No. 04-1168

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

*v.*

PROMETHEUS RADIO PROJECT, ET AL.

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

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission's modifications to its regulations regarding local television, local radio, and cross-media ownership were not supported by a reasoned analysis.

## PARTIES TO THE PROCEEDING

Respondents who were petitioners in the court of appeals below are: Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, CBS Television Network Affiliates Association, the NBC Television Affiliates, ABC Television Network Affiliates, the Network Affiliated Stations Alliance, Fox Entertainment Group, Fox Television Stations, Inc., Viacom, Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches in Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy, Fairness and Accuracy in Reporting, Clear Channel Communications, Minority Media & Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

Respondents who were intervenors in the court of appeals below are: Newspaper Association of America, Gannett Company, Inc., Belo Corporation, Morris Communications Company, LLC, Nassau Broadcasting Holdings, Inc., Nassau Broadcasting II, LLC, Family Stations, Inc., Sunbelt Communications Company, Press Communications, LLC, Diversified Communications, Simmons Media Group, Millcreek Broadcasting, LLC, Consumer Federation of America, Con-

sumers Union, Univision Communications, and Capitol Broadcasting Company.

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## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States and the Federal Communications Commission, respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Court should deny the petitions for a writ of certiorari in Nos. 04-1020, 04-1033, 04-1036, and 04-1045. If, however, the Court were to grant one or more of those petitions, it should also grant this cross-petition. If the Court denies those petitions, it also should deny this cross-petition.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

## JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005. On December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005, and the petitions were filed on January 28 and January 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, are set out in an appendix to this cross-petition. App., *infra*, 1a-4a.

## STATEMENT

This case arises from the Federal Communications Commission's congressionally mandated reexamination of its longstanding regulations governing the ownership of radio and television broadcast stations that operate pursuant to federal licenses. A divided panel of the court of appeals concluded that the Commission had failed to provide a reasoned analysis in support of the precise ownership limitations adopted in the recent revision. The court accordingly

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

remanded those regulations to the Commission for further justification. Pet. App. 12a.

The petitions in Nos. 04-1020, 04-1036, and 04-1045 challenge the settled rule that the FCC's broadcast ownership limitations are subject only to rational-basis review under the Constitution. The petitions in Nos. 04-1033, 04-1036, and 04-1045 challenge the Third Circuit's conclusion that, as a statutory matter, FCC decisions to maintain or establish such limitations do not require a special, higher justification than would be applicable to FCC decisions to relax or eliminate such limitations.

This cross-petition does not concern the legal standards—constitutional or statutory—governing review of the FCC's broadcast ownership rules. Instead, it challenges the court of appeals' conclusion that, under ordinary standards governing judicial review of administrative action, the Commission failed adequately to justify some elements of its new rules. The government believes that the most appropriate course in this case would be to permit proceedings on remand before the Commission to go forward, so that the agency could address the Third Circuit's concerns about the adequacy of its justifications and adopt a concrete set of rules that would be suitable for judicial review. In the event that the Court disagrees with that conclusion, however, the Court should not grant review to consider the abstract arguments of petitioners regarding the appropriate standard for review of broadcast ownership rules, without also granting this cross-petition so that the Court would have before it and could consider in a concrete fashion the validity of the rules that the Commission actually adopted.

1. The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, comprehensively addresses the transmission and use of radio signals in the United States. The Act prohibits radio transmissions that are not authorized under a license from the Commission, 47 U.S.C. 301, and requires that any assign-

ment or transfer of such a license receive the Commission's prior approval, 47 U.S.C. 310(d). The Act also specifies that Commission licenses to engage in radio communications are valid "for limited periods of time," 47 U.S.C. 301, after which they expire unless renewed, 47 U.S.C. 307(c); see 47 U.S.C. 309(k) (renewal standard for broadcast licenses).

Before it may grant, renew, or approve the assignment or transfer of a radio license, the Commission must conclude that such action would serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). With respect to licenses authorizing radio and television broadcasting services, the Commission has long favored diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*). At the same time, however, the Commission has recognized that its broadcast licensing policies should promote the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." *Id.* at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). As this Court has recognized, the Act does not require the Commission to give either policy "controlling weight in all circumstances." Rather, the Act leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810; see *NBC* v. *FCC*, 319 U.S. 190, 224 (1943) ("It is not for [the courts] to say that the 'public interest' will be furthered or retarded" by the Commission's regulations.).

