 81-82.

Except for a nebulous reference to agency "judgment," there is no serious indication the FCC actually considered anything other than the DI. The Order recites, for instance, only that "[u]sing our diversity index analysis and our independent judgment regarding desired levels of diversity, we first identify 'at risk' markets that might already be thought to be moderately concentrated for diversity purposes." JA0212. As the FCC's brief acknowledges, FCC Br. at 77, and the Order unabashedly states, "in defining 'at risk' markets, we have ***used our DI and sampled the effect of transactions in large and small markets,*** involving heavily used sources of local news and information." JA0214-15 (emphasis supplied)

(citing only App. D, "Diversity Index Scenarios").[17] The agency did not – and cannot – claim that the "at risk" markets for which the CML bars cross-ownership transactions are anything other than the identical results of the DI. The FCC has not – and cannot – cite to any significant methodological, statistical or empirical difference between the DI and its resulting cross-ownership CML rule. There is no simply no material difference between the output of the Diversity Index and the rule itself.

As a practical matter, therefore, the record demonstrates clearly that the DI was the ***only*** concrete information in the record the Commission actually cited or relief upon in fashioning and adopting the CML. Certainly neither the FCC's brief nor the Order itself identifies any other factor, criterion or evidence on which the Commission relied in fashioning the CML rules.

Minimizing the DI as a mere "tool" does not save the Commission from arbitrary behavior. Methodology, no less than any other administrative agency behavior, must be based on substantial evidence in the record and a rational

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[17] Likewise, in the section titled "Identifying At-Risk Local Markets," extensive analysis of the DI and the effects of mergers on the index is presented. ***Absolutely nothing other than the DI is discussed.*** In fact, the Order states that the Commission draws the line for at-risk markets because "based on our analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations. . . . Accordingly, we will prohibit certain cross-media combinations involving those properties in markets with three or fewer television stations." JA0214-16. This makes plain that in crafting the rule defining "at risk" markets in the CML, *see* FCC Br. at 68, the Commission acted mathematically, and solely on the basis of the Diversity Index, without regard to any other factor or criterion.

consideration of the appropriate factors. *Inland Empire Pub. Lands Council v. Schultz,* 992 F.2d 977, 981 (9th Cir. 1993) ("We defer to agency expertise on questions of methodology unless the agency has failed to address some factor, consideration of which was essential to a truly informed decision."); *Hughes River Water Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1989) ("Agencies are entitled to select their own methodology as long as that methodology is reasonable."). As described in Citizens' opening brief and *infra* Section III, IV.B, the DI's methodology is inconsistent and unreasonable.

In sum, merely asserting that the DI "informed" the FCC's exercise of "judgment" provides no shield from judicial review, and is in error in the same way the FCC's choices of the "voice" test was in *Sinclair.* The diversity index is not based on "diversity" as defined by the Commission. Its analysis is inconsistent and should be reversed for the same reasons the eight voices test was reversed.

B. The Central Importance of the DI to the FCC's Analysis Compelled A Prior Opportunity for Public Comment.

The FCC utterly failed to address Citizens' argument that the Commission's "DI was formulated, in secret, after the comment period closed . . . " in violation of the notice requirements of the APA. CPI Br. at 39.

The FCC's response is that there was clear notice that the Commission contemplated "how to reformulate our mechanism" and solicited public comment on how this might be done. FCC Br. at 91. It says that the APA permits agencies undertake additional studies and develop new data without soliciting additional public comment. FCC Br. at 91-02.

The first point is a red herring. The complaint is not that the issuance of the DI was a surprise, but that its formulation was not subjected to public scrutiny. Indeed, Citizens showed in their Statement of the Case that there was widespread discussion of the fact that a DI was under construction, and that citizens groups, members of Congress, and members of the Commission all called upon the Chairman to allow "public review of proposed changes." CPI Br. at 12 (citing to JA 5118, JA 5146).

