

# The Score Is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review

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## I. INTRODUCTION

Media ownership continues to be an important democratic issue mired in a complicated policy limbo.<sup>1</sup> The relationship between the control of media outlets, the sources of information, and the range of viewpoint diversity available to citizens has been at the center of a continuing legal impasse between the FCC and the courts. Even in the Internet age, access to local news and information is an important element in maximizing political participation, and so broadcasting retains a central role in the media use of everyday Americans.<sup>2</sup>

The FCC implemented a media ownership policy to balance the economic goal of competition, the democratic societal values associated with viewpoint diversity, and the operational objectives of broadcast stations licensed to serve a local community.<sup>3</sup> The regulatory matrix of competition, localism, and diversity has been the pillar of media ownership policy since the agency's initial adoption of the conceptual relationship between ownership and diversity in the rulemaking proceeding that implemented the newspaper-broadcast cross ownership ban in 1975.<sup>4</sup>

While contemporary media ownership policy was not created by the adoption of a single economic theory, the central conceptual premise of media ownership policy is simple: ownership and diversity are directly related. Yet this simple premise has been elusive for the agency to support empirically.<sup>5</sup> Most significantly, the FCC's inability to demonstrate a clear relationship between the variables, and to functionally apply the relationship to the larger policy in a way that promotes ownership by women, minorities, and other underrepresented groups. This led to a series of paralyzing remands when the Third Circuit Court of Appeals reviewed FCC decisions on media ownership.<sup>6</sup> These remands involve the agency's rush to implement new ownership limits after passage of the Telecommunications Act of 1996 coupled with the functional abandonment of its localism and diversity objectives. These remands are the product of a running series of defeats for the FCC in cases

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1. Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 328, 328–29 (2019) (discussing the possibility of localism as a remedy for market failure).

2. *Id.* at 330.

3. *Id.*

4. *Id.* at 334. *See generally* Amendment of Sections 73.34, 73.240, And 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, And Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046 (1975).

5. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019) (stating that empirical evidence supporting or refuting FCC regulatory premises has been inconsistent).

6. *See* Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 567, 572 (3d Cir. 2019) *reh'g en banc denied*, (3d Cir. Nov. 20, 2019) (expressing the Third Circuit's clear exasperation with the two-decade saga that has been Prometheus, Judge Ambro begins the case with, “[h]ere we are again”); *see also* Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 383 (3d Cir. 2004).

brought by lead plaintiff and citizen petitioner Prometheus Radio Project.<sup>7</sup> After judicial setbacks in 2004, 2011, 2016, and 2019, the FCC continues to find itself in a legal quagmire with limited policy options moving forward.<sup>8</sup>

This Article traces the implementation of FCC media ownership policy since the passage of the Telecommunications Act of 1996<sup>9</sup> through the FCC's continuing legal battle with the Prometheus Radio Project. The paper discusses the FCC's various policy proposals, the agency's 1998,<sup>10</sup> 2000,<sup>11</sup> and 2002<sup>12</sup> Biennial Reviews, its Quadrennial Reviews undertaken in 2006,<sup>13</sup> 2010,<sup>14</sup> 2014<sup>15</sup> and the ongoing review launched at the end of 2018.<sup>16</sup> Then, in context of this background, this Article concludes by proposing a new approach to media ownership and minority ownership policy based on the FCC's ongoing statutory mandate to regulate broadcast ownership.

This Article suggests that the FCC just do what it is told: develop and implement a minority ownership policy that puts broadcast stations in the hands of locally based owners who themselves are women and minorities. Furthermore, when faced with the precedent from *Adarand*, the FCC should recognize that because of spectrum scarcity, it is not subject to the same level of scrutiny that would dictate a content neutral approach in application. In short, the FCC should focus on just two aspects of the media ownership equation—localism and diversity. Empirical evidence strongly suggests this

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7. *Id.* at 388–89.

8. *Id.* at 381; Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 437 (3d Cir. 2011); Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33, 37 (3d Cir. 2016)

9. 47 U.S.C. § 533 (2018); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat 56 (1996) [hereinafter Telecommunications Act].

10. 1998 Biennial Regulatory Review – Review of the Commission Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd. 11058, 162 (2000) [hereinafter *1998 Biennial Review*].

11. The 2000 Biennial Regulatory Review, *Report*, 16 FCC Rcd. 1207 (2001) [hereinafter *2000 Biennial Review*].

12. 2002 Biennial Regulatory Review – Review of the Commission Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 13620 (2003) [hereinafter *2002 Biennial Review*].

13. 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rule Making*, 21 FCC Rcd. 8834 (2006) [hereinafter *2006 Quadrennial Regulatory Review*].

14. 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 25 FCC Rcd. 6086 (2010) [hereinafter *2010 Quadrennial Regulatory Review*].

15. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Second Report and Order*, 31 FCC Rcd. 9864 (2016) [hereinafter *2014 Quadrennial Review*].

16. 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking*, 32 FCC Rcd. 12111 (2018).

will lead to the competition that the FCC seeks. That is, unless the FCC intends to lose in court *again*.

## II. THE BEGINNING – TELECOMMUNICATIONS ACT OF 1996

On February 8th, 1996, President Bill Clinton signed the Telecommunications Act into law.<sup>17</sup> Congress designed the omnibus bill to update, but not replace, major elements of the Communications Act of 1934.<sup>18</sup> Among the changes within the Telecommunications Act were provisions that resulted in significant structural changes to the legal, policy, and social dynamics of media ownership.

Largely overlooked in historical discussion is the reality that in the Telecommunications Act, Congress had, for the first time, directly substituted its own judgment on media ownership for the regulatory expertise of the FCC.<sup>19</sup> The statutory delegation of the Telecommunications Act mandated specific ownership limits for radio and television.<sup>20</sup> No longer would the FCC interpret a delegation and assess policy alternatives through the rulemaking process in its role as the expert agency in charge of assigning stations to qualified owners. This change in media licensing policy largely reduced the FCC to the status of a regulatory errand boy whose primary duty is to approve mergers and transfer station operation licenses.<sup>21</sup>

Just as this do-as-we-are-told type approach to media regulation significantly changed the FCC's traditional public-trustee decision making previously employed for assessing ownership and license allocation, Congress also moved away from the FCC's traditional administrative process. This was brought about by a new statutory requirement to conduct a review of the agency's media ownership rules every two years.<sup>22</sup> This review required existing rules to survive an agency review process with an evidence standard roughly equivalent to FCC rulemaking. On top of that, Congress also set some media ownership policies itself. Section 202(b)(1) of the Telecommunications Act set new ownership limitations.

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17. Telecommunications Act § 202.

18. Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064 (to be codified at 47 U.S.C. § 151).

19. Telecommunications Act § 202.

20. *Id.*

21. *Id.*

22. *See id.* § (h).

In a radio market with 45 or more commercial radio stations, a single 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); 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); 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 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.<sup>23</sup>

When Congress mandated these rules to the FCC, the process of rulemaking for media ownership also changed. In order to quickly comply, the FCC solicited no comments, and collected no evidence on the state of the media industry.

We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the Telecom Act. We find that notice and comment procedures are unnecessary, and that this action therefore falls within the "good cause" exception of the Administrative Procedure Act ("APA"). The rule changes adopted in this Order do not involve discretionary action on the part of the [FCC]. Rather, they simply implement provisions of the Telecom Act that direct the [FCC] to revise its rules according to specific terms set forth in the legislation.<sup>24</sup>

In the wake of this decision, the FCC approved a massive, rapid wave of station transfers and mergers that consolidated ownership, and between 1996 and 2010, the looser ownership limits resulted in significant changes to the media landscape and rapid consolidation of ownership within the industry.<sup>25</sup>

Congress's alteration of the traditional rulemaking process resulted in rapid changes to the production and distribution models for media content. Furthermore, embedded within the Telecommunications Act was Section 202(h), an obscure but important mandate that requires the agency to remove

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23. Telecommunications Act § 202(b)(1); *see also* 47 C.F.R. § 73.3555 (1996).

24. Implementation of Section 202(a) and 202(b) of the Telecommunications Act of 1996, *Order*, 11 FCC Rcd. 12371, para. 5 (1996).

25. 2010 Quadrennial Regulatory Review, *supra* note 14, at para. 4.

or modify rules that are no longer necessary to promote competition or no longer in the public interest.<sup>26</sup> This mandate, which alters the traditional administrative process<sup>27</sup> specified that:

The [FCC] 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 [FCC] shall repeal or modify any regulation it determines to be no longer in the public interest.<sup>28</sup>

In a rush to implement the ownership changes mandated by the Telecommunications Act, the FCC failed to fully assess the state of media ownership before starting a process of rapid consolidation.<sup>29</sup> Lacking the baseline comparator data on the status of media ownership policy, and saddled with the ongoing review requirements of Section 202(h), it is unsurprising that a shortage of evidence demonstrating positive outcomes for media ownership policy bedevils the FCC. The relevant history shows this problem tormenting the agency time and time again.

### III. FIRST REVIEW – THE FCC’S 1998 BIENNIAL REVIEW

The FCC launched the first of the mandated biennial reviews for media ownership rules under Section 202(h) on March 12, 1998.<sup>30</sup> The review examined seven ownership policies using the guidelines set by Section 202(h).<sup>31</sup> Of the seven, the FCC examined four rules unmodified by the Telecommunications Act, including the UHF television discount,<sup>32</sup>

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26. Telecommunications Act § 202(h).

27. See Andrew Jay Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of the Intended Consequences*, 58 FED. COMM. L. J. 581, 583-84 (2006) (providing an explanation of how 202(h) perverts the usual administrative process).

28. *Id.*

29. See generally Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 C.F.R. Section 73.3555, *Order*, 11 FCC Rcd. 12368, para. 5–6 (1996) (discussing the implementation of sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996).

30. The FCC already began the process of reviewing two ownership rules. The first, the television duopoly rule prevented a party from owning, operating, or controlling two or more broadcast television stations with overlapping "Grade B" signal contours, essentially preventing the ownership of more than one television station in a market. Additionally, the FCC launched a review of the "one-to-a-market" rule, which prohibited the common ownership of a television and a radio station in the same market. 1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd. 11276, paras. 1, 9 (1998) [hereinafter *1998 Notice of Inquiry*].

31. See *id.* at paras. 8–54.

32. *Id.* at paras. 25–27. The UHF television discount rule attributes 50% of television households in a local television market to the audience reach of a UHF television station for purposes of calculating whether a television station owner complies with the 35% national audience reach cap. 47 C.F.R. 73.3555(e)(2)(i) (1998).

newspaper-broadcast cross-ownership rule,<sup>33</sup> cable television cross-ownership rule,<sup>34</sup> and experimental broadcast station multiple ownership rules.<sup>35</sup> Additionally, the review also examined three rules that the FCC modified per directives of the Telecommunications Act, namely the national television ownership rule,<sup>36</sup> local radio ownership rules,<sup>37</sup> and dual network rule.<sup>38</sup>

The FCC launched the 1998 Biennial Review while adjudicating many proposed mergers and license transfers. During review of its media ownership rules, but before approving changes to those rules, the FCC granted a series of conditional waivers to various owners.<sup>39</sup> By continuing to grant waivers,

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33. *1998 Notice of Inquiry*, *supra* note 30, at paras. 28–42. The newspaper-broadcast cross-ownership rule prohibits common ownership of a broadcast station and daily newspaper in the same market; 47 C.F.R. 73.3555(d) (1996). The rule was passed by the FCC in 1975. Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Second Report and Order*, 50 FCC Rcd. 1046 (1975).

34. *Id.* at paras. 43–52. The cable-television cross-ownership rule effectively prohibited the common ownership of a broadcast television station and cable system in the same market. 47 C.F.R. 76.501(a) (1998).