2. To facilitate its own implementation of the Act with respect to individual license applications, and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance,

assignment, or transfer of radio and television station licenses would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have established limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast licenses and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding nationwide prohibition on cross-ownership of daily newspapers and broadcast stations). Under the regulations, the Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that a waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co*, 351 U.S. at 205; *NBC*, 319 U.S. at 225.

In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to the broadcast ownership rules that were in effect at that time. For instance, the 1996 Act directed the Commission to eliminate its national limit on radio station ownership and to establish less restrictive radio ownership limits for local markets. 1996 Act § 202(a) and (b), 110 Stat. 110. Likewise, with regard to broadcast television stations, the 1996 Act required the Commission to ease its national ownership limit and to conduct a rulemaking to reexamine its limits on ownership of multiple television stations in local markets. 1996 Act § 202(c)(1) and (2), 110 Stat. 111.

In addition to those specific directives, the 1996 Act imposed a general duty on the Commission to conduct a periodic review of the media marketplace and tailor its broadcast ownership rules in accordance with its findings. Section 202(h) of the 1996 Act provided that the "Commission shall review its rules * * * biennially" to determine "whether

any of such rules are necessary in the public interest as the result of competition." 110 Stat. 111-112. Section 202(h) also requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 112.

3. In September 2002, the Commission initiated its third biennial proceeding to review its broadcast ownership rules under Section 202(h). *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002) (*2002 Biennial Review*). The 2002 biennial review incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing radio station ownership in local markets and common ownership of daily newspapers and broadcast stations in local markets. That consolidated proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a single local market.

*Cross-Media Rule.* As modified by the Commission, the cross-media rule prohibited combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations would be permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, which, the Commission found, "tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners," the Commission

declined to impose any cross-media limit. Pet. App. 534a (Order ¶ 473).

In establishing its cross-media limits, the Commission utilized a "Diversity Index"—a tool based loosely on the Herfindahl-Hirshmann Index (HHI) used in antitrust analysis—to "inform [its] judgments about the need for ownership limits" and "where [the agency] should draw lines between diverse and concentrated markets." Pet. App. 480a (Order ¶ 391). The Commission did not adopt the Diversity Index as an ownership rule; rather, it used the Index "for analyzing and measuring the availability of outlets that contributed to viewpoint diversity in local media markets." *Ibid.* The Commission emphasized that the Diversity Index was not designed to "measure diversity in specific markets," but to "capture generalized, typical market structures" that the Commission could consider in formulating nationally applicable cross-media limits. *Id.* at 480a-481a (Order ¶ 392).

*Local Television Ownership Rule.* Like the cross-media rule, the Commission's revised local television ownership rule established ownership restrictions that were tied to the number of television stations in the local market. Under the rule, a party could own two commercial television stations in individual markets with 17 or fewer television stations, and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The rule, moreover, prohibited combinations involving the four highest-rated television stations in the market. Pet. App. 331a (Order ¶ 186); 04-1036 Pet. App. 661a. This "top four" restriction thus would preclude common ownership of multiple television stations in markets with four stations or fewer.

*Local Radio Ownership Rule.* Finally, the Commission retained its numerical limits on local radio station ownership, which Congress had directed the Commission to establish in the 1996 Act. Much like the local television rule, the local

radio rule provided that the number of commercial radio stations a single party may own in a local market would depend on the number of radio stations located in the market. Although it did not change the numerical caps themselves, the Commission did change its application of those limits in two ways: It revised the method of determining the scope of the radio market to which the rule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274), and it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295); see also 04-1036 Pet. App. 659a-660a.[2]

4. Several petitions for review were filed in various circuits within the ten-day filing window established for the triggering of a judicial lottery. See 28 U.S.C. 2112(a)(3). The Third Circuit was selected by lottery to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

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[2] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the biennial review process (which the statute changed to a quadrennial review). Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99; see Pet. App. 36a-38a.

5. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's structural limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[3] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (explaining that regulation of use of broadcast spectrum is necessary because "many more people would like access to [broadcast spectrum] than can be accommodated").

Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. Pet. App. 45a-46a. The court added that the development of more media outlets since *NCCB* was not a basis for reaching a different result in this case. *Ibid.* The court likewise rejected petitioners' argument that the agency's statutory authority to adopt ownership limits was limited by Section 202(h) of the 1996 Act. *Id.* at 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibil-

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[3] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

ity of increased regulation under the biennial review if the Commission finds such action in the public interest.").

a. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should all be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership rules the Commission chose. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

*Cross-Media Rule.* The court of appeals concluded that the Commission's cross-media rule was not supported by a "reasoned analysis." Pet. App. 48a. The majority focused its criticism on the Commission's use of the Diversity Index to guide its judgment in setting ownership limits for local media markets of various sizes. In particular, the majority rejected the Commission's decision to evaluate diversity under the Diversity Index by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. In the majority's view, the equal share assignment "makes unrealistic assumptions about media outlets' relative contributions to viewpoint diversity in local markets." *Ibid.* The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet." *Id.* at 49a. Finally, the court stated that the Commission's cross-media rule did not rationally reflect the Diversity Index analysis because the rule "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed." *Id.* at 63a.

*Local Television Ownership Rule*. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-77a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction (see p. 7, *supra*), it treated each television station in the market as having equal significance. *Id.* at 76a. In line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed an HHI of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (*DOJ/FTC Merger Guidelines*) (designating markets with an HHI above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

*Local Radio Ownership Rule*. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to include noncommercial stations in local markets for purposes of applying the ownership rules, *id.* at 90a-91a. The court accepted that the Commission's use of numerical limits to prevent undue concentration of radio stations by a single party was "rational and in the public interest." *Id.* at 101a-102a.

The majority concluded, however, that the Commission's decision to retain the existing numerical limits—which the Commission had established at Congress's specific direction

in the 1996 Act—was not supported by "reasoned analysis." Pet. App. 102a. As with the other local ownership rules, the majority rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of a number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

b. Chief Judge Scirica dissented. In a comprehensive opinion, the Chief Judge emphasized that the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 107a-108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained in detail why he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Id.* at 108a.

6. In issuing its decision, the court of appeals extended the stay of the Commission's new broadcast ownership rules that it had issued before briefing and argument, "pending [its] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, as part of its action on the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revisions to its local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed by the court of appeals.

## ARGUMENT

In Nos. 04-1020, 04-1033, 04-1036, and 04-1045, various industry parties make constitutional and statutory arguments that the Commission's broadcast ownership limitations must be subject to extraordinarily rigorous judicial scrutiny. As the government will explain in greater detail in its brief in opposition, the Court should deny those petitions. If, however, the Court were to grant the industry petitions, it should also grant this conditional cross-petition to review the court of appeals' conclusion that, under ordinary standards of judicial review of administrative action, the Commission failed to provide a reasoned analysis supporting the particular cross-media and local television and radio rules that it adopted. Otherwise, the Court's consideration of the industry petitioners' claims would require the Court to determine abstract constitutional (and statutory) questions without having before it any set of otherwise valid, concrete rules to which the desired higher standards of review could be applied.

### A. The Petitions For Certiorari Do Not Warrant Review

1. Petitioners argue that the First and Fifth Amendments and Section 202(h) of the 1996 Act mandate heightened judicial scrutiny of the Commission's decision to continue to restrict broadcast station ownership.[4] The Third Circuit, however, correctly recognized the settled law that

[4] Two of the petitions also discuss issues that are less directly related to the Commission's rationale for the ownership rules it adopted. In No. 04-1033, petitioner NAB argues (Pet. 19-25) that Section 202 of the 1996 Act, 110 Stat. 110, eliminated the Commission's authority to adopt revisions that have the effect of making its ownership rules more restrictive. In No. 04-1036, petitioner Tribune argues (Pet. 25-26) that the Third Circuit erred in maintaining the stay of the FCC's revised ownership rules pending the Commission's remand proceedings; the questions presented in No. 04-1036, however, do not expressly raise that issue, see *id.* at i.

the Commission's broadcast ownership regulations must be affirmed if they are "a reasonable means of promoting the public interest." Pet. App. 48a (citing *NCCB*, 436 U.S. at 796); see *id.* at 36a (stating that the Commission's rule revisions will be upheld if they are "in the public interest" and supported by "a reasoned analysis").