The second point is more relevant, but not more responsive. This case is not simply about whether some additional facts of import were adduced, but whether the Commission should have sought comment about the methodology it was developing upon which it based a fundamental restructuring of media ownership in the United States. Citizens sought meaningful participation in the debate over "the reasoning that has led the agency to the proposed rules." *Connecticut Light and Power v. NRC,* 673 F.2d 525, 530 (D.C. Cir. 1982); *NRDC v. EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) (parties are entitled to be fairly apprized); *MCI Telecommunications Corp. v. FCC*, 57 F.2d 1136, 1140-41 (D.C. Cir. 1995) (FCC must afford fairness and assure that it has relevant facts and information). *See also Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 547 (D.C. Cir. 1983) (discussing how notice assures that agency rulemaking is tested by exposure to public comment).[18]

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[18] For the same reason, the Court should reject the FCC's claim that the NPRM's "comprehensive review" language gave adequate public notice that it intended to allow count noncommercial radio stations in determining local radio

The Commission disingenuously attempts to trivialize the matter, by saying the DI "is simply an analytical tool" used to inform its judgment, FCC Br. at 91.[19] However, as shown above, the DI is the *critical input* into the Commission's new CM, which required fifteen pages of explanation. JA0194-0208. Citizen Petitioners

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caps, allow television triopolies, and amend its policy for failing station waivers. *See* FCC Br. at 36-37, 54-55. The FCC's *modus operendi* is not new. *See McElroy Electronics Corp. v.. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (Wald, J.)(admonishing FCC not to hide its intentions with confusing language and burying important points in footnotes because "[s]uch obscurity and imprecision collide[s] with the Commission's responsibility, shared by all federal agencies, of issuing intelligible orders.") Despite the FCC's claim, FCC Br. at 37, nothing in either the *Sinclair* remand decision or the NPRM alerted the public to the fact that triopolies were under consideration. Language quoted from *Sinclair* remand refers to possible changes in the eight independent voices standard, not the possibility of tripolies: "[o]n remand the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit," 284 F.3d at 162. Moreover, the word "triopolies" is used only once in the NPRM in a question about the economic incentives of triopolies regarding local news. JA3477. That is a far cry from notice that the agency was considering permitting local triopolies almost across the board for the first time in its history. Finally, the Court should reject the FCC's claim that the NPRM's request for comment on the advantages or disadvantages of a "case-by-case approach" gave adequate notice of its new waiver standards. FCC Br. at 37 (citing NPRM ¶106). That paragraph sought comment on whether to replace the entire local TV rule with a case-by-case approach, not whether it should amend the waiver policy as to failed stations.

[19] The Commission's assures this Court that the HHI has been "'widely used for measuring content diversity.'" FCC Br. at 90, but that may not be the case. The brief and the Order cite only one article, published in 1979, to support that sweeping claim. JA0141. Examination of the article suggests that it would not give a knowledgeable party any reason to expect that the HHI would be used as a model for measuring diversity. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). Although the article applies the HHI to measure vertical diversity which the FCC uses to determine whether the television schedule is balanced, it notes that "vertical diversity does not really reflect the options available to the viewer at any point in time." Barry Litman, *The Television Networks, Competition and Program Diversity*, 23 J. of Broadcasting 393, 402-03 (1979). In fact, the article only uses the HHI for the narrow purpose of measuring "size distribution of programming." *Id.* at 403.

had no opportunity to comment on either the methodology or data. Moreover, Petitioners have identified multiple defects in both the methodology and data. CPI Br. at 34-49, *infra* at Section III, IV.B. Clearly, Petitioners were prejudiced by the Commission's refusal to seek public comment on the Diversity Index and its implications for revising the cross-ownership rules.

Thus, the failure to obtain input on the mechanics of the DI closely resembles the circumstances faced in *McLouth Steel Products v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988), where the EPA failed to solicit public comment in developing a new and binding "VHS model" to predict the amount of contamination leaching from hazardous waste. *See also, U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (D.C. Cir. 1977) ("[W]hen the basis for a proposed rule is a scientific decision, the scientific material . . . should be exposed to the view of interested parties . . . .") When an agency bases its rule on such a critical component, it must make its mechanism available for public comment. For example, in *Portland Cement Association*, the court found that it "is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency. 486 F.2d 375, 393 (D.C. Cir. 1973). *See also National Crushed Stone Ass'n v. EPA,* 601 F.2d 111, 117 (4th Cir. 1979), *rev'd on other grounds,* 449 U.S. 64 (1980) (remanding because at the time the rule was being promulgated "only the EPA knew about the data in detail . . . the refusal to make the actual data available

to those immediately affected by it cannot be excused").[20]