35. The experimental broadcast station multiple ownership rule limited the number of experimental broadcast stations that can be licensed to or controlled by a person. *1998 Notice of Inquiry*, *supra* note 30, at paras. 53–54.

36. The Telecommunications Act revised the national television ownership rule to eliminate a numerical limit on the number of television stations a party could own nationally and increase the national audience reach cap of television station ownership from 25% to 35% of television households nationally. *See* Telecommunications Act § 202(c)(1)(B).

37. The Telecommunications Act revised the local radio ownership rules to allow an organization ownership of up to 8 commercial radio stations in a market depending on the number of commercial radio stations in the market. These rules allow for combinations of up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM), in markets with 45 or more commercial radio stations; combinations of up to 7 commercial radio stations, not more than 4 of which are in the same service, in markets with between 30 and 44 commercial radio stations; combinations of up to 6 commercial radio stations, not more than 4 of which are in the same service, in markets with between 15 and 29 commercial radio stations; combinations of up to 5 commercial radio stations, not more than 3 of which are in the same service, if no party controls more than 50% of the stations in the radio market, in radio markets with 14 or fewer commercial radio stations. Telecommunications Act § 202(b).

38. The dual network rule permitted an entity to maintain two or more broadcast networks unless such dual or multiple networks are composed of (1) two or more of the four major networks (ABC, CBS, Fox, NBC), or (2) any of the four major networks and one of the two emerging networks (WBTV, UPN). 47 C.F.R. 73.658(g) (1996); *see also 1998 Notice of Inquiry*, *supra* note 30 at para. 24, n.28.

39. For example, QueenB's request for waiver in DA 97-1067 at 14: "Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding." Concrete River Associates. L.P., *Memorandum and Order*, 12 FCC Rcd. 6614, para. 14 (1997) (assigning a license to QueenB Radio).



even conditionally, the FCC openly encouraged further ownership consolidation to occur at a rate faster than the agency could empirically assess the results of its freshly approved mergers.

The 1998 Biennial Review concluded 17 months later, in which the FCC declared it could not meaningfully assess the effects of ownership consolidation since 1996, primarily because it had not yet completed the initial wave of mergers.<sup>40</sup> The FCC amended the television duopoly rule to permit common ownership of television stations in two specific scenarios related to media market measurements. Second, the FCC relaxed the radio/television cross-ownership (“one-to-a-market”) rule in order to approve more of such combinations. This was a substantial change that could permit a party to own as many as one TV station and seven radio stations under certain circumstances.<sup>41</sup>

#### IV. MOVING ALONG – THE FCC’S 2000 BIENNIAL REVIEW

After concluding the first biennial review in August of 1999, the FCC chose to use the required 2000 Biennial Review to build a framework to “form the basis for further action.”<sup>42</sup> The FCC hoped to build a working framework for future reviews under Section 202(h), most notably for the review scheduled to begin in 2002.

We will continue to take a proactive approach to reviewing, modifying, and repealing our rules, and believe that the 2002 regulatory review will benefit from and build upon prior biennial reviews. As competition increases, technology evolves, and laws change, it will be critical for us to modify and eliminate our rules, and improve our processes, to reflect these changes. Accordingly, we direct staff to continue its ongoing efforts to review [FCC] rules and suggest appropriate modifications and improvements.<sup>43</sup>

The FCC’s 2000 Staff Report represented the majority of the work completed during the 2000 Biennial Review process. Engaged in a top to bottom review of existing FCC regulations, staff applied a five-part test to

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40. See *1998 Biennial Review*, *supra* note 10, at para. 4 (“It is currently too soon to tell what effect his will have consolidation, competition, and diversity.”).

41. *Id.* at para. 65; see generally *Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd. 12903, paras. 8–11 (1999) for the FCC’s explanation of how the use of “failed station” waivers allow augmented ownership past the outlined six station limit [hereinafter *1999 Report and Order*].

42. 2000 Biennial Review, *supra* note 11, at para. 13. While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau staff during the 2000 proceeding. See *Biennial Regulatory Review 2000 Staff Report*, 15 FCC Rcd. 21142, para. 43 (2000) [hereinafter *2000 Staff Report*].

43. 2000 Biennial Review, *supra* note 11, at para. 84.

each rule in their analysis to decide between a recommendation of either modification or elimination of a rule.

Staff's review considered (1) the purpose of the rule; (2) the advantages of the rule; (3) the disadvantages of the rule; (4) what impact competitive developments have had on the rule; and (5) whether to recommend modification or revocation of the rule. This analysis allowed the staff to make reasoned determinations about whether a rule should be changed or eliminated either because of competitive developments, or for other reasons.<sup>44</sup>

The FCC designed its 2000 Staff Report to provide recommendations, but importantly, it did not have the power of a rulemaking proceeding. In terms of media ownership, the 2000 Staff Report applied this five part test to eight separate rules, including the local radio ownership rule, local television ownership rule, radio television cross-ownership rule, daily newspaper-broadcast cross-ownership rule, national television multiple ownership rule, dual network rule, experimental broadcast station multiple ownership rule, and cable television broadcast station cross-ownership rule.<sup>45</sup> The 2000 Staff Report also opined on the FCC's plans to launch a rulemaking proceeding on the local radio ownership rule designed to more clearly define radio markets, and to stabilize the counting methodology used to determine ownership of radio stations.<sup>46</sup> The Mass Media Bureau stated it would take no action on the local television ownership rule and the radio television cross-ownership rule, preferring to wait and examine the effects generated by the recent changes to the rules.<sup>47</sup>

In terms of the newspaper-broadcast cross-ownership prohibition, the 2000 Staff Report identified that the rule remained in the public interest and furthered the important goal of viewpoint diversity, but at the same time the report also noted that the FCC had an on-going rulemaking inquiry launched in 1996 about the continued need for the rule.<sup>48</sup> Similar rulemaking inquiries were announced for the dual network<sup>49</sup> and cable television cross-ownership rules.<sup>50</sup>

As a result of the agency-wide review commenced in 2000, the FCC proposed retaining, but modifying, three of its media ownership rules while eliminating a fourth. The FCC then launched rulemaking inquiries to amend

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44. Part two of the analysis includes consideration of how adroitly, precisely, and cost-effectively the rule addresses the problem at issue. Part three includes consideration of whether the rule is over- or under-inclusive in its scope, and whether compliance imposes unnecessary costs. *2000 Staff Report*, *supra* note 42, at 21111-12, nn.10-11, para. 12; *see also* 16 FCC Rcd. at 1235, para. 82, for a further inclusion of part two of the aforementioned analysis.

45. *2000 Staff Report*, *supra* note 42, at para. 116.

46. *Id.* at para. 120.

47. *Id.*

48. *Id.* at para. 122.

49. *Id.* at para. 127.

50. *Id.* at para. 129.

the dual network rule,<sup>51</sup> the definition of local radio markets,<sup>52</sup> and the newspaper-broadcast cross-ownership rule.<sup>53</sup> The agency also proposed to eliminate its restriction on multiple ownership of experimental broadcast stations.<sup>54</sup> Ultimately, each of these individual proceedings would become elements of the next required review under Section 202(h), the 2002 Biennial Review.

## V. FIRST OVERHAUL ATTEMPT – FCC’S 2002 BIENNIAL REVIEW

The story of the Prometheus Radio Project’s 4-0 record in the Third Circuit begins with the FCC’s review of the existing media ownership rules in the 2002 Biennial Review.<sup>55</sup> From the outset of the 2002 Biennial Review, the FCC mulled reconsidering its longstanding thinking about the premise of media ownership policy:

The regulatory structure best suited to promote the public interest is not static. Thus, the [FCC]’s media ownership rules must be reassessed on an ongoing basis to ensure that they are grounded in the current realities of the media marketplace. It is only through this reevaluation that the [FCC] can be assured that its media ownership rules actually advance, rather than undermine, our policy goals. In this regard, we recognize that the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation.<sup>56</sup>

Focusing the initial process on the biennial reviews of existing media ownership rules conducted in 1998 and 2000 (specifically the national television multiple ownership rule, the local television multiple ownership rule, and the radio-television cross-ownership rule), the FCC had two objectives that dominated the early phase of the 2002 Biennial Review proceeding. First was the Section 202(h) mandate to engage in the review, part of which incorporated the ongoing rulemaking proceedings launched after the 2000 Biennial Review.<sup>57</sup> A second mandate involved answering a

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51. *Id.* at para. 127.

52. *Id.* at paras. 118–19.

53. *Id.* at paras. 122–24.

54. *Id.* at para. 128.

55. 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rule Making*, 17 FCC Rcd. 18505, para. 6 (2002) [hereinafter *2002 Notice of Proposed Rulemaking*].

56. *Id.* at para. 4.

57. *Id.* at para. 3.

remand from the D.C. Circuit Court of Appeals in *Fox Television v. FCC*<sup>58</sup> over the national television ownership rule.<sup>59</sup>

The *Fox Television* remand was significant in two ways. First, the D.C. Circuit stated that the FCC failed to provide evidence and rational reasoning for the its decision to retain the ownership cap set at 35% of national audience, a decision contained in both the 1998 and 2000 proceedings.<sup>60</sup> In a section of the decision, the court chastised the FCC for failing to provide factual evidence, and ruled that, “Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”<sup>61</sup> However, the panel did not rule on the meaning of Section 202(h) of the Telecommunications Act “when it instructs the [FCC] first to determine whether a rule is ‘necessary in the public interest’ but then to ‘repeal or modify’ the rule if it is simply ‘no longer in the public interest.’”<sup>62</sup>

The requirement for factual evidence led the FCC to publicly request that commenters buttress their comments with empirical evidence.<sup>63</sup> Also, The FCC decided to fund a series of studies on media ownership as part of its Media Ownership Working Group (MOWG).<sup>64</sup> In reviewing the four rules, the FCC tested each with an eye on promoting its policy goals of competition, localism, and diversity.<sup>65</sup> Notably, the Notice of Proposed Rulemaking (NPRM) for the 2002 Biennial Review states that the FCC’s interest was furthering of “one or more of the three public interest goals.”<sup>66</sup> This marked a change to the FCC’s discussion of its three goal (Competition-Localism-Diversity) strategy, where in the past, its policy promoted all three objectives simultaneously.<sup>67</sup>

Also of note in the NPRM was the FCC’s flexible adoption and application of the standards from a decision earlier in the year in *Sinclair v. FCC*.<sup>68</sup> In *Sinclair*, the D.C. Circuit noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in material presented over the airwaves.<sup>69</sup> The court

58. *Fox Television v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002) [hereinafter *Fox Television*].

59. 2002 Biennial Review, *supra* note 12, para. 6, n.8 (2002).

60. *Fox Television*, 280 F.3d. at 1042.

61. *Id.* at 1048.

62. *Notice of Proposed Rulemaking 2002*, *supra* note 55, at para. 18; *see also Fox Television*, 280 F.3d. at 1034 (quoting 47 U.S.C. § 161).

63. *Notice of Proposed Rulemaking 2002*, *supra* note 55, at para. 27.

64. *Id.*

65. *Id.* at paras. 29–30.

66. *Id.* at para. 29.

67. *See Matter of Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, 15 FCC Rcd. 20764–65 (1999) in which Commissioner Ness, quoting a letter by Senators Hollings and Dorgan to Chairman Kennard, stated that it was imperative that the, ‘[FCC] remain mindful of the careful balancing. . . the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment.’ I believe we have done that.”

68. *See Sinclair v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002); *Notice of Proposed Rulemaking 2002*, *supra* note 55, at 18510.