Petitioners' argument that the First Amendment compels heightened judicial scrutiny does not warrant review by this Court. The Court has spoken directly to that precise issue, making clear that as long as the Commission's licensing policies are designed to promote the public interest and are otherwise valid under the Communications Act, a decision to deny a license "is not a denial of free speech." *NBC*, 319 U.S. at 227. Petitioners do not suggest that there is any confusion in the lower courts about that rule. To the contrary, the D.C. and Third Circuits have both recently recognized and applied it. See, *e.g.*, Pet. App. 46a-48a; *Sinclair Broad. Group, Inc.* v. *FCC*, 284 F.3d 148, 167-169 (D.C. Cir. 2002). In any event, a licensing case such as this one does not present the question of the continuing validity of the "scarcity rationale" of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), as applied to the regulation of the *content* of broadcast speech. Regardless of whether the reasoning of *Red Lion* remains appropriate in analyzing a regulation of the content of broadcast speech, such as the Commission's former "fairness doctrine,"[5] the Commission's ownership regulations have consistently been regarded as content-neutral applications of the Commission's licensing authority.[6] The

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[5] The Commission repealed the fairness doctrine in 1987. See *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

[6] See *NBC*, 319 U.S. at 226; *NCCB*, 436 U.S. at 775; see also *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (stating that ownership regulations are not "content-based regulation" of speech); *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d

courts of appeals have not reached divergent views on the level of scrutiny that should apply in this context, and this Court's precedents do not suggest a need for revisiting that settled question.

Nor is further review warranted with respect to petitioners' argument that the cross-media rule unconstitutionally singles out newspaper owners, in violation of due process and equal protection principles, without limiting owners of cable television systems, Internet websites, or other information-delivery technologies. See 04-1020 Pet. 23-25; 04-1036 Pet. 19-24. Petitioners overlook that "the fact that a law singles out a certain medium" for different treatment by itself does not establish a constitutional concern. *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 660 (1994) (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Rather, such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 662 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)). Here, the Commission found that "broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information." Pet. App. 520a (Order ¶ 452). It was appropriate, therefore, for the Commission to focus its rule on those "most widely utilized media sources," while avoiding unnecessary regulation of other industries. See *NCCB*, 436 U.S. at 815 (upholding reasonableness of

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501, 506 n.2 (D.C. Cir. 1986) (observing that, while *NBC* upheld the government's authority to adopt licensing policies, *Red Lion* was the first instance in which the Court addressed "whether the scarcity doctrine could justify regulation of the content of broadcasts"); cf. *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 643 (1994) ("laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral").

Commission's decision to require divestiture of newspaper-broadcast combinations in small markets).

Finally, petitioners' statutory argument (04-1033 Pet. 29; 04-1036 Pet. 24-25; 04-1045 Pet. 19-22) that Section 202(h) of the 1996 Act compels heightened scrutiny of the Commission's ownership regulations does not warrant this Court's review. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20), the Third Circuit's interpretation of Section 202(h) does not conflict with the D.C. Circuit's decisions in *Fox Televsion Stations, Inc.* v. *FCC*, 280 F.3d 1027 (2002), and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision.[7] See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* The Third Circuit articulated the same standard in this case. See Pet. App. 34a-36a (stating that the Commission's decision to

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[7] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, and not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open the question of the standard that the Commission must meet under section 202(h). *Fox Television Stations, Inc.* v. *FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002). In *Cellco Partnership* v. *FCC*, 357 F.3d 88, 98 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require only that it "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." The court of appeals in this case applied *Cellco*'s interpretation of Section 11 to Section 202(h). Pet. App. 28a-33a.

retain, modify, or repeal an ownership rule must be supported by a "reasoned analysis" and that a rule must be "vacated or modified" if the Commission concludes that it is no longer "useful").[8]

2. Even if petitioners had raised issues that might warrant this Court's consideration in a different context, this case is in an interlocutory posture and does not provide an appropriate vehicle for doing so. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally R. Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002).