Both cases cited by the FCC are inapposite because the data in those cases was not critical to the promulgated rule. In *Community Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir 1984), the court found that the two studies that were not subject to comment were used for limited purposes and "did not provide entirely new information "critical" to the Secretary's determination." In *Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991), the agency's "methodology remained constant," and was not at issue. The court found no APA notice problem, since the dispute was merely about use of a different data source for certain quantitative measures, and because the and because the added data was used to check or confirm prior assessments." *Id.* Moreover, "petitioners had ample opportunity to criticize EPA's approach." *Id.*

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[20] The Commission's position here also does not accord with routine agency practice. For example, in the telephone area, when the FCC in complex calculations of "universal service" subsidies used to support local phone service in high-cost areas, it subjects its formulae to public comment. Thus, in developing a new universal service regulatory regime, the Commission published its mathematical models and asked for public comment. Indeed, it treated the model and the inputs to the model as two completely different proceedings, both of which were opened to public comment. *Forward-looking Mechanism for High Cost Support for Non-rural LECs*, CC Docket No. 96-45, FCC 99-120 (rel. May 28, 1999) (seeking comment on the appropriate values to assign for forward-looking network cost on a nationwide basis); *Forward-looking Mechanism for High Cost Support for Non-rural LECs,* 12 FCCRcd. 18514, 18519 (1997) (seeking comment on cost models to adopt for the local switched network). It is impossible to harmonize the FCC's position that public notice of the DI was not required with the fact that it routinely seeks comment on similar methodological issues in other areas of its regulatory responsibilities.

IV. THE FCC DID NOT WEIGH THE RECORD EVIDENCE BUT INSTEAD ENGAGED IN INCONSISTENT REASONING AND IGNORED WITHOUT EXPLANATION ALL DATA CONFLICTING WITH ITS *A PRIORI* CONCLUSIONS.

The FCC calls its revised rules "a new, comprehensive framework," FCC Br. at 11, 20, but treats each of the rules *seriatim,* without harmonizing their many, serious analytical inconsistencies. Furthermore, even when the rules are viewed in isolation, the FCC's analysis is often inconsistent and fails to grapple with the contradictory evidence in the record. The Court should reverse, where as here, the agency has relied upon internally inconsistent findings and analysis. *Airline Pilots Ass'n v . FAA,* 3 F.3d 449, 453 (D.C. Cir. 1993).

A. The FCC's Inconsistent Analytical Framework Violates the Fundamental Holding of *Sinclair.*

Sinclair upheld the FCC's "eight voices" rule but remanded for reconsideration of the definition of those voices. As the D.C. Circuit explained, the FCC's error was that it had not harmonized its inclusion of certain media as "voices" for purposes of the TV duopoly rule with its different approach to the radio-television cross-ownership rule. 284 F.3d at 158-59, 162. The Commission's inconsistent analysis of the several rules promulgated in its Order contravenes the *Sinclair* holding and for that reason should be reversed.

The FCC does not reconcile its inconsistent treatment of top four television stations and newspapers. The FCC claims that it adopted the CML to "specifically to check the acquisition by any single entity of a dominant position in local media markets," FCC Br. at 76, and to "target 'the types of transactions that would give us

the most concern and which are not already prohibited by our intra-service caps.'"
Id. at 77 (quoting JA0211-12). Yet the CML does nothing to prohibit mergers between the only daily newspaper and the dominant television news provider in the vast majority of communities. In contrast, based on a market structure analysis of local and national television markets, the FCC concluded that the dominant firms – the top four local stations and the four major national networks in terms of market share – should not be allowed to merge with each other. The Commission identified a host of dangers in such mergers[21] and little public interest benefit because the merging parties were likely to be healthy and already engaged in the production of news and information products. JA0114-15, JA0274.

The record contained substantial evidence that each of these reasons for banning mergers between dominant entities in TV markets applies equally to mergers between dominant TV stations and newspapers. A merger between a dominant TV station and a dominant newspaper results in an entity that dwarfs its nearest competitors in terms of control of news production, and has a sufficiently large cross-media presence to diminish the antagonism between print and video media, thereby reducing competition.[22] Moreover, mergers between dominant

[21] According to the FCC, such mergers would increase economic market power, JA0114-15, JA0270-71, create dominant firms that are much larger than their nearest rivals, JA0113-14, JA0272-73, who could distort the market for inputs available to other distributors of content, JA0269-70, JA0271, and diminish the incentive to compete, JA0114, JA0116.