69. The *Sinclair* court elaborates on American courts’ general presumption against judicial review of FCC regulatory line-drawing. That court applied this presumption to the “voice-count test” that the FCC proposed to promote diversity. *Sinclair*, 284 F.3d 148.

added that promoting ownership diversity as a means to achieving viewpoint diversity serves a legitimate government interest, and has, in the past, survived rational basis review.<sup>70</sup> When launching the 2002 Biennial Review, the FCC stretched the finding in *Sinclair* by stating, “The interests that government may promote through content neutral rules also include competition – both the promotion of competition and the prevention of anti-competitive practices and results.”<sup>71</sup>

The FCC, in a section of the 2002 Biennial Review NPRM, discussed four possible proxy methodologies for assessing diversity: viewpoint diversity, source diversity, program diversity, and outlet diversity.<sup>72</sup> Viewpoint diversity is a content-based measurement and policy.<sup>73</sup> While both source diversity and program diversity examine content indirectly, viewpoint diversity requires a direct analysis of the content itself.<sup>74</sup> More importantly, viewpoint diversity, “has been the touchstone of the [FCC]’s ownership rules and policies. We remain fully committed to preserving citizens’ access to a diversity of viewpoints through the media.”<sup>75</sup>

Yet, when dealing with viewpoint diversity as a measurement, the FCC expressed concerns that regulations involving judgments about content would be inherently subjective, and thus problematic under the First Amendment.<sup>76</sup> The FCC admitted that it questioned whether viewpoint diversity, a longstanding policy objective, should retain the central, “touchstone” position in policy implementation for media ownership rules. The FCC sought comment on whether viewpoint diversity should be a primary goal, and whether source diversity or program diversity, as simple counting methodologies, could be employed as proxies in place of viewpoint diversity.

Viewpoint diversity has been a central policy objective of the [FCC]’s ownership rules. We seek comment on whether viewpoint diversity should continue to be a primary goal of the [FCC]’s decision-making. The [FCC] has not viewed source and outlet diversity as policy goals in and of themselves, but as proxies for viewpoint diversity. Should the [FCC] continue to use source and outlet diversity as proxies to protect and advance viewpoint diversity?<sup>77</sup>

Put another way, the FCC’s stated objective in the 2002 Biennial Review was to redefine the diversity goals of media ownership policy by

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70. *Notice of Proposed Rulemaking 2002*, *supra* note 55, at para. 30; *see Sinclair*, 284 F.3d at 159–60 (“The [FCC] had acted rationally, despite the inconclusiveness of the rulemaking record, in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint.”) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 570 (1990)).

71. *Notice of Proposed Rulemaking 2002*, *supra* note 55, at para. 30.

72. *Id.* at paras. 35–41.

73. *See id.* at para. 35.

74. *See id.* at paras. 37, 38.

75. *Id.* at para. 35.

76. *Id.* at para. 20.

77. *Id.* at para. 41.

using the competition objective as a proxy for localism and diversity. Relying on a raw count of media outlets, including newspapers, broadcasters, cable, and the Internet,<sup>78</sup> the agency shifted media ownership policy away from the viewpoint diversity objective by creating an ownership environment that would “advance diversity without regulatory requirements.”<sup>79</sup> To this end, the FCC sought empirical evidence from interested parties on the topics of media usage and possible media substitution.

In considering these questions, we are particularly interested in the actual experience of the media industry. Has consolidation in local markets led to less or greater diversity? Commenters are encouraged to submit empirical data and analysis demonstrating both the change (either decrease or increase) in diversity levels and the causal link, as opposed to mere correlation, between those changes and greater consolidation in local markets. Evidence comparing the levels of diversity in local communities with different levels of media concentration would be especially useful.<sup>80</sup>

As further indication of relegating viewpoint diversity to a secondary concern, the FCC also addressed the effects of ownership consolidation on the advertising market. After noting its status “as the steward of the Communications Act,” the [FCC] went on to clarify their belief that its role is “charged with evaluating the potential benefits and harms to the viewing and listening public, not to advertisers.” However, after asserting this belief, the FCC then requested comments on whether its authority under the Communications Act justified basing media ownership limits on the advertising market.<sup>81</sup> Additionally, the FCC requested commenters to submit empirical evidence dealing with effects on consolidation on the advertising market.<sup>82</sup>

On July 2, 2003, the FCC released an Order in the 2002 Biennial Review proceeding.<sup>83</sup> Concluding the 2002 Biennial Review,<sup>84</sup> this Order would set the stage for judicial review by the Third Circuit Court of Appeals in a challenge brought by Prometheus Radio Project. The Order modified the local television multiple ownership rule and now permitted a single party to own up to two television stations in markets with 17 or fewer television stations and up to three television stations in markets with 18 or more stations.<sup>85</sup> This order also added a “top four” provision to the local television ownership rule that prevents a party from acquiring a television station if a

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78. *Id.* at para. 42.

79. *Id.*

80. *Id.* at para. 43.

81. *Id.* at para. 59.

82. *Id.*

83. 2002 Biennial Review, *supra* note 12, at 13620.

84. *Id.* at para. 1.

85. *Id.* at para. 186.

proposed merger would cause the party to own two of the top four rated television stations in a market.<sup>86</sup>

The FCC's 2002 Biennial Review Order retained existing limits on local radio ownership as defined by the Telecommunication Act, but it made two significant changes to its method for calculating the size of a radio market.<sup>87</sup> First, the Order adopted market definitions for radio as defined by Arbitron,<sup>88</sup> which at the time was the entity that provided radio stations with ratings data.<sup>89</sup> Additionally, the Order now included local non-commercial stations when calculating the total number of stations in each market, a decision that functionally allowed for additional ownership consolidation at the local level.<sup>90</sup> The Order also retained the dual network rule,<sup>91</sup> which prohibited a merger between any two of the top four broadcast television networks, but the agency revised the national television ownership rule to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience.<sup>92</sup> With respect to bigger overhauls, the Order replaced two other existing media ownership rules: the newspaper-broadcast cross-ownership and the radio-television cross-ownership rule. The FCC replaced both with the Diversity Index,<sup>93</sup> a modified version of the Herfindahl-Hirschman Index (HHI) – an antitrust tool traditionally applied by the Department of Justice and the FTC for analyzing impact of mergers on market consolidation.<sup>94</sup>

A market's HHI score is the sum of market shares squared; thus a highly competitive market will have a lower HHI score than a concentrated one. The DOJ and FTC at the time rated markets with HHI scores above 1800 as

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86. *Id.* at para. 1, n.6.

87. *Id.* at paras. 273–86.

88. *Id.* at para. 275; *see id.* at paras. 276–81 for a deeper explanation of how the FCC came to their decision.

89. Previously, the FCC used a signal contour overlap methodology to define ownership parameters, a process which continued until the FCC adopted Arbitron Market definitions in 2003. In FCC 96-90, the FCC affirmed the signal contour policy, “define the relevant radio market as the area encompassed by the principal community contours (i.e., predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) 3 of the mutually overlapping stations proposing to have common ownership. (2) The number of stations in the market will continue to be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations. (3) The stations that will be included within the market will continue to be: operating commercial full-power stations, including daytimers and foreign stations.” Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 C.F.R. Section 73.3555, *Order*, 11 FCC Rcd. 12368, para. 4 (1996).

90. *Id.* at para. 280.

91. *Id.* at para. 600.

92. *Id.* at paras. 499–500.

93. *Id.* at para. 390.

94. *Id.* at para. 394.

“highly concentrated,” and if a proposed merger would exceed this limit, the agencies deem the merger as harmful to the competition in that market.<sup>95</sup>

The central theory of the FCC’s Diversity Index was the use of the market share-squared formula found in the HHI to identify mergers that resulted highly concentrated markets. The Diversity Index marked a substantial change in both procedure and policy and, mathematically, generated some questionable but legal merger arrangements.<sup>96</sup> Compounding the FCC’s struggles in deploying this new methodology, however, were gaps in traditional rulemaking procedures by the agency. None of the new limits, rule modifications, existence of the Diversity Index, or any rationale for any of the changes were made public ahead of the release of the Order implementing these changes on June 3, 2003.<sup>97</sup>

## VI. FIRST LOSS – PROMETHEUS RADIO PROJECT V. FCC

Groups of both “citizen petitioners”<sup>98</sup> and “deregulatory petitioners”<sup>99</sup> challenged the FCC’s 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated

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95. *Id.* at para. 79; see 1998 *Biennial Review*, *supra* note 10, at para. 47 (stating that commenters also remarked that a market with an HHI rating of 1800 was considered to be, “substantially concentrated”); see also *Prometheus I*, 373 F.3d at 418 for a brief discussion by the Third Circuit about diversity indexing change within the FCC.

96. Most notably is the example involving a college television station and the New York Times. *Prometheus I*, 373 F.3d at 408 n.39.

97. *Prometheus II*, 652 F.3d at 451 (holding that the FCC 2006 Quadrennial Review provided too little information to the public about what the FCC intended to do, that it did not sufficiently explain what the FCC considered as options, and that it did not provide sufficient time for public comment); Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC’s Incubator Program*, 24 COMM. L. & POL’Y 403, 416 (2019).

98. In the *Prometheus* ruling, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” “Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (“UCC”) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule.” *Prometheus I*, 373 F.3d at 381 n.1.

99. See *id.* at 381 n.2, stating that the “Deregulatory Petitioners,” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).”



the petitions.<sup>100</sup> Unlike the *Sinclair* and *Fox* cases which the D.C. Circuit Court of Appeals, the traditional venue for administrative agencies, the panel sent the case to the Third Circuit Court of Appeals, consolidating the challenges under lead plaintiff, Prometheus Radio Project. After a preliminary hearing, the Third Circuit stayed implementation of the FCC's rules pending review, and denied a petition filed jointly by members of the deregulatory petitioners and the FCC to return the case to the D.C. Circuit.<sup>101</sup>

The Third Circuit heard eight hours of oral argument, and on June 24, 2004, it released a 2-1 decision, written by Judge Thomas L. Ambro, which stayed and remanded most of the FCC's 2003 Order.<sup>102</sup> Among the primary reasons for remand was the FCC's arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.

[W]e have identified several provisions in which the [FCC] falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The [FCC]'s derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have 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. We thus remand for the [FCC] to justify or modify its approach to setting numerical limits.<sup>103</sup>

In terms of radio, the majority upheld the FCC's decision to change market definitions to the geographical market definitions provided by Arbitron<sup>104</sup> and the FCC's decision to include non-commercial stations when assessing the total number of stations in each market.<sup>105</sup> The majority also ruled that the agency's decision to retain the existing limits, essentially the limits within the Telecommunications Act, was unsupported and arbitrary and

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100. *Id.* at 382.

101. *Id.* at 389.

102. *Prometheus I*, 373 F.3d at 435; For example, the 2002 Biennial Review, *supra* note 12, para. 327 describes the cross-ownership rulemaking by the FCC — with foregoing explanation — with which the Third Circuit found fault.

103. *Id.*

104. The majority rejected the contention of the citizen petitioners that using Arbitron's market designations was a delegation of governmental power to a non-government agency. The ruling indicated that Arbitron will only provide a methodology for measuring market concentration, and cited the, "established specific safeguards to deter potential manipulation, including a two-year buffer period before any party can receive the benefit of either a change in Arbitron Metro market boundaries or the addition of more radio stations to the market." *Prometheus I*, 373 F.3d at 425 (citing 2002 Biennial Review, *supra* note 12, para. 278, n.584).

