No. 11-698

# In the Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,
PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Communications Commission's local television ownership rule, which implements a longstanding policy of limiting the number of television station licenses in a local market a single entity may own or control.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-84a[1]) is reported at 652 F.3d 431. The report and order of the Federal Communications Commission (Pet. App. 85a-375a) is reported at 23 F.C.C.R. 2010.

## JURISDICTION

The judgment of the court of appeals was entered on July 7, 2011. A petition for rehearing was denied on September 6, 2011 (Pet. App. 376a-378a). The petition for a writ of certiorari was filed on December 5, 2011.

[1] All "Pet. App." citations are to the appendix to the petition for a writ of certiorari in *Tribune Co.* v. *Federal Communications Commission*, No. 11-696.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq*., establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. In order to "maintain the control of the United States over all the channels of radio transmission," the Act requires all persons seeking to use the electromagnetic spectrum, including those wishing to engage in radio or television broadcasting, to obtain a limited-term license from the Federal Communications Commission (FCC or Commission). 47 U.S.C. 301. The Act prohibits the assignment or transfer of any such license without the Commission's prior approval. 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a license, the Commission must determine 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). In making that determination, "the Commission has long acted on the theory that diversification of mass media ownership serves 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). In order to promote viewpoint diversity and reduce economic concentration, the Commission regulates, *inter alia*, the number of broadcast station licenses one entity may own or control in a given local market.

The Commission initially effectuated its policies favoring viewpoint diversity and economic competition in local markets by adopting a presumption against the grant of a second radio license to an existing licensee in the same community. See *Genesee Radio Corp.*, 5 F.C.C. 183 (1938). In 1964, the Commission extended that approach to television licenses. As originally promulgated, the local ownership rule prohibited "duopolies"—the common ownership or control of television stations with overlapping "grade B" signal contours.[2] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476 (1964).

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, directed the Commission to make a number of specific changes to its broadcast ownership rules. See § 202(a)-(f), 110 Stat. 110-111. With respect to the local television ownership rule, Congress directed the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market." § 202(c)(2), 110 Stat. 111. Congress also required the Commission to review its ownership rules periodically and to "repeal or modify any regulation [the

[2] "The Grade B contour of a television station is the imaginary line within which a good picture may be expected 90% of the time at the best 50% of the locations." *Bucks County Cable TV, Inc.* v. *United States*, 427 F.2d 438, 440 n.1 (3d Cir.), cert. denied, 400 U.S. 831 (1970). It is intended to identify the area within which, given average terrain, the station's audience can receive a viewable signal. See 47 C.F.R. 73.683.

Commission] determines to be no longer in the public interest." § 202(h), 110 Stat. 112.[3]

In 1999, the Commission revised the local television ownership rule. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903 (*1999 Order*); 47 C.F.R. 73.3555(b). The new rule allowed common ownership or control of two stations in the same television market (as defined by the Nielsen market research company) when either: (1) the stations' Grade B signals do not overlap; or (2) one of the two stations is not among the four top-rated stations in the market, and the market includes at least eight other television "voices" (defined to mean independently owned, full-power, operational television stations). *1999 Order*, 14 F.C.C.R. at 12,907-12,908 (¶¶ 8-9).

In *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002) (*Sinclair*), the D.C. Circuit remanded—but did not vacate—the revised local television ownership rule. The *Sinclair* court recognized that the FCC "has wide discretion to determine where to draw administrative lines." *Id.* at 162 (citation omitted). The court found, however, that the agency had not adequately explained why it counted only television stations as voices for purposes of the local television ownership rule, while counting other media outlets (including daily newspapers and cable systems) under different rules governing cross-ownership of radio and television stations. *Id.* at 164. The court held that "the Commission ha[d] failed to demonstrate that its exclusion of non-broadcast me-

[3] The 1996 Act required the Commission to review its ownership rules every two years. § 202(h), 110 Stat. 111. Congress later changed the review period to every four years. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-199, § 629(3), 118 Stat. 100.

dia from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act." *Id*. at 165.