[22] *See* CFA Newspaper Broadcast Comments at 77; Cooper *ex parte*, Docket No 02-277 (filed May 21, 2003); CFA Newspaper Broadcast Reply at 62-64, 76-81; CFA Comments at 227-234.

newspapers and television stations are not likely to increase news production; indeed, the synergies sought are likely to diminish the total resources available for news production.[23]

Sinclair holds specifically that inconsistencies in the methodology or analysis of different rules addressing the same subject matter undermine their rationality for purposes of judicial review under the APA. If the FCC uses different criteria for different rules (as it has here), then *Sinclair* at the very least demands a reasoned explanation for the difference in treatment. *Sinclair*, 284 F.3d at 162. More broadly, *Sinclair* plainly supports a rather unremarkable proposition: that the FCC should indeed fashion a comprehensive analytical framework that treats similar media in similar fashion based on similar considerations. Having set forth on a mission to craft a set of "new, comprehensive" rules for media concentration, FCC Br. at 11, 20, the FCC was therefore obligated at the very least to provide reasoned explanations for the analytical and quantitative differences in the various rules as revised by the Order. It has not done so.

B. The FCC's Decision To Assume Equal Market Shares For Competitive Analysis Purposes Violates *Sinclair* and Is Unsupported By Any Evidence of Record.

Another example of the FCC's inconsistent analysis between and among rules is its treatment of market share. The FCC contends, in connection with both the local TV rule and the cross-ownership rule, that assuming equal market shares for all firms is reasonable because media markets shares are fluid and "can shift

[23] CFA Reply at 22-24; CFA Comments at 221-224, 246-254.

substantially," FCC Br. at 35, thus making "capacity" a better economic metric. *Id.* *See id.* at 53 & n.24 (equal-sized firm assumption for radio rules justified by market share fluidity).[24] This treatment of market share is flatly inconsistent with the FCC's rules precluding mergers among the top four local stations or the top four national TV networks. FCC Br. at 33-34. In retaining the top four restriction and dual network rule, the FCC found that further concentration among larger firms would lead to a host of competitive and public interest dangers, including creation of dominant firms, JA0113-14, JA0272-73, and distorting markets for programming inputs, JA0269-70, JA0271. As in *Sinclair,* an assumption of equal size and market share for some rules cannot be harmonized with the use of size and market share as the basis for other rules in the same Order.

The FCC's market share "fluidity" rationale does not suffice because, if it were correct, such a determination would fatally undermine both of the top-four bans. These prohibitions are based on the conclusion that the "Big Four networks continue to comprise a 'strategic group' within the national television advertising market . . . due largely to those networks' continued ability to attract mass audiences." JA0114. The Commission also found a "general separation between the audience shares of the top four-ranked [local] stations and the audience shares of other stations in the market." JA0113-14; *see also id.* ("continued market

[24] The Networks point out another example of the Commission's unexplained inconsistent analysis. Networks Br. at 57 (FCC "pursued its six-firm target with considerably more rigor in television than it pursued its five firm target in radio. There is no explanation for the different approaches.").

leadership" of networks and "the top local stations in virtually all local markets"). It is precisely this historic evidence of "continued market leadership" in broadcasting, JA0114, that as a factual matter makes the FCC's "fluidity" rationale not just suspect, but contradicted by the Commission's own empirical analysis.[25]

A review of the record demonstrates unequivocally that the FCC's "fluidity" assumption, and with it the equal-sized firm criterion, lack any factual basis. Because entry into television broadcasting is confronted by a unique barrier, the holding of license, as well as other economic barriers, one would not expect to find greater fluidity here. In fact, little or no new entry into television ownership has taken place. Although the number of full power stations has increased, the number of owners has declined sharply.[26] Moreover, the number of stations providing news has declined slightly.[27] The top four firms today in each market account for about 80 percent of the stations providing local news. Even if the top four accounted for 100 percent twenty five years ago (which they did not), this hardly constitutes fluidity.

The Supreme Court has held that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up

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[25] In national and local media markets, historical experience demonstrates that market shares are especially durable. *See, e.g.,* Christopher Noxon, Yesterday, It Was Such an Easy Game to Play, *New York Times* (May 24, 2003) (ABC as "perennial lollygagger"); *see generally* Howard J. Blumenthal, Oliver R. Goodenough, This Business of Television 6-10 (1988) (describing emergence of ABC as a result of FCC-ordered divestiture and 30-year struggle to reach parity with NBC and CBS).