The Third Circuit did not *uphold* the new broadcast ownership rules that petitioners challenged; the court instead *rejected* aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the agency on remand. Thus, in the current posture of this case, there is an unreversed

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[8] In 04-1045, petitioners argue (Pet. 23-25) that the court of appeals' application of traditional principles of deferential review should have led the court to affirm the Commission's decision in this case. Although the government agrees with that conclusion for the reasons stated below, that claim of error consists of the "misapplication of a properly stated rule of law," and therefore does not, by itself, warrant exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10. As explained herein, however, if the Court decides to grant the petition in No. 04-1045, or any of the other petitions, it should consider the questions raised in this conditional cross-petition together with its consideration of the questions presented in such petitions. Indeed, grant of this conditional cross-petition would be particularly warranted if the Court were to grant the petition in No. 04-1045 because, while the legal errors addressed in that petition and the instant cross-petition are fundamentally the same, petitioners in No. 04-1045 are concerned only with the cross-media rule that affects newspaper interests, whereas the instant cross-petition covers the local television and radio rules as well.

determination that, regardless of any higher level of constitutional scrutiny that may be applicable, the Commission failed to justify adequately its new rules under ordinary standards applicable to judicial review of administrative action. That determination is sufficient to preclude application of the new rules, pending the Commission's remand proceedings. As to the old broadcast ownership rules, although they are now back in force due to the Third Circuit's stay of the Commission's new rules, they are not being challenged in this ongoing proceeding, and, in any event, they are likely to be changed as the result of the remand proceedings. Petitioners' constitutional challenges are therefore in effect directed to whatever future rules the Commission may choose to issue in its remand proceeding—not to any concrete rules that exist today.

This Court has long emphasized the undesirability of deciding pure questions of constitutional law, removed from a specific application of the constitutional rule to a particular government action. General prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[9] The Court's reluctance to entertain pure issues of constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the

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[9] See, e.*g.*, *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1947).

legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387 (1941).

Because the old ownership rules are not at issue in this case and the court of appeals' conclusion precludes enforcement of the new ones in any event, granting further review of the constitutional questions in this case would in effect present the Court with the need to resolve abstract constitutional questions outside a specific factual and regulatory setting. Rather than entertaining such a speculative challenge to possible future agency action, the Court should deny review in this case and allow the Commission to decide, on remand, what broadcast ownership rules are appropriate and why they are justified.

### B. If One Or More Of The Petitions Are Nonetheless Granted, The Cross-Petition Should Also Be Granted So That The Court Is Not Compelled To Address Petitioners' Claims In The Abstract

If the Court nonetheless were to grant review in this case, the Court should grant review of this cross-petition as well, thereby bringing before the Court the validity of the Commission's new rules. The Court would thus have an opportunity to consider petitioners' arguments for more stringent review of broadcast ownership rules in the concrete context of the particular rules (and rationales) adopted by the Commission. That approach would allow the Court to consider the antecedent issue of the validity of those rules under the ordinary procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. 706(2), before being

required to consider a new constitutional standard.[10] This Court has consistently followed the practice of considering statutory issues before constitutional challenges in adjudicating the validity of the Commission's ownership rules in the past. See *NCCB*, 436 U.S. at 793 ("We turn first to the statutory, and then to the constitutional, issues."); *NBC*, 319 U.S. at 226 ("We come, finally, to an appeal to the First Amendment."). If the Court determines that further review is warranted at all in this case, it should follow the same course here.

Although the question whether the Commission adequately supported its revisions to its broadcast ownership rules is complex and specific to the facts of this case, granting further review on the questions presented in any of the petitions would likely require detailed consideration of much of the Commission's reasoning in the decision under review in any event. Petitioners themselves invoke the Commission's findings and conclusions to support their various constitutional and statutory arguments, see, *e.g.*, 04-1020 Pet. 18; 04-1033 Pet. 26-27; 04-1036 Pet. 16-18, and the government's merits brief likewise would necessarily involve reference to the Commission's analysis in the order under review. Given the detailed examination of the Commission's order that would be required to address petitioners' various constitutional and statutory arguments, there are no practical reasons to refuse to consider, as well, the related (and logically prior) question of whether the challenged regulations are supported by a reasoned analysis.

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[10] Those same considerations apply *a fortiori* to petitioners' arguments that Section 202(h) requires heightened scrutiny of the Commission's broadcast ownership regulations. The Court should not consider whether the challenged rules survive any heightened scrutiny that would be applicable under Section 202(h) while leaving unreviewed the court of appeals' conclusion that the rules failed to survive the more deferential review normally applicable under the APA.