The D.C. Circuit also examined the effect of Section 202(h) on media ownership rules in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, modified on reh'g, 293 F.3d 537 (2002), which involved challenges to the Commission's 1998 decision not to repeal or modify its national television station ownership or cable-broadcast ownership rules, *id.* at 1033. In that case, the court emphasized that "nothing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest authority. *Id*. at 1042. The court construed Section 202(h) as requiring the FCC to provide an adequate explanation for any decision to retain a particular ownership rule, accounting for the state of competition in the relevant media markets. See *id.* at 1042, 1044. Based on its determination that the Commission had not adequately explained its decision to retain the national television and cable-television cross-ownership rules, the court remanded those rules to the FCC for further consideration. *Id*. at 1047-1049.

3. In 2003, the FCC completed a comprehensive Section 202(h) review of its ownership rules, including its local television ownership rule. *2002 Biennial Regulatory Review*, 18 F.C.C.R. 13,620 (*2003 Order*). In the *2003 Order*, the Commission relaxed the local television ownership rule by adopting a tiered approach under which regulatory limits on common ownership of television stations depended on the number of such stations in the relevant market. Under the revised rule, a single entity could own (a) two full-power commercial television stations in a market with 17 or fewer stations; and (b) three full-power commercial stations (a so-called

"triopoly") in markets with 18 or more television stations. The revised rule retained the restriction on a single entity's ownership or control of any two of the four highest rated stations in the market. See *2003 Order*, 18 F.C.C.R. at 13,668 (¶ 134).

Numerous petitions for review of the Commission's *2003 Order* were consolidated in the United States Court of Appeals for the Third Circuit, which first stayed the revised rules and then remanded them to the agency. *Prometheus Radio Project* v. *FCC*, 373 F.3d 372 (2004), cert. denied, 545 U.S. 1123 (2005) (*Prometheus I*). Although the court agreed with the Commission that "broadcast media are not the only media outlets contributing to viewpoint diversity in local markets," *id.* at 414, it rejected the specific numerical triggers contained in the revised ownership rule, holding that they were based on unsupported assumptions, *id.* at 418-420. As a result of the previously issued judicial stay, the 1999 rule governing common ownership of television stations in the same market remained in effect.

4. On remand, the FCC decided not to re-adopt the local television ownership limits set forth in the *2003 Order*. Pet. App. 207a-227a. Instead, the agency retained "the local television ownership rule as it is currently in effect," *i.e.*, the rule as it was promulgated in 1999. *Id.* at 207a. The agency acknowledged its prior finding that the rule was no longer "necessary to promote viewpoint diversity." *Id.* at 209a. The Commission determined, however, that "the current rule is consistent with the public interest" because it serves to promote competition in local television markets, *id.* at 214a, which yields "higher quality programming provided to viewers," *id.* at 215a, as well as lower advertising costs, which can be passed on to consumers, *id.* at 216a.

The Commission determined that, in assessing the degree of competition in a local television market, it was appropriate to take account of local television stations without regard to other media competing in the market. The agency explained that non-broadcast sources, such as cable networks, do not provide competition in local markets because "those networks respond primarily to national and regional forces." Pet. App. 215a-216a. The Commission recognized that other media, such as "radio, newspapers, cable, and the Internet," may "contribute to viewpoint diversity," and that rules intended to foster viewpoint diversity therefore should take those media into account. *Id.* at 219a; see also *id.* at 199a n.259. The FCC explained, however, that the local television ownership rule was intended to promote "competition among broadcast television stations in local markets" rather than to foster viewpoint diversity. *Id.* at 219a.

The Commission adhered to its prior determination that "a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace." Pet. App. 217a. The FCC explained that this numerical threshold would ensure that each local television market "includes four stations affiliated with the four major networks in each market (*i.e.*, ABC, NBC, CBS, and Fox), plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network." *Ibid.* The Commission expressed the view that the eight-voices requirement "will help to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *Ibid.*

5. The court of appeals affirmed the Commission's decision to adhere to the 1999 local television ownership rule. Pet. App. 49a-56a. The court held that the FCC's decision to retain an eight-voices test, limited to local television stations, was "a line-drawing exercise" that the agency had "reasonably explained." *Id.* at 53a. The Third Circuit rejected the contention that the FCC had violated the D.C. Circuit's mandate in *Sinclair*, holding that "the FCC has offered a new and reasonable rationale for this policy choice—competition." *Ibid.* The court also explained that, "because the purpose of the rule is to promote competition among the [local television] stations themselves," the Commission had permissibly declined to consider "the effect of other video programming." *Id.* at 54a. The court accordingly "affirm[ed] the validity of the rule." *Id.* at 79a.