105. *Prometheus I*, 373 F.3d at 426.

capricious.<sup>106</sup> While generally supportive of the agency decision to use numeric limits in place of a case by case analysis, the majority declared the decision to retain the existing limits lacked reasoned analysis of the information within the docket, citing both the 34% in reduction in owners identified by the FCC study and the docket comments, both of which provided examples of consolidated radio groups eliminating local news production.<sup>107</sup>

The court also felt unpersuaded by the FCC's use of the economic literature, specifically game theory, which led the FCC to conclude that five equal sized competitors represented a sufficiently competitive market: The [FCC]'s numerical limits cannot rationally be derived from a "five equal-sized competitor" premise. We thus remand for the [FCC] to develop numerical limits that are supported by a rational analysis.<sup>108</sup>

The majority took a hard look at Congress's delegation in the Telecommunications Act and the requirements of Section 202(h), ruling that the delegation required the FCC to monitor the effects of competition and make adjustment to its regulations. Judge Ambro noted that the text of Section 202(h) omits the word "necessary" in its repeal or modify instruction.<sup>109</sup> This was significant as it set the stage for the review of the rules using a traditional view of the phrase, "necessary in the public interest."

So, in interpreting the [FCC]'s obligation under § 202(h) to review its broadcast media ownership rules to determine whether they are "necessary in the public interest," we adopt what the [FCC] termed "the plain public interest" standard under which "necessary" means "convenient," "useful," or "helpful," not "essential" or "indispensable."<sup>110</sup>

The majority was not ignorant to the intent and context in which Congress enacted the mandate of Section 202(h), and while Judge Ambro's decision described Section 202(h) as deregulatory in nature, the ruling rejected the suggestion of the earlier *Fox* and *Sinclair* decisions that the deregulatory nature of the provision acted as a "one-way ratchet."

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106. The remand on this point is notable among the others because the majority does not suggest that ownership consolidation has gone, or is capable of going, too far, as was the underlying case against the cross-media limits and the Diversity Index. In fact, after the complicated discussion of the cross-media limits, the ruling is very simple. In the 1998 and 2000 reviews, the FCC decided that the existing limits were in the public interest. In 2002 the agency did not provide evidence to support this conclusion, and thus the ruling remands the local radio ownership rule to the agency for additional evidence and rationale. *Id.* at 430–35.

107. *Id.*

108. *Id.* at 434.

109. *Id.* at 393.

110. *Id.* at 394.

We do not accept that the “repeal or modify in the public interest” instruction must therefore operate only as a one-way ratchet, i.e., the [FCC] can use the review process only to eliminate then-extant regulations. For starters, this ignores both “modify” and the requirement that the [FCC] act “in the public interest.” What if the [FCC] reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.<sup>111</sup>

The majority interpreted Section 202(h) as a requirement to periodically justify existing regulations, which absent the review provision, the FCC would not have an obligation to complete.<sup>112</sup> Additionally, when the FCC engages in the review of its rules, it must determine if rules remain useful to the public interest. Rules deemed no longer useful must be repealed or modified.<sup>113</sup> But after reviewing a rule, regardless of what the FCC determined to be the proper action, whether “retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis.”<sup>114</sup>

Judge Ambro then invalidated the FCC’s new cross-ownership limits and Diversity Index methodology for failing hard look review.<sup>115</sup> While the ruling noted that the FCC’s decision to replace cross-ownership rules with the new limits was constitutional and allowable in context of Section 202(h)’s mandate, its procedure was its ultimate flaw, as the FCC failed to demonstrate a reasoned analysis.<sup>116</sup>

Ambro’s opinion also explored the FCC’s empirical support for the underlying conceptual relationship between viewpoint diversity and ownership. In terms of newspaper-broadcast cross-ownership, the FCC’s Order relied heavily on the Spavins Media Ownership Working Group study.<sup>117</sup> Spavin’s data indicated that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations. The FCC relied on this data, coupled with other empirical findings from a Project of Excellence in Journalism study, which stated that

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111. *Id.* at 394–95.

112. *Id.* at 395 (“§ 202(h) extends this requirement to the [FCC]’s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the [FCC]’s rulemaking authority and to contravene ‘traditional administrative law principles.’”).

113. *Id.*

114. *Id.* at 435.

115. *Id.* at 435; *see also* Motor Vehicle Mfr’s Ass’n v. State Farm, 463 U.S. 29 (1983) (establishing the “Hard Look Doctrine” later applied by the *Sinclair* court).

116. *Id.* at 418.

117. *Id.* at 398 (“The [FCC] principally relied on the findings of its MOWG study that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations, an average of 21.9 hours per week.”) (citing Thomas C. Spavins et al., *The Measurement of Local Television News and Public Affairs Programs* 3 (FCC Media Bureau Staff Research Paper 2002-7) (2002)).

newspaper-owned stations “were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features.”<sup>118</sup>

After this finding by Spavin, the FCC began the process of repealing the newspaper-broadcast cross-ownership ban, offering two rationales to do so. First, a blanket ban was no longer necessary to ensure diversity, a contention the FCC supported by citing the conclusion of the Pritchard MOWG study, “Commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice.”<sup>119</sup> The FCC’s second rationale was that other media sources at the local level, including cable and the Internet, made up for the loss of viewpoints when newspapers and broadcasts became commonly owned.<sup>120</sup>

The majority was entirely skeptical of the FCC’s rationale, citing the external criticism of the Pritchard MOWG study methodology, including the narrow scope of the data and lack of control group, but given the inconclusive evidence in the docket about viewpoint diversity’s relation to ownership, the majority ruled that FCC acted reasonably when concluding it lacked evidence of a uniform bias to justify upholding the provision implementing the ban on newspaper-broadcast cross-ownership.<sup>121</sup>

Likewise, the *Prometheus I* court upheld the FCC’s finding that cable and Internet news sources could supplement the diversity of viewpoints available in local markets, a conclusion drawn from the Waldfoegel 2002 MOWG study on media substitutability.<sup>122</sup> Despite this, the majority ruled that the agency had not provided a reasonable rationale for its decision, stating that the FCC’s evidence demonstrated that Internet and cable counted as sources for local news, but they did not replace or outrank newspapers or broadcast stations for local content. Basically, the Third Circuit believed that cable and Internet sources can count as local news, but not to the extent of replacing legacy media.

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118. *Id.*

119. *Id.* at 399.

120. *Id.* at 400.

121. The initial finding by the FCC could be described as evidentiary slight-of-hand. Relying on the discredited Pritchard 2002 MOWG Study, the FCC used the findings of the study to cast doubt on the uniformity of viewpoint by a single owner. Then by applying the evidence standard of Section 202(h), the agency said that because of the confusion over the validity of Pritchard’s data, it lacked evidence to uphold the ban on newspaper broadcast cross-ownership. In simpler terms, the FCC relied on questionable data in order to fail to provide evidence necessary to uphold a regulation it wanted to repeal, but lacked evidence to justify repeal, so that the rule could be repealed. See generally David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (FCC Media Ownership Working Grp.) (2002).

122. Although the majority questioned the weight assigned to these Internet contributions to diversity by the Diversity Index. *Prometheus I*, 373 F.3d at 408.

The [FCC]’s finding that a blanket prohibition on newspaper/broadcast cross-ownership is no longer in the public interest does not compel the conclusion that no regulation is necessary . . . As described above, the [FCC] found evidence to undermine the premise that ownership always influences viewpoint, but it did not find the opposite to be true. And while the [FCC] found that other media sources contributed to viewpoint diversity in local markets, it could not have found that the Internet and cable were complete substitutes for the viewpoints provided by newspapers and broadcast stations.<sup>123</sup>

The Third Circuit was also extremely skeptical of the FCC’s new approach to regulating media ownership using the Diversity Index. The court concluded that the FCC gave the Internet too much weight in the Diversity Index.<sup>124</sup> Judge Ambro’s opinion also suggested that the FCC’s assumption of equal market shares was inconsistent with the intended approach of the Diversity Index.<sup>125</sup> This inconsistency generated a set of unrealistic assumptions about the relative contributions of media outlets to viewpoint diversity within local markets. The assigning of equal shares within a media form did not “jibe” with the FCC’s decision to assign relative weights to each type of media, which in turn, created a problematic rationale for the use of the HHI formula at the heart of the Diversity Index.<sup>126</sup> The purpose of the Diversity Index was to facilitate a measurement of the actual loss of diversity caused by additional consolidation, a process designed to assess the changes to a market based on the “diversity importance” of the merging parties.

Judge Ambro’s decision also demonstrated the *Prometheus I* court’s skepticism of the FCC’s assignment of equal shares to media outlets that did not carry local news, stating that the result generated “an almost certainly . . . understated view of concentration.”<sup>127</sup> Finally the majority criticized the FCC’s commitment to making “the most conservative assumption possible” when estimating the effect of a merger on the availability of viewpoint diversity.<sup>128</sup>

The court supported the FCC’s decision to discount cable’s contribution to viewpoint diversity, but ruled that the same rationale which applied to cable should also apply to the Internet, stating the “decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational.”<sup>129</sup> The FCC properly excluded cable because of serious

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123. *Id.* at 400.

124. *Id.*

125. *Id.*

126. *Id.* at 408.

127. *Id.*

128. *Id.*

129. *Id.* at 405.

doubts as to the extent that cable provided independent local news—the FCC’s recognized indicator of viewpoint diversity in local markets.”<sup>130</sup>

Local news production, which the FCC functionally applied as a quantitative assessment of its localism objective, factored heavily into the majority questioning the weight assigned to the Internet. While the FCC used data from MOWG study, specifically the finding that 18.8% of the survey respondents listed the Internet as a source of local news, the survey design did not generate data indicating which websites users visited for news.<sup>131</sup> As such, the majority was skeptical that sites producing local news were not websites tied to existing media outlets.

There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an “independent” viewpoint and thus should not be considered as contributing diversity to local markets.<sup>132</sup>

On the local and independent production point, the majority slammed the FCC’s decision, stating the record lacked basic evidence to support the agency’s premise of independent news websites producing local news.<sup>133</sup> Additionally, the websites the FCC highlighted as potential local news contributors provided news national in scope.

The [FCC] does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet. According to the record, most sources of local news on the Internet are the websites for newspapers and broadcast television stations . . . (62% of Internet users get local news from newspaper websites, 39% visit television station websites). And the examples the [FCC] does cite—the Drudge Report and Salon.com—have a national, not local, news focus.<sup>134</sup>

The majority’s view of the Diversity Index also criticized the FCC’s inclusion of the important contributions of the Internet as a local news source at the time. In the 2003 Order,<sup>135</sup> the FCC purported that the Internet was a “virtual universe of information sources.”<sup>136</sup> This “universe” of diversity was

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130. *Id.* at 405 (citing 2002 Biennial Review, *supra* note 12, para. 394) (“News and public affairs programming is the clearest example of programming that can provide viewpoint diversity . . . [and] the appropriate geographic market for viewpoint diversity is local.”).

131. Nielsen Media Research, *Consumer Survey on Media Usage 1* (FCC Media Ownership Work Grp., Research Paper 2002-8) (2002).

132. *Prometheus I*, 373 F.3d at 405–06.

133. *Id.* at 406.

134. *Id.*

135. *Id.*

136. *Id.*

the FCC's rationale for its decision to include the Internet in its local diversity measurements, with the FCC arguing that the immense diversity of the Internet should automatically qualify the web as a source of viewpoint diversity.<sup>137</sup> The majority disagreed, stating, "[T]o accept this rationale we would have to distort the [FCC]'s own premise that local news is an indicator of viewpoint diversity."<sup>138</sup> In fact, the majority found that the FCC's evidence undermined the very argument the FCC put forward.