### C. The Court Of Appeals Erred In Concluding That The Specific Radio- And Television-Licensing Rules The Commission Adopted Were Inadequately Supported

The Communications Act vests in the Commission the exclusive authority to define and promote "the public interest, convenience, and necessity" in the broadcast field, see, *e.g.*, 47 U.S.C. 309(a), 310(d), and "[i]t is not for [reviewing courts] to say that the 'public interest' will be furthered or retarded" by the specific means that the Commission has chosen to carry out its statutory duties. *NBC*, 319 U.S. at 224. Rather, judicial review of the Commission's exercise of delegated authority must accord with traditional administrative law principles, which preclude a court from "substitut[ing] its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In reviewing the Commission's decision, the court of appeals was required to defer to the agency's rational policy choices and uphold the modified rules so long as they were "based on consideration of permissible factors and * * * otherwise reasonable." *NCCB*, 436 U.S. at 793. In crucial respects, however, the court erred in disregarding its obligation to uphold the Commission's reasoned decisions.

1. *Equal weighting.* The Commission's broadcast ownership rules are grounded in the longstanding policy of licensing broadcast radio and television stations in a manner that promotes rather than undermines media diversity and competition, and encourages broadcast television and radio stations to be "responsive to the needs and interests of their local communities." Pet. App. 219a, 248a (Order ¶¶ 17, 74). In the order under review, the Commission decided (with limited exceptions) to craft its broadcast ownership rules so that broadcast outlets of the same type are treated equally for purposes of applying the rules, rather than differently in accordance with their share of the audience or operations at

a particular moment in time. See, *e.g.*, Pet. App. 356a-357a, 412a-413a, 501a-503a (Order ¶¶ 219, 300, 423-425).

The Commission explained that its choice to give equal weight to each broadcast outlet of a particular type was supported by several rationales.[11] As the Commission observed, "current market shares (*e.g.*, of viewing or listening) may not be good predictors of future behavior," because broadcast outlets can rapidly "change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the 'viewpoint diversity' marketplace." Pet. App. 501a-502a (Order ¶ 423). The Commission further explained that applying a market-share test sensibly to particular transactions in the broadcast industry would require difficult and contentious case-specific analyses which, among other things, could require first determining which programs are properly classified as offering news and public affairs and then determining their share of the audience. Such an approach could present its own "legal/ constitutional and data collection" problems, foster uncertainty about the Commission's ultimate decision, and raise transaction costs. *Id.* at 502a-503a (Order ¶ 424); see *id.* at 251a-255a (Order ¶¶ 80-85). The Commission noted that attempting to mitigate those concerns by imposing a bright-line ownership cap based on market shares might cause equal harm if it "discourag[ed] * * * firms from earning market share through

[11] The Commission did not apply its approach indiscriminately. For instance, the Commission concluded that structural conditions in the television market (*i.e.*, the longstanding presence of four dominant television networks) warranted a prohibition on consolidating the top-four-ranked television stations in local markets (Pet. App. 337a-343a (Order ¶¶ 195-200)) and the top-four television networks, *id.* at 628a-629a (Order ¶¶ 621). The Commission particularly noted that new television networks face significant obstacles to competing with the top-four television networks, and those obstacles protect the dominant position of the top-four television stations in local markets. *Id.* at 338a-339a, 619a-622a (Order ¶¶ 196, 607-610).

investment in quality programming," *id.* at 413a (Order ¶ 300), or it could ultimately lead to excessive concentration by permitting consolidation of "a large number of stations with low audience share," *id.* at 357a (Order ¶ 219). Finally, an "equal share" approach reflects the "[u]ltimate[] * * * goal" of "ensur[ing] that a wide range of viewpoints have an *opportunity* to reach the public," rather than ensuring that the public will choose to tune in to any particular viewpoint in large numbers. *Id.* at 503a (Order ¶ 425) (emphasis added).[12]

Although the court of appeals paid lip service to the principle of deferential review of agency policy choices, see Pet. App. 24a-26a, 36a, the court in fact departed from that standard most clearly in its rejection of the Commission's determination to give equal weight to outlets within the same medium. The court below remanded the three local ownership rules because, in the majority's view, they each suffer from "the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets." *Id.* at 107a. The Commission, however, made a reasoned policy decision that focusing on the potential impact of like outlets, rather than their individual market shares at a particular moment in time, would better promote the agency's public interest goals of ensuring the *availability* of diverse viewpoints, fostering certainty, encouraging investment in