6. Pursuant to Section 202(h), the Commission has continued to examine its media ownership rules quadrennially. On May 25, 2010, the Commission issued a Notice of Inquiry for its fifth such review. *2010 Quadrennial Regulatory Review*, 25 F.C.C.R. 6086. In support of its current proceeding, the Commission has commissioned several economic studies to evaluate the current marketplace and the state of the media industry, see Public Notice DA 10-1084, 25 F.C.C.R. 7514 (2010), and hundreds of parties have filed comments. The FCC recently issued a Notice of Proposed Rulemaking (NPRM), which proposes a number of changes to the FCC's ownership rules in order "to take account of new technologies and changing marketplace conditions while ensuring that [the] rules continue to serve our public interest goals of competition, localism and diversity." *2010 Quadrennial Regulatory Review*, 77 Fed. Reg. 2868 (Jan. 19, 2012). In that NPRM, the Commission

"tentatively conclude[d] that the local television ownership rule, with certain modifications * * * , remains necessary in the public interest as a result of competition." *Id.* at 2872. The FCC sought comment on that tentative conclusion and on a number of specific questions related to it. *Id.* at 2871-2877.

## ARGUMENT

The decision of the court of appeals upholding the Commission's local television ownership rule does not conflict with any decision of this Court or any other court of appeals. The court's fact-bound resolution of a garden-variety issue of administrative law, regarding an ownership rule that the FCC is currently reevaluating, is correct and does not warrant this Court's review.

1. a. Contrary to petitioner's contention (Pet. 2-3, 18-23), the decision below does not conflict with the D.C. Circuit's decision in *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002), remanding the local television ownership rule for further agency consideration. The D.C. Circuit's remand was based on that court's determination that the Commission had not adequately justified "counting fewer types of 'voices' in the local ownership rule than it counted in its rule on cross-ownership of radio and television stations." *Id.* at 162. The court found that the Commission's decision to adopt the rule was "deficien[t]" because the agency had not explained why the considerations of "diversity and competition" that underlie the cross-ownership rule "should not also be reflected in its definition of 'voices' for the local ownership rule." *Id.* at 164. The court therefore held that the Commission had "failed to demonstrate that its exclusion of non-broadcast media from the eight voices

exception" satisfied the regulatory review obligation imposed by the 1996 Act. *Id.* at 165.

After the Third Circuit overturned the Commission's 2003 attempt to modify the rule, the FCC decided to adhere to the existing (*i.e.*, 1999) local television ownership rule, but it provided the adequate explanation that the D.C. Circuit had found lacking in *Sinclair*. The Commission explained that, although the local television ownership rule was "no longer necessary to foster diversity" of viewpoints, the rule was an appropriate way "to foster competition among local television stations." Pet. App. 219a; see *id.* at 218a-219a. The Commission observed that such competition provides an "incentive to television stations to invest in better programming and to provide programming that is preferred by viewers." *Id.* at 215a. To further that competition-promoting purpose, the FCC found it "appropriate to limit [its] voices test to television stations." *Id.* at 219a.

This Court has long recognized that, after a judicial remand, an agency may "reexamine[] the problem, recast its rationale and reach[] the same result." *Securities & Exch. Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Consistent with that principle, the court below upheld the rule on the basis of the Commission's refined competition rationale. Pet. App. 53a-55a. Because the FCC on remand articulated the reasoned justification that the D.C. Circuit in *Sinclair* had previously found lacking, the Third Circuit's decision does not conflict with *Sinclair*. See *id.* at 53a.

b. Petitioner contends that the decision below "reflects an underlying disagreement" with the D.C. Circuit concerning "the proper scope of the Commission's review of its media ownership rules under the 1996 Act." Pet. 21; see CBS Br. 9-10. Petitioner asserts that the