The [FCC] attempts to justify different treatment for cable and the Internet by suggesting that local cable news channels are only available in select markets, while the Internet is available everywhere. Not only is this distinction demonstrably false (as even the [FCC] acknowledged that almost 30% of Americans do not have Internet access), it is irrelevant. That the Internet is more available than local cable news channels does not mean that it is providing independent local news. On remand the [FCC] must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.<sup>139</sup>

On other points, the majority also criticized the FCC's lack of evidence, such as its suggestion that stations will increase the amount of news they provide upon merger, a contention entirely unsupported by data in the record.<sup>140</sup> Notably, the majority showed skepticism for the FCC's reluctance to assess actual media content and evaluate media usage as empirical measurements of viewpoint diversity. In the process of discounting even the constitutional and data collection problems the FCC used to justify this decision, the majority pointed right at the data cited by the agency to support its change to the Diversity Index. In MOWG 8, the FCC had ability to collect actual usage data by media type, where it avoided making a content distinguishing judgement by asking a survey question about where people went for local news.<sup>141</sup> Likewise critical of the data collection issue, the majority opinion suggests that not only are the FCC's objections to the collection of this type of data "vague and unexplained; there is no suggestion that obtaining actual-use data for outlets within a media type would be prohibitively more onerous than obtaining the same data for the media types themselves."<sup>142</sup> These shortcomings on the development of empirical evidence resulted in a remand of the relevant sections of the order to the FCC.

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137. *Id.*

138. *Id.* at 406.

139. *Id.* at 407.

140. *Id.* at 409 ("The [FCC] needs to undergird its predictive judgment that stations can freely change the level of their news content with some evidence for that judgment to survive arbitrary and capricious review.").

141. *Id.*

142. *Id.*

Because the [FCC]’s reasons for eschewing actual-use data in assigning market shares to outlets within a media type and assuming equal market shares are unrealistic and inconsistent with the [FCC]’s overall approach to the Diversity Index and its proffered rationale, we remand for the [FCC]’s additional consideration of this aspect of the Order.<sup>143</sup>

Judge Scirica dissented from the majority’s opinion in *Prometheus I*, primarily over the traditional administrative law premise that the court should provide the FCC more deference on implementation of the Diversity Index and proposed changes to the rules.<sup>144</sup> Despite this argument, the majority was quite deferential, stating that the agency was “entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets’ Diversity Index scores.”<sup>145</sup> The majority’s stated problem was agency consistency.<sup>146</sup> The FCC’s proposal for cross-ownership limits, by their design, allowed combinations where the increases for Diversity Index scores were higher than scores for some prohibited combinations.<sup>147</sup> As before, the FCC’s action on cross-media limits was “without doubt” arbitrary and capricious.<sup>148</sup>

The majority also addressed the FCC’s procedural approach during the 2002 Biennial Review, arguing that remand of the FCC’s cross-ownership limits was an appropriate method to resolve lingering issues about public notification of the changes. While the FCC provided notice of a new ownership assessment metric, it did not notify the public of the Diversity Index itself.<sup>149</sup> The FCC countered, claiming that it formulated the Diversity Index in response to comments, so it had no reason to seek additional comment on the Diversity Index.<sup>150</sup> The majority found this argument unpersuasive, even suggesting the FCC had acted with prejudice, by noting

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143. *Id.*

144. *Id.* at 435 (Scirica, C.J., dissenting in part, concurring in part).

145. *Id.* at 410.

146. *See id.* at 411.

147. *Id.* (“Consider the mid-sized markets (four to eight stations), where the [FCC] found that a combination of a newspaper, a television station, and half the radio stations allowed under the local radio rule would increase the average Diversity Index scores in those markets by 408 (four stations), 393 (five), 340 (six), 247 (seven), and 314 (eight) points respectively. These permitted increases seem to belong on the other side of the [FCC]’s line. They are considerably higher than the Diversity Index score increases resulting from other combinations that the [FCC] permitted, such as the newspaper and television combination, 242 (four stations), 223 (five), 200 (six), 121 (seven), and 152 (eight). They are even higher than those resulting from the combination of a newspaper and television duopoly—376 (five stations), 357 (six), 242 (seven), and 308 (eight)—which the [FCC] did not permit.”).

148. *Id.* (“The [FCC]’s failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits.”).

149. *Id.* at 411–12 (referencing requirements pursuant to the Administrative Procedures Act (APA) §553(b)(3)); *See generally* Administrative Procedures Act, 5 U.S.C. § 553(b)(3) (1946).

150. *Id.* at 412, n.42 (rejecting the FCC’s argument that the Diversity Index was “simply an analytical tool” for measuring diversity).



that if the agency sought comment on the Diversity Index, some of its methodological flaws might have been discovered ahead of time.

As the Diversity Index's numerous flaws make apparent, the [FCC]'s decision to withhold it from public scrutiny was not without prejudice. As the [FCC] reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.<sup>151</sup>

*Prometheus I* also had a secondary effect. In January 2004, Congress inserted itself into the process during the Third Circuit's stay of the media ownership rule changes, passing an amendment to Section 202(c) of the Telecommunications Act which raised the national television ownership (audience) cap to 39%.<sup>152</sup> Congress also made two other changes. First, Congress replaced the FCC's biennial review obligation under Section 202(h) with mandatory quadrennial reviews. Second, Congress "insulated" the national television ownership limit's 39% audience cap from review under Section 202(h).<sup>153</sup>

## VII. ROUND TWO BEGINS – THE 2006 QUADRENNIAL REVIEW

After the Third Circuit issued its remand in 2004, the FCC took minimal action on media ownership policy beyond adjudicating merger actions. A new FCC chairman, Kevin Martin, took charge in March 2005, and the agency set aside media ownership issues pending the first quadrennial review scheduled for 2006.<sup>154</sup>

After more than two years of inaction, on June 21, 2006, the FCC began its first quadrennial review under the amended Section 202(h) of the Telecommunications Act.<sup>155</sup> At the beginning of the 2006 Quadrennial Review, the FCC suggested it designed the proceeding to respond to procedural issues from the *Prometheus I* remand, and it took early steps to resolve the matters, including public access to proceedings, during this review.<sup>156</sup> To this end, the FCC scheduled a series of six public hearings and

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151. *Id.*

152. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat 3.

153. *Id.*

154. *Biography of Kevin J. Martin*, FCC, <https://www.fcc.gov/biography-kevin-j-martin> [<https://perma.cc/VB7X-FEQK>] (last visited Feb. 21, 2020). *See also* Press Statement, Kevin J. Martin, Chairman, Fed. Comm'ns Commission, (Dec. 18, 2007), <https://transition.fcc.gov/kjm121807-ownership.pdf>.

155. 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 21 FCC Rcd. 8834, paras. 1, 7–8, n.10 (2006) [hereinafter *2006 Further Notice of Proposed Rulemaking*].

156. *See id.*

extended the comment period on the initial 2006 Quadrennial Review NPRM to 120 days.<sup>157</sup> The FCC also announced that it would make available up to \$200,000 in funding to develop a series of new evidentiary studies exploring how people obtained news and information, competition within types of media and across media platforms, marketplace changes since the 2002 Biennial Review, localism, minority participation and independent and diverse programming in today's media environment, and the impact of ownership on production of children's and family-friendly programming.<sup>158</sup> To limit concerns about the transparency of the process, the FCC also provided access to information about the proceeding and a range of empirical studies on a special website.<sup>159</sup>

Unfortunately, the agency did not publicly release all the information weighing on its decision making. A Senate hearing unearthed an unreleased FCC report from 2003 that empirically demonstrated local ownership of television stations added significant content to local television news broadcasts.<sup>160</sup> Shortly after this study released, news reports also surfaced that then-FCC Chairman Michael Powell ordered all copies of the draft study destroyed—Chairman Powell denied (and continues to deny) those allegations.<sup>161</sup>

Five days later, a second unreleased FCC study became public.<sup>162</sup> The study, titled "Review of the Radio Industry," criticized the FCC's implementation of media ownership policy, perhaps even more fiercely than the television localism study.<sup>163</sup> After examining the effects of consolidation on the radio industry between 1996 and March 2003, the report reached five major conclusions, all of which would have caused problems for the FCC if its 2002 Biennial Review docket included the empirical data. First, despite a nearly 6% increase in the number of radio stations overall, the number of owners decreased by 35% thanks almost entirely to mergers between existing owners.<sup>164</sup> Second, the largest group owner in 1996 had fewer than 65 radio

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157. The topic of public hearings was of specific importance to the FCC Commissioners, with Chairman Martin and Commissioners Copps, Adelstein, Tate, and McDowell all stating that increased surveying of the general public was pertinent to FCC regulation going forward. 2006 Quadrennial Regulatory Review, *supra* note 13, at 8859–8860, 8861–63, 8865–66, 8868–69.

158. *Id.* at 8859.

159. *Id.*; *but see id.* at 8863 for a rejoinder by Commissioner Copps, stating that the transparency of process agreed upon in the 2006 Quadrennial Review was inadequate, "I am deeply disappointed that this Notice does not contain a specific, up-front commitment to share proposed media concentration rules with the American people in advance of a final vote."

160. *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*, FCC 1-2 (2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267448A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf) [<https://perma.cc/WQR9-CURG>].

161. David Folkenflik, *FCC Study of TV Ownership Comes to Light*, NPR: MEDIA (Sept. 15, 2006), <https://www.npr.org/templates/story/story.php?storyId=6082952> [<https://perma.cc/CY6J-BUQP>].

162. *See id.*; *see also Review of the Radio Industry*, (FCC Media Bureau Staff Research Paper Series), <https://docs.fcc.gov/public/attachments/DOC-267479A1.pdf> (last visited Aug. 28, 2020) [hereinafter *The Media Bureau Staff Research Paper Series*].

163. *The Media Bureau Staff Research Paper Series*, *supra* note 162.

164. *Id.* at 2.

stations, which meant that the consolidation of ownership was even more significant than the 35% overall reduction in owners suggested.<sup>165</sup> In just seven years, the top two companies, Clear Channel Communications and Cumulus Broadcasting, acquired more than 1,200 and just over 250 stations respectively.<sup>166</sup> Third, at the local level, the report marked a downward trend in the number of owners in Arbitron markets.<sup>167</sup> Fourth, in terms of advertising competition, the data demonstrated that the top firm in each market controlled on average 46% of advertising revenues and that the top two firms controlled on average 76% of advertising revenues.<sup>168</sup> The report concluded that this concentrated control at least partially caused an 87% increase in advertising rates even as station ratings fell.<sup>169</sup> Finally, in terms of consolidation's effect on format diversity, the study suggested that while the numbers of formats remained largely steady overall, there was actually a slight reduction in the number of formats offered in the larger markets.<sup>170</sup>

Facing the requirements of the Third Circuit's remand and revelations from the uncovering of lost evidence, when the FCC acted to conclude its 2006 Quadrennial Review in late 2007, its proposals were best described as modest. The FCC proposed revising only one ownership rule, allowing a newspaper to own one television station or one radio station—a partial repeal of the 1975 prohibition on newspaper-broadcast cross-ownership, but only in the top 20 media markets.<sup>171</sup>

Meanwhile, in a parallel rulemaking proceeding, the FCC also released a new minority ownership policy.<sup>172</sup> Using established Small Business Administration (SBA) financial standards, the policy created a class of license applicants called “eligible entities.”<sup>173</sup>

The eligible entity policy represented a significant change from previous FCC minority ownership initiatives that provided direct enhancements and incentives to minorities.<sup>174</sup> In fact, the eligible entity proposal was not a direct minority ownership policy, but a broader and comprehensive policy for diversity, which the agency proposed could eventually include women and minorities as eligible entities.<sup>175</sup> To become an “eligible entity,” an applicant had to meet SBA standards as defined by

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165. *Id.* at 2–3.