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[12] It is well established that the Commission's regulation of broadcast license ownership confers no antitrust immunity. See *United States* v. *Radio Corp. of Am.*, 358 U.S. 334, 346 (1959); see also 1996 Act § 601(b), 110 Stat. 143 (the 1996 Act does not "modify, impair, or supersede the applicability of any of the antitrust laws"); Pet. App. 348a, 439a-440a (Order ¶¶ 208, 339). The Department of Justice reviews broadcast mergers under the antitrust laws. The standards of the antitrust laws are distinct from those of the Communications Act, and their application may lead to different conclusions.

quality programming to increase market share, and avoiding the long-term risks of permitting consolidation of a large number of stations that begin with low market share. The panel majority below failed to evaluate, much less give deference to, those rationales. See, *e.g.*, Pet. App. 79a (stating that "no reasonable explanation underlies [the Commission's] decision to disregard actual market share" in local television rule); *id.* at 105a (stating that the Commission did not explain "why it could not take actual market share into account when deriving the numerical limits").

The panel majority did take issue with the Commission's judgment that current market shares are poor indicators of future market conditions. The Commission reasoned that, given the relatively low marginal cost of altering their programming, media outlets can quickly appeal to new markets and provide opportunity for expression of different viewpoints. In the majority's view, that rationale was insufficient because the Commission did "not provide any evidence that media outlets "*actually undergo* * * * radical content change" on a regular basis. See, *e.g.*, Pet. App. 60a. When an agency's decision is "primarily of a judgmental or predictive nature," however, "complete factual support in the record * * * 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.'" *NCCB*, 436 U.S. at 813-814. The Commission's judgment that its licensees will be able to change their operations in response to changes in market or regulatory conditions should have been upheld as a reasonable exercise of the agency's expert predictive judgment.

2. *The Internet's contributions to diversity.* The Commission rejected arguments that it should discount the Internet's contribution to local diversity based on statistics about historical usage of that emerging communications

medium. Explaining that the "availability of media, not the popularity of specific * * * websites" at any particular moment, is the critical focus of the agency's analysis, the Commission determined that the "virtual universe of information sources on the Internet" should be included as part of the "diversity mix." Pet. App. 505a (Order ¶ 427). Thus, the Commission concluded that its rules should focus on the post-combination competitive *potential* of proposed media combinations, rather than their pre-combination market shares.

The panel majority exceeded its proper role in rejecting the Commission's analysis of the Internet's contribution to diversity in local media markets. According to the majority, the Commission gave the Internet "too much weight" in the Diversity Index. Pet. App. 49a. Although the weight that the Commission assigned to the Internet was based on evidence of consumers' reliance on Internet-delivered news and current affairs information, see *id.* at 486a-487a (Order ¶ 402), the court of appeals concluded that the Commission should have found that evidence unreliable because the consumer survey "did not identify which websites respondents used as sources of local news." *Id.* at 54a.

There is no objective basis for the panel majority's rejection of the weight that the Commission assigned to the Internet. Rather, much like its rejection of the Commission's equal-weighting approach, the majority disregarded the Commission's expert judgment that the relative significance of the Internet as a communications medium should be determined primarily by the capability of that medium to make a "virtual universe of information" available to consumers, and not by the "popularity of specific * * * websites" at a particular moment in time.[13] Pet. App. 505a

[13] The panel majority analogized its analysis of the Internet to the Commission's decision in the order under review to attach lesser weight to

(Order ¶ 427). As Chief Judge Scirica observed, because "the Internet is unconstrained and provides a forum for a limitless number of voices and viewpoints," the "FCC acted reasonably in counting the Internet as a significant addition to the [traditional] media marketplace." *Id.* at 167a-168a.

The panel majority opined that much of the information on the Internet has an "entirely different character" from traditional media outlets and "thus contribute[s] to viewpoint diversity in an entirely different way." Pet. App. 56a. In reaching that conclusion, the two judges in the majority acted based upon their own view that "the media provides (to different degrees, depending on the outlet) accuracy and depth in local news," whereas other Internet users—including "political candidates" and "local governments"—are not "media outlets for viewpoint-diversity purposes" because they merely "use the Internet to disseminate information and opinion about matters of local concern." *Id.* at 56a-57a. Different media no doubt have different characteristics and contribute to diversity in different ways. But the Commission acted reasonably in concluding that the wide array of information and opinion on the Internet should be taken into