[26] JA2464; CFA Comments at 77.

[27] CFA Comments at 77.

or down with the novelty or plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 391 (2000); *McConnell v. FEC,* slip op. at 34 (Dec. 10, 2003). This same principle applies to judicial review of agency action. Because the FCC's proposition that media market shares are "fluid" is contrary to its findings elsewhere, its "plausibility" is strained and thus the FCC should be required to come forth with more "empirical evidence" to support its conclusions than otherwise necessary. And as the D.C. Circuit held in *Sinclair*, the Commission must consistently justify its rules. *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 162 (D.C. Cir 2002).

Amazingly, however, the FCC has offered ***no empirical support*** for its equal-sized firm assumptions whatsoever. None was relied on in the Order, JA0112 (asserting without record or other citation that because of fluid market shares, "a firm's 'capacity' to deliver programming" is the relevant factor), and the FCC's brief merely parrots the conclusion that media shares are "more fluid and subject to change than in other industries." FCC Br. at 35. The Networks agree. Networks Br. at 55 (equal-sized firm criterion "has no rational foundation"), 61 ("impossible to extract from the Merger Guidelines a concentration-control rule calling for firms that are equally sized.").

The claim of fluidity in the media is even more ludicrous when applied to newspapers. There has been almost no entry into the business of publishing daily newspapers, the mainstay of print journalism, in decades. The record shows, and no one has challenged, that the number of papers and owners has been shrinking, not

expanding.[28] And the record shows that the total number of print pages, including weeklies, has been flat.[29]

The radio rules similarly adopted an irrational and unsupported ownership limit based on the assumption that five equally-sized owners would support adequate competition. The FCC never defends the radio rules from Citizens' attack (that the rules are too high). Instead, it only opposes the Viacom/NAB/ Clear Channel position (that they are too low). That is because the only ground the FCC had for insisting that the rules make sense from a market structure standpoint was its assumption of five equal-sized firms. JA0150 (assumes "market with five or more relatively equal sized firms"). That assumption is demonstrably false, CPI Br. at 59, because, as Citizens pointed out, these academic sources actually contradict the agency's hypothesis that a five-firm market is workably competitive or that its equal size assumption "comports with general economic theory." FCC Br. at 51. The D.C. Circuit in *Sinclair* sharply criticized the Commission for a similar error. 284 F.3d at 163 (chastising the Commission for relying on an academic article that did not stand for the proposition stated).

Stripped of its equal shares assumptions, the FCC's competitive analysis breaks down completely. The effect of the Commission's decision to pretend market shares are equal is to allow mergers to create horribly concentrated media

[28] CFA/CU Newspaper Broadcast Comments, Docket No. 01-235 (filed Dec. 3, 2001) at 79.
[29] *See* Newspaper Broadcast NPRM, JA2463; CFA/CU Newspaper Broadcast Comments at 84.

markets. *See* CPI Br. at 34, 53-54, 59, *see supra* p.21. In short, through the implausible, uncorroborated and empirically incorrect assumption that market shares are equal, the FCC has adopted a regime that presents a best-case scenario which no accepted measure of competition would find tolerable.

C. Each Of the FCC's New Media Concentration Rules Challenged By Citizens Is Based On An Improperly Selective Reading Of the Evidence And Inexplicable Inconsistencies With Other Rules.

1. Cross Media Limits

The FCC's analysis of the record evidence on cross-ownership is laced with inconsistencies and inaccuracies. First, to support its prediction that broadcast-newspaper acquisitions will serve its diversity goals the Commission astonishingly relies, almost exclusively, on the very data it earlier rejected – the Pritchard study – without any explanation for the difference. FCC Br. at 75 (citing JA0181-82). Yet the Commission may not base two opposite conclusions on the same evidence because it "is not free to prescribe what inferences from the evidence it will accept or reject." *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359, 378 (1998).

Next, the Commission argues that the record supports its reliance on the Internet as a contributor to local diversity. FCC Br. at 73. Yet the FCC's argument that the Internet is a meaningful source of information relies, like the Order, on generic statements that simply do not support such a finding. FCC Br. at 74-75 (the Web has "30 million" sites and is an "unrestrained forum"). The Deregulatory Petitioners point to another blanket statement, that "there is a virtual universe of information sources on the Internet," NAA Br. at 45 (*citing* JA0223 (referring solely

to the national news sources *Drudge Report* and *Salon*)), which is for the same reason wholly inadequate.[30] Neither the Order nor the FCC's brief makes any effort to evaluate the quality or quantity of independent local news on the Internet.