D.C. Circuit has interpreted Section 202(h) to require "a presumption in favor of repealing or modifying the ownership rules," Pet. 21 (quoting *Sinclair*, 284 F.3d at 159), and that the Third Circuit "has established a presumption in favor of the status quo," *ibid.*

Contrary to petitioner's contention, the two courts of appeals have approached Section 202(h) consistently. The Third Circuit does not employ a "presumption in favor of the status quo." Rather, that court has recognized that Section 202(h) requires repeal or modification of rules that are "no longer useful" to serve the public interest, and that the Commission must "support its decision with a reasoned analysis." Pet. App. 21a (citation omitted).

Nor has the D.C. Circuit employed a contrary presumption in favor of deregulation. Petitioner relies (Pet. 21) on the statement in *Sinclair* that Section 202(h) establishes a "presumption in favor of repealing or modifying the ownership rules." 284 F.3d at 152 (citation omitted). The D.C. Circuit has since explained, however, that it was simply "piggyback[ing]" on its statement in a prior case (*Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1048, modified on reh'g, 293 F.3d 537 (2002)) that "only came after the court had concluded that the Commission's explanation for its action could not withstand arbitrary and capricious review, and the question became the selection of the appropriate remedy for the court to impose." *Cellco P'ship* v. *FCC*, 357 F.3d 88, 98 (2004). The D.C. Circuit recognized in *Cellco* that *Sinclair* "did not adopt a general presumption in favor of modification or elimination of regulations when considering a substantive challenge to the adequacy of the Commission's determinations." *Ibid.* In *Prometheus I*, this Court declined to grant review to consider essentially the same argument concerning the proper construction of Section 202(h). See Gov't Br. in Opp. at 25-26, *Media Gen., Inc.* v. *FCC*, 545 U.S. 1123 (2005) (Nos. 04-1020 et al.). There is no reason for a different result here.

Both the Third and D.C. Circuits have properly rejected the view of respondent CBS Corp. (a petitioner below) that Section 202(h) requires the Commission to jettison a regulation without regard to whether it is necessary to serve the public interest. CBS Br. 14-15. There is no merit to CBS's contention (*id.* at 15) that the reasonableness review conducted by those courts "renders the statute meaningless." *Ibid.* In Section 202(h), Congress directed the FCC to review its rules and to alter them where appropriate. Pursuant to that directive, the Commission has reviewed and altered its media ownership regulations three times and is currently engaged in a fourth examination.[4] That the Commission's actions are reviewed under the ordinary test applicable to most agency actions does not undermine the statutory purposes.

2. Under the Commission's local ownership rule, a single entity may lawfully own or control two stations in the same television market if, *inter alia*, the market includes at least eight other television "voices." Petitioner contends (Pet. 25-27) that the court of appeals

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[4] CBS contends (Br. 14) that the Third Circuit's construction of Section 202(h) "could be interpreted to impose no obligation on the agency at all other than to robotically undertake a quadrennial review that results in no modifications to the ownership rules whatsoever." That contention is belied by the Third Circuit's decisions in *Prometheus I* and *Prometheus II*, in which the court engaged in comprehensive and detailed review of the Commission's media ownership rules, resulting in the remand of several.

erred in upholding the FCC's decision not to consider non-television media in determining whether eight voices exist in a particular market. The court's case-specific ruling was correct and does not warrant further review.

Unlike other ownership rules, which are intended to achieve viewpoint diversity in the broader video programming market, the FCC's local ownership rule serves to foster "robust competition in the local television marketplace." Pet. App. 217a. As the court below correctly recognized, the local ownership rule "does not depend on the effect of other video programming" because "the purpose of the rule is to promote competition among the stations themselves." *Id.* at 54a. In contending that exclusion of non-broadcast media from the voice count is "entirely unjustified in light of the state of the media marketplace," Pet. 26, petitioner misapprehends the rule's purpose.