166. *Id.* at 3.

167. *Id.* at 3–4.

168. *Id.*

169. *Id.* at 19.

170. *Id.* at 6–7.

171. *Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule*, FCC 2 (2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278113A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf) [<https://perma.cc/3PEX-582T>]; *see also* 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order on Reconsideration*, 23 FCC Rcd. 2010, para. 13 (2007).

172. *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd. 5922 (2008) [hereinafter *2008 Order*].

173. *Id.* at paras. 6–7.

174. *See id.*

175. *See id.* at para. 4.

total annual sales of an organization or its parent company.<sup>176</sup> For radio, the qualifying limit was \$6.5 million, and for television, the limit was \$13 million.<sup>177</sup> In addition, an eligible entity had to hold:

30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.<sup>178</sup>

A legal battle over jurisdiction delayed judicial review of the Order resulting from the 2006 Quadrennial Review. Although the Third Circuit claimed jurisdiction over the FCC's response to the remand issued in *Prometheus I*, both the FCC and members of the deregulatory petitioners attempted to move judicial review to the D.C. Circuit. The petitions failed, the Third Circuits consolidated the cases, and oral arguments occurred in front of the panel on February 11, 2011.

## VIII. LOSS NUMBER TWO – *PROMETHEUS II*

Returning to the Third Circuit resulted in another significant legal setback for the FCC. Judge Ambro issued another remand, this time of the FCC's 2007 decisions on media ownership, citing the agency's continuing series of procedural and evidence problems.<sup>179</sup> The panel also incorporated the FCC's eligible entry proposal into the review along with the largely unresolved remand from *Prometheus I*.<sup>180</sup> Suggesting that the agency had "in

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176. *Id.* at para. 6.

177. *Id.* at para. 6.

178. 2008 Order, *supra* note 172, para. 6.

179. "[T]he [FCC] failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based 'eligible entity' definition, and the FCC's decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women." *Prometheus II*, 652 F.3d at 437.

180. The Third Circuit overturned the FCC's 2003 Order in *Prometheus I*. See *Prometheus I*, 373 F.3d at 435.

large part punted” on the minority ownership issue,<sup>181</sup> the second decision on remand mandated that the FCC address minority ownership before the completion of the then in-progress 2010 Quadrennial Review.

The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.<sup>182</sup>

The ruling also signaled that the FCC strained the majority’s patience on procedural matters and with its continuing failure to develop a rational media ownership policy decision. The panel provided the FCC with the administrative law version of the “there’s no crying in baseball” speech and instructed the agency to resolve lingering evidence problems.

Stating that the task is difficult in light of *Adarand* does not constitute considering proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the [FCC] requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.<sup>183</sup>

Despite this blow, the Third Circuit agreed with the agency on a few points in the 2008 Order.<sup>184</sup> Rejecting an argument proposed by CBS and Clear Channel that media ownership rules were unconstitutional attempts by the FCC to regulate content,<sup>185</sup> the majority also agreed with the FCC and

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181. “Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.” *Prometheus II*, 652 F.3d at 471–72.

182. *Id.*

183. *Id.* at 484, n.42.

184. *Id.* at 458.

185. *Id.* at 465.

reaffirmed the belief that the media ownership rules served a substantial government interest in promoting diversity.

We agree with the FCC that the rules do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity. In *NCCB*, the Court said that limiting common ownership was a reasonable means of promoting these interests. Therefore, as we did in *Prometheus I*, we hold that the [FCC's] continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.<sup>186</sup>

Despite the FCC's relatively modest approach taken on media ownership in 2006 Quadrennial Review, the Third Circuit found that the FCC's rationale, ultimate policy decision, and lack of evidence to support its decisions, demonstrated that the FCC failed to create an adequate method of addressing diversity ownership.<sup>187</sup>

## IX. SINKING MORALE – THE 2010 AND 2014 QUADRENNIAL REVIEWS

Following its second loss in court and facing another remand that now applied to a majority of its media ownership policies, the FCC nominally continued the ongoing 2010 Quadrennial Review required under Section 202(h).<sup>188</sup> After *Prometheus II*, the FCC's 2010 Quadrennial Review bogged down and became an extended process before expanding to incorporate the Third Circuit's latest remand on minority ownership policy. As time passed, the FCC demonstrated minimal public commitment to conducting the review process or proposing new minority ownership policies.<sup>189</sup> Ultimately, the agency ran out the four-year clock on the 2010 Quadrennial Review without releasing another decision.<sup>190</sup> As time to complete the proceeding expired, the

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186. *Id.* at 464-65; Citing *Nat'l Citizens Comm. for Broad. v. FCC*, 436 U.S. 775, 797 (1978) in which J. Marshall stated that diversity and its effects are elusive concepts, and held that the FCC was entitled to rely on the judgment that commonly held station-newspaper combinations would be unlikely to provide "true diversity."

187. *Id.* at 469 (citing Commissioner Copps' part concurrence part dissent, commenting that, "We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn't have. . . . [W]e don't even know how many minority and female owners there are. . . ." 2008 *Order*, *supra* note 172, at 5983).

188. 2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant of Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371, para. 1 (2014) [hereinafter 2014 Quadrennial Review NPRM].

189. *Prometheus II*, 652 F.3d at 465.

190. See 2014 Quadrennial Review NPRM, *supra* note 188, para. 74 & nn. 185–86 in which the FCC explains it disagreed with the Third Circuit's holdings that the agency's rulemaking procedures and outcomes on media ownership were insufficient.

agency continued the 2010 Quadrennial Review as well as a formal response to the remands issued by the Third Circuit in 2004 and 2011 by extending the ongoing process into the launch of the 2014 Quadrennial Review.

Launch of the 2014 Quadrennial Review proceeding further highlighted the FCC's limited actions on media ownership policy.<sup>191</sup> In the following year, the agency failed to release a new proposal and released no new empirical research evaluating the outcomes of media ownership policy. Following the extended period of inaction by the agency, the deregulatory petitioners, the citizen petitioners, and the FCC returned to the Third Circuit in April 2016.<sup>192</sup>

## X. YET ANOTHER LOSS – *PROMETHEUS III*

During a hostile oral argument, the judges on the panel pressed the FCC for a straight answer as to when the agency would conclude the open proceedings and take some type of formal action.<sup>193</sup> Although the FCC was reluctant to commit to a timeline for final agency action, agency lawyers informed the court that a draft of new rules would be circulated among FCC commissioners before the end of June 2016.<sup>194</sup>

In response, the Third Circuit panel in *Prometheus III* mandated agency action to conclude the open 2010 and 2014 proceedings and deliver a new proposal for a functional minority ownership policy before the end of the calendar year.<sup>195</sup> The court argued that the FCC's delay "keeps five broadcast ownership rules in limbo."<sup>196</sup> As an example, the court stated that the 1975 ban on local cross-ownership of daily newspapers and broadcast stations remained in effect even though the FCC had determined more than a decade earlier that the ban was no longer in the public interest.<sup>197</sup> This delay also resulted in "significant expense to parties that would be able, under some of the less restrictive options being considered by the [FCC], to engage in profitable combinations."<sup>198</sup> The court also observed that the FCC's delay "hamper[ed] judicial review because there is no final agency action to challenge."<sup>199</sup>

The FCC's ongoing failure to develop—and support with empirical evidence—a policy plan to increase ownership of stations by women and minorities tested the Third Circuit's patience.

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191. 2014 Quadrennial Review NPRM, *supra* note 188, at paras. 1, 3.

192. *Prometheus III*, 824 F.3d at 37.

193. *See id.* at 51.

194. *See id.* at 53–54.

195. *See id.* at 52.

196. *Id.* at 51.

197. *See id.*

198. *Id.* at 51–52.

199. *Id.* at 52.

The FCC presents two arguments for why we should not order relief. Both fail. The first is that it is not yet in violation of *Prometheus II* because we instructed it to address the eligible entity definition during the 2010 Quadrennial Review, which is still ongoing. This contention improperly attempts to use one delay (the Quadrennial Review) to excuse another (the eligible entity definition). By this logic, the [FCC] could delay another decade or more without running afoul of our remand. Simply put, it cannot evade our remand merely by keeping the 2010 review open indefinitely.<sup>200</sup>

Judge Ambro's opinion in *Prometheus III* reiterated the point from *Prometheus II* that the FCC's inability to resolve the impasse over media ownership policy might eventually lead the court to declare the entire structural regulation approach arbitrary and capricious.

Equally troubling is that nearly a decade has passed since the [FCC] last completed a review of its broadcast ownership rules. . . . Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay—creating, in effect, complete deregulation in the industry. This is the administrative law equivalent of burning down the house to roast the pig, and we decline to order it. However, we note that this remedy, while extreme, might be justified in the future if the [FCC] does not act quickly to carry out its legislative mandate.<sup>201</sup>

After cataloguing what it saw as the shortcomings in the FCC's most recent actions, the Third Circuit seemed resigned to continue with more litigation over the FCC's broadcast ownership rules. The last paragraph of the opinion noted:

This is our third go-round with the [FCC]'s broadcast ownership rules and diversity initiatives. Rarely does a trilogy benefit from a sequel. To that end, we are hopeful that our decision here brings this saga to its conclusion. However, we are also mindful of the likelihood of further litigation.<sup>202</sup>

## XI. THE FCC GIVES IT ANOTHER GO

In response, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as a response to the *Prometheus I* and *Prometheus II* remands. Although the FCC recognized that high speed Internet and other technological innovations unregulated by the FCC have changed how many Americans consume media, it stressed that

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200. *Id.* at 49.

201. *Id.* at 37.

202. *Id.* at 60.



localism—and the newspapers, television stations, and radio stations that provide local content—remain indispensable. Specifically, the FCC stated:

Traditional media outlets . . . are still of vital importance to their local communities and essential to achieving the [FCC’s] goals of competition, localism, and viewpoint diversity. This is particularly true with respect to local news and public interest programming, with traditional media outlets continuing to serve as the primary sources on which consumers rely.<sup>203</sup>

Most notably, after six years of inaction, the FCC decided to maintain existing media ownership rules and also offered a full recycle of the eligible entity minority ownership program that the Third Circuit ruled on in *Prometheus II*.<sup>204</sup> “[T]he public interest is best served by retaining our existing rules, with some minor modifications.”<sup>205</sup>

[W]e find that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. The competition-based rule indirectly advances our diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.<sup>206</sup>

Significantly, the FCC’s decision to make no changes to existing rules brought the agency into conflict with the mandates of Section 202(h), as the agency lacked any direct evidence to sustain the existing rules.<sup>207</sup> Instead, the FCC relied only on competition as a proxy indicator to justify the rules, saying that the other two key elements of media ownership policy, localism and viewpoint diversity, no longer mattered in assessing the state of the media environment.

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203. 2014 Quadrennial Review NPRM, *supra* note 191, para. 1.

204. *Id.* at para. 4.

205. Comments Invited on Section 214 Application(S) to Discontinue Domestic Non-Dominant Carrier Telecommunications Services, *Public Notice*, 31 FCC Rcd 9864, para. 3 (2016).

206. *Id.* at para. 125.