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cable television because of doubts about the contribution of cable systems to local news and public affairs programming. Pet. App. 52a-53a. The analogy is inapt. All programming available over a cable television system is generally either under the control of the cable operator or consists of the mere retransmission of over-the-air broadcast television channels. The question for the Commission was whether there was reliable record evidence on the degree to which cable operators contribute to local diversity. The Commission concluded that there was insufficient evidence to make that determination. *Id.* at 493a-495a (Order ¶¶ 412-414). In contrast, Internet web sites generally are not under the control of a single entity. With respect to the Internet, therefore, the pertinent question was whether the Internet medium is capable of contributing to diversity in local markets. Because diverse providers of information have *access* to the Internet, it is not sufficient, as the panel majority suggests, to determine the percentage of websites on the Internet that presently are sources of local news and public affairs information.

account in determining the viewpoint diversity available in a given community. The panel majority's conclusion to the contrary amounted to a policy judgment about the types of diversity that should be fostered; that, however, is a policy "choice properly within the purview of the Agency." Pet. App. 165a-166a (Scirica, C.J., dissenting).

3. *Line-drawing.* Finally, although the panel majority said that "[d]eference to the Commission's judgment is highest when assessing the rationality of the agency's line-drawing endeavors," Pet. App. 62a, the court rejected several of the Commission's line-drawing determinations without evaluating the substance of the Commission's reasoning. For instance, the court stated that the cross-media rules inconsistently permitted combinations that the Diversity Index analysis had suggested were more harmful than other types of cross-media combinations that were prohibited. The Commission explained, however, that it did not develop the Diversity Index "with the idea of slavishly following the numbers, * * * but [only] to confirm and support [its] judgments * * * regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market." *Id.* at 533a (Order ¶ 471).

Likewise, rather than deferring to the Commission's decision to retain the limits on local radio ownership that the Telecommunications Act instructed the Commission to adopt, the majority stated that the Commission's decision was not "justified by a reasonable explanation" because of a modest perceived inconsistency with the *DOJ/FTC Merger Guidelines*. Pet. App. 103a & n.77.[14] All line drawing is to

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[14] The majority indicated that the perceived conflict with the *DOJ/FTC Merger Guidelines* was relevant because the Commission had analogized to the benchmarks in the *DOJ/FTC Merger Guidelines* in developing the

some extent arbitrary, and it is not likely that the Commission could ever identify an absolute line dividing permissible from impermissible combinations without the possibility of drawing the line in a slightly more permissive or more restrictive manner. *Barnhart* v. *Thomas*, 540 U.S. 20, 29 (2003) ("To generalize is to be imprecise. Virtually every legal (or other) rule has imperfect applications in particular circumstances."). So long as a court may assure itself that the Commission's rules generally track its rationale with reasonable clarity—as the Commission's rules do here—the court's role is at an end. The Commission's broadcast ownership rules should have been affirmed.

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limits in the local television ownership rule. See Pet. App. 103a. The Commission explained in the television context, however, that it had no intention of deriving its media ownership rules from "a strict * * * application" of the *DOJ/FTC Merger Guidelines*. *Id.* at 336a (Order ¶ 193); see *id.* at 503a (Order ¶ 425). Indeed, given that the panel majority elsewhere recognized that "[n]o reason exists * * * for the Commission's local television ownership limits to mirror precisely its local radio ownership limits," the majority's decision to require the Commission to explain its local radio limits with reference to the *DOJ/FTC Merger Guidelines* is particularly unwarranted. *Id.* at 77a n.52.

## CONCLUSION

If the Court grants one or more of the petitions for a writ of certiorari in Nos. 04-1020, 04-1033, 04-1036 and 04-1045, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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## APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 110, provides, in relevant part:

**BROADCAST OWNERSHIP**.

* * * * *

(b) LOCAL RADIO DIVERSITY.—

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

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

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

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

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

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person

or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

* * * * *

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

2. Section 301 of Title 47 of the United States Code provides:

**License for radio communication or transmission of energy**

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or

(c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

3. Section 309(a) of Title 47 of the United States Code provides:

**Application for license**

**(a) Considerations in granting application**

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

4. Section 310(d) of Title 47 of the United States Code provides:

**License ownership restrictions**

* * * * *

**(d) Assignment and transfer of construction permit or station license**

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.