The Commission did not find, as petitioner asserts, that "local television stations compete only against each other." Pet. 25. Rather, the Commission reasonably determined that the public interest would be best served by a rule that maximizes competition among local television stations, without regard to other media. Local stations, the FCC found, respond much more strongly than other media to local needs and interests. Pet. App. 215a-216a. Concerns about viewpoint diversity, the Commission reasonably determined, were more appropriately dealt with in the agency's cross-ownership rules, which take account of a broader range of media. *Id.* at 219a.

Equally unavailing is petitioner's argument (Pet. 27-28) that the court of appeals erred by failing to "explain[] why [its decision in] *Prometheus I* had been wrong to conclude that increased common ownership leads to welfare-enhancing efficiencies." Pet. 28. Petitioner's claim of intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, no such conflict exists.

In *Prometheus I*, the Third Circuit accepted the FCC's determination that increased concentration of ownership could yield certain benefits. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 415 (2004), cert. denied, 545 U.S. 1123 (2005). In its order on remand, the Commission similarly recognized that a more permissive multiple ownership rule could lead to potential "savings in overhead and management costs." Pet. App. 216a. The agency found "insufficient evidence to conclude that the current rule threatens local programming," *id*. at 223a, however, and it therefore concluded that "it serves the public interest to retain [the current rule] in order to preserve vigorous competition among local television stations." *Ibid*. An administrative agency may change its policy judgments so long as it explains the change, see *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and the FCC permissibly did so here.

Petitioner also contends that the Court should intervene in this case because the local television ownership rule "threatens many local stations' viability." Pet. 29. That argument ignores entirely the Commission's longstanding failed/failing station policy, under which the agency will waive the local ownership rules on a case-by-case basis to prevent the loss of a station in a market. See 47 C.F.R. 73.3555 n.7; *1999 Order*, 14 F.C.C.R. at 12,936-12,940. The failed/failing station policy reflects the FCC's balancing among various competing public interest factors, including the possible harms of media consolidation and the need to assist economically distressed stations. Moreover, recently enacted legislation authorizes the Commission to allow television licensees to return their spectrum assignments to the agency, which can then auction the spectrum rights for other uses and share the auction proceeds with the former licensee. See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403, 126 Stat. 225; see pp. 15-16, *infra*. Over the long term, that authority has the potential to alter significantly the economics of television stations in poor economic health, and it undermines the claim that the Court must act to preserve such stations' viability.[5]

3. Finally, further review of this matter would be particularly unwarranted given the FCC's ongoing review of the media ownership rules. See pp. 8-9, *supra*. Petitioner and other interested parties now have the opportunity to create a new record before the Commission that could support a regulatory approach other than the one adopted in the order at issue here. Any such rule will be judicially reviewable on the new administrative record, under the applicable legal standards.

Moreover, as noted above, newly enacted legislation has the potential to alter the television marketplace in ways that could affect future regulation. The Middle Class Tax Relief and Job Creation Act of 2012, Pub. L.

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[5] Petitioner faults the court of appeals for retaining jurisdiction over the Commission's disposition of the issues the court remanded to the agency. Pet. 32-34. Petitioner does not allege a circuit conflict on that procedural issue; does not identify any legal error in the court's action; and does not contend that the court of appeals "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

No. 112-96, 126 Stat. 156, which became law on February 22, 2012, authorizes the Commission to allow television licensees to return their spectrum assignments to the agency, which can then auction the spectrum rights for other uses, such as wireless telecommunications services, and share the auction proceeds with the former licensee. See, *e.g.*, § 6403, 126 Stat. 225. Although the new legislation is unlikely to have an immediate impact on the television marketplace, any reclamation of spectrum in the longer term could reduce the number of broadcast television stations across the country and affect how consumers access media in those markets. The option to return a license in exchange for money may also alter the economics of television markets. While it is too early to predict any particular effect of the new legislation, the possibility of future changes in the television industry also weighs against further review here.[6]

[6] Contrary to petitioner's suggestion (Pet. 34 n.10), the pendency of other certiorari petitions raising constitutional challenges to FCC media ownership rules provides no reason to grant this petition. The issues presented by those other petitions are entirely different from the issues raised here, and the disposition of those constitutional challenges would have no bearing on the administrative-law issues presented in this case. For the same reason, there is no reason to hold this petition pending disposition of the others.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.*

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* The Solicitor General is recused in this case.