Even the *post hoc* evidence cited by FCC counsel to this Court, while irrelevant as a legal matter,[31] is demonstrably incorrect. The FCC relies on several Media General pleadings to argue that there are "scores of ***local*** web sites that could be expected to provide a wide range of ***local*** news and information." FCC Br. at 74 (emphasis original). In those pleadings, Media General evaluated six markets in which it offers service. In those markets, it identified a meager total of ***nine*** independent web sites in the "local news/weather" category out of hundreds of sites that it evaluated. MG Comments, App. 9-14, JA4187-310. One market, Roanoke-Lynchburg, VA, had no independent local news sites at all. MG Comments, Appendix 10, JA4256-59. And of those nine independent local web sites, ***none*** were populated with news gathered by professional journalists, and ***only one*** includes original content that does not duplicate information prepared for other outlets in the first instance.[32]

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[30] *See also* T/MG Br. at 43, stating without any citation that the Internet includes "virtually every local organization, school, government or other outlet for participation in public affairs."

[31] Under the APA, a reviewing court is to affirm or reverse an agency decision on the basis of the evidence and explanation provided by the agency itself, not after-the-fact arguments of counsel. *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-69 (1962).

[32] Two provide gateways to existing local news sources; two are commercial sites only (a vacation planner and a long distance telephone service offering); one links to national but not local wire stories; one is a volunteer-run site discussing local art and music with original content; and one could not be found. The

In any event, even taking the Commission's brief at face value, "scores" of web sites could not hope to serve the thousands of communities in this country, let alone the 210 local television markets nationwide. Nor could the web sites described be an adequate source of information sufficient to replace the loss of an independently owned outlet caused by a merger between the only major daily newspaper and the top-ranked television station in a community. For the Commission to make such a conclusion, some modicum of analysis is needed. Neither the Order nor the FCC's brief supplied any such discussion.

Finally, neither the FCC nor the Deregulatory Petitioners can explain the inconsistency between the Commission's inclusion of the Internet in the Diversity Index and its exclusion of magazines and cable television from the index. The FCC gave "no weight to cable television or magazines as sources of local news, notwithstanding the results in the Neilsen survey to the contrary." JA0194-95.[33] In contrast, the Commission conducted *no* analysis of whether the Nielsen data supported inclusion of the Internet. JA0197-200. The Commission was plainly aware that "many television stations and newspapers also distribute their content

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remaining two sites appear not to be independent, despite Media General's classification: one is operated by the *Kingsport Times-News*, *see* http://www.timesnews.net/homedlivery.dn, and the other is run by the *Loris Scene* newspaper, http://www.zwire.com/site/news.cfm?brd=ll (All sites visited December 15, 2003).

[33] The Commission concluded that magazines should be excluded because "most" news magazines "have a national rather than local focus," and because the figures about magazine use combined local and national news so the portion of local news could not be identified. JA0200. Similarly, the Commission excluded cable because it concluded from the data that citizens who report receiving news over cable might "be counting retransmitted broadcast signals," JA0201-02, not original, independent content.

over the Internet," JA0184, n.834, but its analysis does not even address the relevant question whether the "scores" of web sites on the Internet actually provide independent content which does not duplicate that already available from the TV and newspaper parent operations.[34] Indeed, the Nielsen data showed a significant likelihood, comparable to magazines and cable, that citizens were obtaining information on the Internet from existing sources and that the information was national, not local.[35]

The discrepancy is completely unexplained and cannot be justified based on the record evidence before the Commission. It is certainly possible that some communities may be well-served by local, independently-owned Internet news sites, perhaps even sites that produce original news content. But the Commission did not

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[34] The Commission's entire factual analysis consists of the following footnote: "Major media providers need no convincing, as virtually all of them have rushed to create webpages in an effort to capture a segment of this incipient market. For example, MSNBC, Fox News, CNN, the major broadcast networks and many newspapers all now maintain web sites." JA0184. None of these are independently owned sources of local news.