207. *See id.*

In the *Order*, the [FCC] finds that the current Local Radio Ownership Rule remains necessary in the public interest and should be retained with a limited modification. The [FCC] finds that the rule is necessary to promote competition. The radio ownership limits also promote viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. Similarly, [the FCC] find[s] that a competitive local radio market helps to promote localism, as a competitive marketplace will lead to the selection of programming that is responsive to the needs and interests of the local community. However, the *Order* does not rely on viewpoint diversity or localism as a justification for retaining the rule. The [FCC] finds also that the Local Radio Ownership Rule is consistent with the goal of promoting minority and female ownership of broadcast radio stations. The [FCC] ultimately concludes that these benefits outweigh any burdens that may result from the decision to retain the rule without modification.<sup>208</sup>

Likewise, in the face of a clear direction by the court in the remand in *Prometheus II* in 2011 and the decision in *Prometheus III* in 2016 to develop a functional minority ownership policy, the FCC chose to essentially recycle the eligible entity program proposed in 2007. Even with significant empirical evidence available that supported the conclusion that ownership by minorities or women expands the diversity of available content, the FCC chose to try again with a policy that the Third Circuit already deemed unworkable.

[W]e disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the [FCC] has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.<sup>209</sup>

The FCC's action, or lack thereof, risked antagonizing the court. In *Prometheus II*, the Third Circuit clearly ordered the FCC to address the standards and develop a policy for minority ownership:

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208. *Id.* at para. 8.

209. *Id.* at para. 313.

The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.<sup>210</sup>

But instead of following the Third Circuit’s command, the FCC argued that the available data did not support changing media ownership rules, choosing instead to selectively interpret and apply the available data.

In addition, we do not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.<sup>211</sup>

Legal challenges for non-action quickly followed the FCC’s decision, but in November 2017, before those challenges reached oral argument, FCC leadership changed as a result of the 2016 presidential election. Now under new leadership of Chairman Ajit Pai, an appointee of President Donald Trump,<sup>212</sup> the FCC released a new media ownership policy as an Order on Reconsideration of the August 2016 Order.<sup>213</sup> The Order on Reconsideration included an elimination of the newspaper-broadcast cross-ownership rule<sup>214</sup> and the radio-television cross-ownership rule.<sup>215</sup> It also eliminated the eight-

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210. *Prometheus II*, 652 F.3d at 471.

211. 2014 Quadrennial Review NPRM, *supra* note 188, para. 127.

212. 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802, 9888 (2017) [hereinafter *2014 Quadrennial Review Reconsideration Order*] (statement of Chairman Ajit Pai).

213. *Id.* at para. 1.

214. *See id.* at para. 2; *see also id.* at para. 15 (stating that the FCC no longer believed that the newspaper-broadcast cross-ownership rule promoted “viewpoint diversity, localism, or competition” and therefore, “does not serve the public interest”).

215. *Id.*

voices test in the local television ownership rule, replacing it with a case-by-case adjudication of mergers that ran afoul of the top four station prohibition.<sup>216</sup> The changes also included an elimination of the attribution rule for television Joint Service Agreements (JSAs).<sup>217</sup> Unlike the Second Report and Order from August 2016, the Order on Reconsideration neither included a revision to the local radio ownership rule nor directly addressed the Third Circuit's mandate to develop a viable minority ownership policy.<sup>218</sup>

While consolidated cases challenging the original 2016 Order and 2017 Order on Reconsideration pended in *Prometheus IV*, the FCC released its initial proposal for a new minority ownership policy, called the "incubator program"<sup>219</sup> as part of a concentrated effort to break the legal impasse over media ownership policy.<sup>220</sup> The incubator proposal paved avenues for additional ownership consolidation, including opportunities to exceed the local limits set by Congress in the Telecommunications Act for companies willing to incubate a startup through assistance and foster new entrant broadcasters.<sup>221</sup> Under the incubator program, existing operators will provide financial, operational, and technical guidance to new or diverse entities.<sup>222</sup> The Order implementing the new incubator program released in August 2018 just ahead of the Third Circuit's order to respond to the challenges to the 2016 and 2017 decisions.<sup>223</sup> The incubator program focused on developing new ownership entities in broadcast radio.<sup>224</sup> The FCC argued that radio required fewer staff, less technical experience, and a far smaller financial commitment than broadcast television.<sup>225</sup>

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216. *See id.* at para. 66; *see also id.* para. 76 (elaborating on other reasons for the elimination of the eight-voices test).

217. *See id.* at 9846, para. 96; *see also id.* at 9849, paras. 102–3 (in which the FCC further discusses its reasoning in eliminating the attribution rule for television JSAs).

218. *See id.* at para. 7, in which the FCC notes the existence of the *Prometheus Radio Project* line of cases, but does not mention the majority's remand on a functional minority ownership rule. Instead the FCC merely notes that the case involves, "Various diversity-related decisions, certain media ownership rules and the decision not to attribute SSAs."

219. *Id.* at para. 126.

220. *Id.* at para.127; *see also* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Report and Order*, 33 FCC Rcd. 7911, para. 1 (2018) [hereinafter *2018 Incubator Policy*] (in which the FCC describes the Incubator Program as method to foster new and diverse voices into the broadcast industry).

221. *2014 Quadrennial Review Reconsideration Order*, *supra* note 212, at para. 127.

222. *See id.*

223. *See Prometheus IV*, 939 F.3d 567 (3d Cir. 2019).

224. *2018 Incubator Policy*, *supra* note 20, at para. 6.

225. *Id.* at para. 7.

The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the [FCC]'s existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market.<sup>226</sup>

To be eligible for the incubator program, a startup entity must meet two criteria. The first prong of eligibility ties to an update of the FCC's entrant bidding credit standard.<sup>227</sup> To meet this new standard, the incubating entity must not have owned or have an attributable interest in more than three full service AM or FM radio stations and may not have any attributable interest in any broadcast television stations. The second requirement for the new initiative was that an incubated entity must meet the criteria established for the Eligible Entity designation proposed by the FCC in 2007.<sup>228</sup> This is the previously used designation remanded in *Prometheus II* and *Prometheus III*. Despite these remands, the FCC chose to use the designation yet again, this time for incubated entities.<sup>229</sup>

## XII. HERE WE GO AGAIN: THE FOURTH, MOST RECENT, BUT PERHAPS NOT FINAL LOSS – *PROMETHEUS IV*

The consolidated challenges to the 2016, 2017, and 2018 Orders on media ownership returned to the Third Circuit for oral arguments in June 2019. As before, the panel appeared skeptical of the FCC's decision making to the point that one of the attorneys representing a group of the deregulatory petitioners used her available time to argue for limiting the scope of a potential remand.<sup>230</sup>

On September 23, 2019, in the fourth and final 2-1 decision written by Judge Ambro, the Third Circuit handed down the fourth *Prometheus Radio Project* decision which, in practical terms, undermined the FCC's decision

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226. *Id.*

227. *Id.* at para. 19; 2008 Order, *supra* note 172, at 5925.

228. *Id.*

229. 2018 Incubator Policy, *supra* note 20, at para. 19.

230. Oral Argument at 16:45, 37:19, 1:05:25, *Prometheus Radio Project v. FCC (Prometheus IV)*, 939 F.3d 576, 589 (3d Cir. 2018) <http://www2.ca3.uscourts.gov/oralargument/audio/15-3863HowardStirkHoldigsLLCetalvFederalCommunicationCommissionetal.mp3>.

making from 2011 to 2019.<sup>231</sup> The scope of the panel's review included the 2016 Report and Order, the 2017 Order on Reconsideration, and the 2018 incubator program.

Here we are again. After our last encounter with the periodic review by the [FCC] of its broadcast ownership rules and diversity initiatives, the [FCC] has taken a series of actions that, cumulatively, have substantially changed its approach to regulation of broadcast media ownership. First, it issued an order that retained almost all of its existing rules in their current form, effectively abandoning its long-running efforts to change those rules going back to the first round of this litigation. Then it changed course, granting petitions for rehearing and repealing or otherwise scaling back most of those same rules. It also created a new "incubator" program designed to help new entrants into the broadcast industry. The [FCC], in short, has been busy.<sup>232</sup>

While the Third Circuit suggested the agency had been busy in comparison to the years of inaction during the 2010 and 2014 Quadrennial Reviews, the panel ruled that yet again the FCC failed to resolve the two core issues it botched in the prior cases: providing empirical evidence to support a rational policy decision and proposing a policy that would increase ownership by women and minorities.

We do . . . agree with the last group of petitioners, who argue that the [FCC] did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the [FCC's] conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years.<sup>233</sup>

The FCC showed no embarrassment to admit that the failure to respond to the court's earlier mandates was intentional. The panel suggested that FCC did not even attempt to argue that it followed the Third Circuit's instructions.<sup>234</sup> Judge Ambro's decision matched the tone of oral argument,

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231. *Prometheus IV*, 939 F.3d at 589 ("We do conclude... that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order").

232. *Id.* at 572–73.

233. *Id.* at 573.

234. *Id.* at 585 ("Problems abound with the FCC's analysis. Most glaring is that, although we instructed it to consider the effect of any rule changes on female as well as minority ownership, the [FCC] cited no evidence whatsoever regarding gender diversity. It does not contest this.").

pointing out that by any rational analysis the FCC's effort to support its choices was inadequate and could not even pass a more deferential review.

The only 'consideration' the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand. . . . Even just focusing on the evidence with regard to ownership by racial minorities, however, the FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class.<sup>235</sup>

Judge Ambro's decision proposed the need for the FCC to recognize that the outcomes of ownership policy are not natural effects, but rather the results of choices made by the agency. Recognizing this will likely not be the last review of media ownership policy, Judge Ambro states that in future reviews, the FCC will have to show its work and even determine whether other choices or approaches might be better.

And even if we only look at the total number of minority-owned stations, the FCC did not actually make any estimate of the effect of deregulation in the 1990s. Instead it noted only that, whatever this effect was, deregulation was not enough to prevent an overall increase during the following decade. The [FCC] made no attempt to assess the counterfactual scenario: how many minority-owned stations there would have been in 2009 had there been no deregulation.<sup>236</sup>

In the judgement, the Third Circuit vacated and remanded the 2017 Reconsideration Order and the incubator program to the FCC and vacated and remanded the definition of "eligible entities" in the 2016 Report and Order.<sup>237</sup> The Third Circuit, yet again, retained jurisdiction over the remanded issues and all other petitions for review.<sup>238</sup>

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235. *Id.* at 585–86.

236. *Id.* at 586.

237. *Id.* at 587–88.

238. *Id.* ("Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the 'eligible entity' definition from the 2016 Report & Order. On remand the [FCC] must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the [FCC] must provide a substantial basis and justification for its actions whatever it ultimately decides.").

### XIII. HERE WE ARE AGAIN, AGAIN – WHERE WE ARE

The day after the decision released, the FCC also released an Order approving a merger of TV stations under one of the ownership deregulations vacated in *Prometheus IV*.<sup>239</sup> Then the FCC and the National Association of Broadcasters (NAB) each requested a rehearing and en banc review on November 7, 2019. The FCC's filing argued that the Third Circuit had for fifteen years functionally replaced the FCC's authority on media ownership policy.

Through its several remands, the panel has effectively replaced the [FCC]'s broad-ranging public interest analysis (which is focused by statute on competition but historically has included considerations of localism and diversity) with a narrow inquiry into the effect of the FCC's rules on female and minority ownership.<sup>240</sup>

As it had done in oral argument in June 2019, the FCC conflated the standards for evidence between the Administrative Procedure Act and Section 202(h) of the Telecommunications Act, stating that there was no standard requiring the agency to produce evidence of the type the panel demands on remand.<sup>241</sup> Further, the FCC claimed that the evidence on minority ownership that the Third Circuit demanded was impossible to produce, and as such, the panel had set the agency up to fail.

Faced with daunting instructions on remand—to collect decades-old data that may not exist, to conduct analyses that are not defined, and to consider unspecified alternatives, all to satisfy legal standards that are unmoored from the 1996 Act or the APA—the [FCC] has been set up for failure.<sup>242</sup>

Less than two weeks later, on November 20, 2019, Judge Ambro authored a decision denying a review by the full panel. The full panel review sought by the FCC and the NAB would not occur.

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239. *Consent to Assign Certain Licenses from Red River Broadcast Co., LLC to Gray Television Licensee, LCC, Memorandum Opinion and Order*, 34 FCC Rcd. 8590 (2019).

240. Petition of Federal Communications Commission and United States of America for Rehearing en banc at 7-8, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) (en banc) (No. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943, 18-3335).

241. *Id.* at 2.

242. *Id.* at 3.



The petitions for rehearing filed by Respondents and Intervenors in support of Respondents in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court *en banc* are denied.<sup>243</sup>

On November 29, 2019, the panel issued a mandate formally implementing the remand. On December 20, 2019, the FCC's Media Bureau responded to the mandate with an order which concluded the 2014 Quadrennial Review, the 2010 Quadrennial Review, and the incubator program.<sup>244</sup> The Media Bureau's Order reimplemented the long-standing newspaper-broadcast cross-ownership ban, radio-television cross-ownership rule, local television ownership rule, local radio ownership rule, and television JSA attribution rules.<sup>245</sup> The FCC marked the 2017 Order on Reconsideration and the incubator program as repealed.<sup>246</sup> Finally, the 2016 Order's reinstatement of the eligible entity designation was also repealed in line with the Third Circuit's remand in *Prometheus IV*.<sup>247</sup> In summary, the FCC has once again returned media ownership policy to the status quo embraced by the agency in the August 2016 Second Report and Order, functionally leaving most media ownership rules where they have been since the decision in *Prometheus I* in 2004, and arguably since the implementation of the Telecommunications Act.

#### XIV. A NEW, OLD APPROACH

At the center of the FCC's struggle is the continuing reliance on a largely unsupported conceptual relationship between ownership and diversity. While the FCC certainly has employed economic mechanisms to promote competition, the agency has used ownership as a proxy for the policy

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243. *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019), *reh'g en banc denied* (3d Cir. Nov. 20 2019).

244. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets; Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Order*, 34 FCC Red. 12360, paras. 1–3 (2019).

245. *See id.*

246. *See id.*

247. *Id.*

goal of diversity.<sup>248</sup> This approach to policy implementation is problematic and has been a significant obstacle to rational policy design since the passage of the local newspaper-broadcast cross-ownership ban in 1975.

Notably, there is limited empirical data that supports the idea that either internal or external competition is increasing content diversity among the larger ownership structures the agency pursues. Even in proposing the minority ownership proposals, including the 2007 eligible entity definition and the 2018 incubator program, the FCC attempted to shoehorn in some additional ownership diversity without any consideration for what the agency is actually tasked with, namely creating content diversity. Data repeatedly supports the idea that smaller ownership structures, especially those that include stations owned by women or minorities, are the most likely to provide diverse content.<sup>249</sup> While this is a technical point of this discussion, it is an important one.

As Congress removed the FCC's decision-making role as the expert agency, the FCC responded by quickly implementing the new ownership limits mandated by the Telecommunications Act.<sup>250</sup> This decision by the FCC started a chain of problems for the agency that lingers today, since the agency started the media ownership review process with a limited understanding of the current media environment, but despite this limited understanding, allowed six years and the 1998 and 2000 Biennial Reviews to pass without critically assessing the outcomes of its policies.<sup>251</sup> By the time the agency took stock of the changes to the media environment during the 2002 Biennial Review, the FCC could not support the changes it implemented, going so far as to hide empirical evidence about those changes and forcing the agency to develop the Diversity Index in hopes that the index would allow further changes.<sup>252</sup> Unfortunately for the FCC, by the time it proposed the Diversity Index, citizens had seen the outcomes of media ownership policy and sought judicial review. Once media ownership policy reached the Third Circuit, the game was over for the FCC, and the agency has been losing ever since.

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248. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 794–95 (1978) (stating that, “the [FCC] has long given ‘primary significance’ to ‘diversification of control of the media of mass communications,’ and has denied licenses to newspaper owners on the basis of this policy... so as to promote diversification of the mass media as a whole”).

249. See Carolyn M. Byerly, *Gender-and-Race-Conscious Research Toward Egalitarian Broadcast Ownership Regulation*, FED. COMM. COMM'N, (Jan. 27, 2010), <https://transition.fcc.gov/ownership/workshop-012710/byerly.pdf> [<https://perma.cc/2DYC-XB5B>](stating that previous findings of empirical studies indicate that diverse ownership of broadcasting stations leads to audiences which feel the material better fits their community's interests and needs); see also Sandra Fulton, *We Still Need Diversity and Minority Ownership in our Media*, ACLU, (Jan. 19, 2012, 2:05 PM), <https://www.aclu.org/blog/free-speech/internet-speech/we-still-need-diversity-and-minority-ownership-our-media> [<https://perma.cc/A94N-X8ZW>] for an extension of the arguments past not only minority communities made in the above cited remarks, but also concerning women. See generally Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 328, 328–29 (2019).

250. *Id.* at para. 1.

251. *1998 Biennial Review*, *supra* note 10, at. 1–13.

252. See generally *2002 Biennial Review*, *supra* note 12, at paras. 391–400.

Following the decision in *Prometheus IV*, the FCC finds itself with media ownership regulation largely as it has existed since the Telecommunications Act. Although the FCC made minor tweaks to the rules since 1996, the reality is that the regulations in place were the ones adjusted by Congress, at least in the case of the national television ownership rule. This impasse, largely the result of the FCC's unwillingness to develop empirical evidence of the outcomes of media ownership policy, should be resolved as the agency concludes the 2018 Quadrennial Review.<sup>253</sup>

The evidence created by an honest policy evaluation of media ownership policy since 1996 is likely to cast two decades of the FCC's actions in a bad light. That reality cannot be avoided, and the four losses in court to the Prometheus Radio Project have already laid bare the agency's shortcomings. The policy, as implemented, has significant conceptual problems, and absent a new delegation from Congress, the FCC will need to adopt major changes in its approach to implementing media ownership policy to break the impasse. The Third Circuit panel is clear that a functional policy promoting ownership by women and minorities is a requirement for breaking the deadlock,<sup>254</sup> yet the FCC remains reluctant to test perceived equal protection clause issues from the Supreme Court's *Adarand* precedent with a policy proposal that directly promotes ownership by women and minorities.

The FCC actively chooses to make the situation more complicated than it already is. The FCC's 2017 data on minority ownership suggest the need for radical changes.<sup>255</sup> Both women and minorities are drastically underrepresented in terms of media control. Women are 51% of our population, but only held a majority of the voting interests in 73 of 1,368 full power commercial television stations (5.3%); 19 of 330 Class A television stations (5.8%); 76 of 1,025 low power television stations (7.4%); 316 of 3,407 commercial AM radio stations (9.3%); and 390 of 5,399 commercial FM radio stations (7.2%).<sup>256</sup> Beyond gender, breakdowns along racial and ethnic lines demonstrate low levels of control and media ownership. Racial minorities collectively or individually held a majority of the voting interests in only 26 of 1,368 full power commercial television stations (1.9%); 8 of 330 Class A television stations (2.4%); 21 of 1,025 low power television stations (2.0%); 202 of 3,407 commercial AM radio stations (5.9%); and 159 of 5,399 commercial FM radio stations (2.9%), for a miniscule total of 416 of 11,529 (3.6%) of all commercial broadcast stations.<sup>257</sup>

Trivial control and ownership of media properties by women and minorities result from the FCC's implementation of the ownership limits contained in the Telecommunications Act as well as the repeated failure of the agency to develop a functional minority ownership policy that can

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253. See *Prometheus IV*, 939 F.3d at 574, in which J. Ambro, speaking for the majority, stated, "Thrice before we have passed on the [FCC's] performance of its duties under § 202(h), or the lack thereof."

254. See *id.* at 587.

255. See FCC, No. DA 20-161, FOURTH REPORT ON OWNERSHIP OF BROAD. STATIONS, (2020).

256. See *id.* at 4-5.

257. See *id.* at 5.

withstand judicial review. Problematically, empirical evidence seems to suggest that smaller media organizations in the control of minority owners are more likely to create content that directly targets minorities.<sup>258</sup> By allowing the media ownership environment to degrade, the FCC is choosing to limit the political participation of these groups, one of which represents more than half of the U.S. population. Developing a minority ownership policy that directly targets the strict scrutiny standard applied to race and gender based decisionmaking by the *Adarand* precedent may be challenging, but the FCC has decided it is easier to keep losing in court than to even try.<sup>259</sup>

In *Prometheus I*, Judge Ambro's decision suggested to the FCC a way forward on media ownership policy by focusing on broadcast regulation, rather than trying to account for and accommodate other forms of media the agency lacks jurisdiction to regulate.<sup>260</sup> If one applies this logic to the issue of minority ownership, then there is likely a straightforward path for the FCC to follow that is also largely supported by Supreme Court precedent. Broadcasting is an anomaly in judicial review of state action, in that the spectrum scarcity doctrine justifies a lower standard of review.<sup>261</sup> In *NBC v. United States*, the Supreme Court said the FCC was more than a traffic officer and that it had an obligation to determine the nature of the traffic on the airwaves.<sup>262</sup> Likewise, in *Red Lion v. FCC*, the Court said unanimously that the FCC did not infringe the First Amendment by keeping open the airwaves through regulation and that the rights of the listeners were paramount.<sup>263</sup>

Following this policy design to its logical conclusion is a straightforward exercise. Develop and implement a minority ownership policy that puts broadcast stations in the hands of locally based owners who themselves are women and minorities. When faced with the *Adarand* dilemma, rely on the precedent that broadcasting, because of spectrum scarcity, is not subject to scrutiny that dictates a content neutral approach in

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258. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019).

259. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). A fuller discussion of *Adarand* warrants a separate article, but for the purposes of this Article, the Supreme Court's application of strict scrutiny to race-based government decisions intended to benefit racial minorities is the primary stated explanation for why the FCC has, so far, refused to assess or develop an ownership policy that promotes control of broadcast outlets by women and minorities.

260. *Prometheus I*, 373 F.3d at 435.

261. *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969). The decision in *Red Lion* represents a high-water mark for the idealistic role of broadcast regulation in ensuring citizen access to diverse and antagonistic viewpoints. Broadcasting represents the easiest medium for universal access to information, providing opportunities for political maximization while requiring minimal equipment or infrastructure through an established service that can effectively provide targeted content to underrepresented groups, including minorities. While there is a risk to the higher societal values embedded in *Red Lion* if those values are tested against the Strict Scrutiny standard in *Adarand*, the reality is that the FCC's own data, released in 1995, indicates the current approach to media ownership has failed. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

262. *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 215–16 (1943).

263. *Red Lion Broad.*, 395 U.S. at 375 (holding that the "fairness doctrine" as applied to the RTNDA "enhance[d] rather than abridg[ed]" First Amendment liberties).

application.<sup>264</sup> By focusing on just two aspects of the media ownership equation—localism and diversity—competition will increase as new entrants are created. There is substantial empirical evidence available that would justify this approach, and unless the FCC intends to lose in court again, this path provides an answer that the Third Circuit already signaled it would approve.<sup>265</sup>

Localism and diversity were core values of the broadcast regulation scheme prior to the deregulation of the 1980s, but the FCC largely abandoned them in favor of an economic approach to regulation. Now, almost 25 years after the Telecommunications Act, we see its effects clearly. The rights of the “listener” are not being served by ownership regulations that have reduced the diversity of viewpoints. It is time to move on before the slaughter rule gets invoked in time for a potential *Prometheus V*.

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264. *Prometheus II*, 652 F.3d at 483.

265. *Prometheus I*, 373 F.3d at 435.