[35] The data the Commission did rely on are strikingly similar to the cable and magazine data the Commission questioned. The Nielsen survey collected information about which web sites citizens viewed as a source of news, both local and national. Nielsen, MOWG Study #8, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf. Those findings showed that the top four Internet sources comprising MSN.com (22.4%), CNN.com (19.1%), Yahoo.com (17.9%), AOL.com (13.3%) comprising 72.7% of all responses contained no original local news. Not only are MSN, AOL and CNN owned by current media producers, but MSN and Yahoo offer news from existing outlets, while AOL and CNN offer no local news. See http://my.msn.com/change/localnews.armx, (for zip code 12345, offering local news sources from existing television stations); http://news.yahoo.com/news?tmpl=index&cid=815 (for Philadelphia area, for example, offering news from the Philadelphia Daily News and Inquirer); http://aolsvc.news.aol.com/news, http://www.cnn.com/.

identify *any*. The Order cannot rationally conclude that cable and magazines should have no weight for cross-ownership purposes while at the same time, and based on equally if not more compelling data, make the opposite determination for the Internet.

2. The Local TV Rule.

The FCC admits that in relaxing the local TV duopoly rule, it relied on what the Commission found was "persuasive anecdotal evidence" that consolidation would increase local news production. FCC Br. at 31. But neither the Order nor the agency's brief explain why the FCC rejected Citizens' empirical and anecdotal evidence that suggested precisely the opposite. An agency cannot just assert that some evidence is "persuasive" and reject other comparable evidence without some reasoned basis.

Nor has the FCC responded to criticism of the evidence on which it did choose to rely. NAB says there was an "avalanche" of "overwhelming" evidence showing common ownership increased local news. NAB Br. at 55-57. Yet in every case where commenters claimed greater quantity and quality of local news resulted from consolidation, Citizens showed below that the data were not statistically valid and lacked rudimentary scientific controls for other factors such as market size.[36]

[36] In every case where the commenters claimed greater quantity and quality of output, the results are not statistically valid, CFA Reply Comments, Docket 02-277 (filed Feb. 3, 2003) at 25-26, and did not include even the most rudimentary scientific controls for factors such as the level of output of the merged entities before the merger, *id.* at 20-22, market size, *id.* at 26, or the rank of the entities. *id.* at 24. Above all, they do not demonstrate that there is ***more*** news produced in the market, which is the relevant outcome for public policy analysis. *Id.* at 20-21. The final point is of utmost importance because all of the industry studies to which the

Moreover, all of the data were firm-specific, suggesting only that a combination increased new production for one entity. Whether the overall local news and information market expanded or decreased (for instance, as the consequences of the combined entity's larger audience reach and economic power) was neither established or even asked. Indeed, the only specific market case study proffered by industry show a trivial increase in local news from consolidated local TV firms (0.1 hours) offset by a far larger (6.8 hours) loss of independent news generation. CFA Reply Comments, Docket 02-277 (filed Feb. 3, 2003) at 28-29. This is hardly an "avalanche" and certainly not dispositive.

The FCC's claim on brief that the Order "provided a clear and rational explanation" for accepting this ambiguous evidence while rejecting CFA's contrary data, FCC Br. at 72, is simply false. What the cited portions of the Order, JA0176-78, address is the FCC's *ideological and policy beliefs* that "broadcast rules may not and should not discourage" media owners from "us[ing] their media properties to express or advocate a viewpoint." JA0176-77. The Order says absolutely nothing about the grounds, if any, on which the FCC rejected the competing evidence proffered by the anti-deregulatory parties. Characteristically, the FCC now repeats the fundamental error of the Order itself, FCC Br. at 75, namely substituting intuition and ideology for evidence and analysis.

3. The Radio Rule.

Aside from its unresponsive attack on Citizens' procedural claims,[37] the FCC

Commission points asked the wrong research question.

[37] *See supra* note 18.

argues that Citizens did not contest the underlying factual premise behind its decision to include noncommercial stations in radio markets and are, therefore, barred from claiming that it was unreasonable for the Commission to take noncommercial stations into account. FCC Br. at 54. That misconceives the nature of Citizens' argument. Citizens contend that it is arbitrary for the Commission to insist, on the one hand, that it "reaffirmed the ownership tiers established by Congress in the 1996 Act," FCC Br. at 51, while on the other hand, increasing the number of stations that can be commonly owned by counting noncommercial stations in determining the tiers. CPI Br. at 60-61. At bottom, the Commission's action is no different from changing the unit of measure from inches to feet, but leaving the limit at 8.[38] The fallacy of such an approach was recognized in *Sinclair*, where the DC Circuit found that there was a relationship between the unit of measure, in that case a "voice," and the numerical limit. *Sinclair*, 284 F.3d at 162 ("there is a relationship between the definition of voices and the choice of a numerical limit.").

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[38] The "unchanged" limit, for example, will push at least 14 markets into the next higher ownership tier, allowing increased radio consolidation in those markets. *See Broadcasting & Cable Yearbook for 2002-03*. Detroit (from 42 to 61 stations); San Diego (from 42 to 54 stations), Minneapolis (from 41 to 55 stations), Tampa (from 44 to 50 stations), Denver (from 42 to 48 stations), Portland, Ore. (from 43 to 54 stations), Sacramento (from 40 to 45 stations), Indianapolis (from 29 to 40 stations), Raleigh, N.C. (from 39 to 47 stations), Buffalo (from 27 to 32 stations), Albany (from 40 to 54 stations), Knoxville, Tenn. (form 39 to 45 stations), Greenville, N.C. (from 39 to 45 stations), and Des Moines (from 27 to 34 stations). *Id.*

V. THE FCC HAS NOT COUNTERED CITIZENS' CHALLENGES TO ITS 'BRIGHT LINE' RULES, THE UHF DISCOUNT OR ITS MINORITY DIVERSITY POLICY.

A. The Commission's Bright Line Test Violates Section 309.

Citizens opening brief argued that the Commission's "bright line" tests unlawfully preclude public interest challenges to specific media concentration transactions sanctions by the FCC's new rules. CPI Br. at 62-63. The FCC never squarely addresses this point in its brief, but rather dismisses the argument in a three-sentence footnote (without citation to the Order or the rules promulgated therewith). The Commission claims Citizens are wrong because the Order permits "petitions to deny" in "particular cases," FCC Br. at 36 n.14, under 47 U.S.C. § 309(d).[39]

This concession is appreciated, but a promise from the FCC counsel that the Commission did not mean what it said in the Order is not binding. The FCC's brief in any event does not, and cannot, explain how a challenge to a transaction permitted by the new rules could succeed, on any ground. That is because the purpose and effect of the Commission's bright-line rules is precisely to deny opponents the case-by-case review the FCC's brief claims is available.

As the Order explains:

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[39] The public's right to file a petition to deny is firmly rooted in law, and the Commission has been chastised for standing in the way of the public's ability to pursue their rights. *See, e.g, California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1995); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501(D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1961) (*en banc*).

> The bright line rules we establish in this Order will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. *Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry.* Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.

JA0063 (emphasis added). And the Order admits that bright line rules eliminate "a certain amount of flexibility" because only a case-by case analysis "would allow the Commission to reach decisions by taking into account particular circumstances of every case." JA0063-64. The FCC's brief therefore is a *non-sequitur*. A petition to deny must demonstrate that a transaction is not in the public interest, JA0064, n.131. Because the Commission's bright-line rules establish that permitted transactions meet that standard, a petition to deny is by definition meritless under its new regime.

B. Intervenors are Properly Before this Court.

The FCC and the Deregulatory Petitioners argue that certain claims advanced by Intervenors Capitol Broadcasting and MMTC are barred because they were raised only by intervenors and not petitioners. *E.g.,* FCC Br. at 42, 100-01. Citizens did briefly raise both these issues. CPI Br. at 54 (UHF discount inconsistent); CPI Br. at 58 (decision limits ownership opportunities of women and minori-

ties). That is sufficient to preserve them against procedural default.[40] Moreover, it was abundantly clear that Citizens opposed the Commission's conclusions with respect to the UHF discount, a principal argument in Petitions for Review and Motions for Stay, as well as a subject addressed during oral argument September 3, 2003. Citizens did not brief these claims in detail because all parties were under an explicit order of this Court not to duplicate the arguments of others, and were facing very strict word limits. Citizens fully support and adopt the analysis and arguments of Capitol and MMTC both in their opening briefs and on reply.

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[40] Moreover, a court may entertain arguments raised only by an intervenor on review if they have been "fully litigated in the agency proceedings and potentially determinative of the outcome of judicial review." *Synovus Fin. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C.Cir.1991).

CONCLUSION

For all these reasons, the Commission's Order should be reversed and its new media concentration rules vacated.

Respectfully submitted,

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December 22, 2003

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 13,606 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel Word Perfect 9.0 in 14-point Times New Roman type.

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