No. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335

In the
United States Court of Appeals
For the Third Circuit

PROMETHEUS RADIO PROJECT, Et Al.
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF CITIZEN PETITIONERS PROMETHEUS RADIO PROJECT, MEDIA MOBILIZING PROJECT, FREE PRESS, OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA AND COMMON CAUSE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the Third Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Prometheus Radio Project, Media Mobilizing Project ("MMP"), Free Press, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America and Common Cause, respectfully state that each of them is a non-profit organization with no parent companies, subsidiaries or affiliates and that none of them have issued shares to the public.

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JURISDICTIONAL STATEMENT

This is a petition for review of an agency decision under the Communications Act of 1934, 47 U.S.C. §151 et seq. Jurisdiction is from 47 U.S.C. §402(a) and 28 U.S.C. §§2342–44.

Petitioners seek review of three closely-related final orders by the Federal Communications Commission ("FCC"). The FCC issued a Quadrennial Review decision in 2016. *2010/14 Quadrennial Review*, Second Report and Order, 31 F.C.C.Rcd. 9864 (2016) ("Second R&O")(JA-___), 81 Fed.Reg. 76220 (Nov. 1, 2016). The FCC then substantially reversed the Second R&O on reconsideration, *2010/14 Quadrennial Regulatory Review*, 32 F.C.C.Rcd. 9802 (2017) ("Reconsideration Order")(JA-____), 83 Fed.Reg. 733 (Jan. 8, 2018). The FCC adopted rules for a radio incubator program in *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, 33 F.C.C.Rcd. 7911 (2018) ("Incubator Order")(JA-___), 83 Fed.Reg. 43773 (Aug. 28, 2018).

Petitioners Prometheus Radio Project and MMP sought review in this Circuit in Nos. 17-1107 (Second R&O)(JA-___), 18-1092 (Reconsideration Order)(JA-___) and 18-2943 (Incubator Order)(JA-___). Subsequent petitions for review of these orders were transferred to this Circuit pursuant to 28 U.S.C.

§2112(5) and consolidated in 2018 by orders dated January 18; April 5; September 5; and October 22.

RELATED CASES

The decisions under review are the latest in a series of FCC decisions implementing its statutorily-mandated quadrennial review of broadcast ownership rules. A panel of this Court has reviewed these decisions and retained jurisdiction. *Prometheus Radio Project v. Federal Communications Commission*, 824 F.3d 33 (3d Cir. 2016) ("*Prometheus III*"); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*"); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*").

On December 13, 2018, the FCC initiated its statutorily-required *2018 Quadrennial Regulatory Review*, NPRM, MB Docket No. 18-249, FCC 18-179 (Dec. 13, 2018) ("2018 NPRM")(JA-___). Federal Register publication is pending.

On December 18, 2018, the FCC sought comment on a petition seeking reconsideration of the Incubator Order. Public Notice, Report No. 3110(JA-___).

ISSUES PRESENTED

1. Whether the Second R&O and Reconsideration Order failed to comply with the law, were arbitrary and capricious, and resulted in agency action unlawfully withheld and unreasonably delayed because:

a) the FCC lacked substantial evidence in support of the required consideration of its media ownership rules' impact on race/gender ownership diversity and

b) has failed to obtain such evidence for 15 years?

2. Whether the definitions of "eligible entity" adopted in the Second R&O and Incubator Order failed to comply with the law, were arbitrary and capricious, and resulted in agency action unlawfully withheld and unreasonably delayed because:

a) the FCC lacked substantial evidence in support of the definitions' impact on race/gender ownership diversity, and

b) has failed to obtain such evidence for 15 years?

STATEMENT OF THE CASE

A. Introduction

Despite reversals by this Court in *Prometheus I, II and III*, the FCC has yet again failed to address a critical element of its core mission: its obligation—set forth in statute, judicial opinions and FCC precedent—to promote race and gender

diversity in broadcast ownership, particularly with its ownership rules. Here again, the FCC adopted rules permitting massive consolidation, using analysis falling far short of what law, policy and judicial remands require.

In the decisions under review, the FCC replaced decades of complex (though still inadequate) study with a total of *three paragraphs* across three orders, using simplistic numerical tabulation and unreliable data not subject to required notice and comment. The FCC's decisionmaking is marred by long-standing data defects and continued failure to conduct appropriate studies.

In considering the term "eligible entity," which determines the entities that can take advantage of certain beneficial policies, the FCC twice adopted definitions inconsistent with this Court's remands. The Second R&O eliminated the definition's race/gender diversity objective and failed to replace it with anything that would promote such diversity. The Incubator Order's slightly different definition was crafted using flawed and unreliable data that failed to demonstrate it would promote race/gender ownership diversity.

B. Prometheus Remands

This Court has remanded three previous ownership reviews. In each, it considered, *inter alia*, whether the FCC adequately adhered to its statutory mandate to promote race/gender ownership diversity and whether the FCC

adequately supported its decisions. The procedural history is set forth in *Prometheus III*, 824 F.3d at 37-49.

Prometheus III rejected the FCC's 2014 decision deferring resolution of the 2010 Quadrennial Review until it completed the newly-initiated 2014 Quadrennial Review. *2014 Quadrennial Regulatory Review,* FNPRM, 29 F.C.C.Rcd. 4371 (2014) ("FNPRM")(JA-___).

This Court found the FCC yet again failed to meet its statutory obligation to promote race/gender broadcast ownership diversity, and chastised the FCC for delay in compiling data supporting a revenue-based eligible entity definition:

> With 12 years having passed since *Prometheus I*, we conclude that the Commission has had more than enough time to reach a decision on the eligible entity definition. We put it on notice of our concerns five years ago in *Prometheus II*. We directed it to take action in the course of the 2010 Quadrennial Review, and then we returned to that topic again to 're-emphasize' our directive. However, the Commission has not complied.

Prometheus III, 824 F.3d at 48 (citations omitted). Thus, the Court remanded to the FCC with directions "to act promptly to bring the eligible entity definition to a close. It must make a final determination as to whether to adopt a new definition. *If it needs more data to do so, it must get it.*" *Id.* at 49 (emphasis added).

The Court reminded the FCC "the Quadrennial Review must also, per our previous decisions, include a determination about 'the effect of [the] rules on minority and female ownership;'" it instructed the FCC to "consider how the

ongoing broadcast incentive auction affects minority and female ownership." *Id.* at 54 n.13.

C. 2010/2014 Review and Incubator Order

The Second R&O, its subsequent reversal in the Reconsideration Order, and the Incubator Order are under review here.

1. Second R&O

In its 2014 FNPRM, the FCC proposed to retain most of its rules, with slight modifications. The Second R&O issued in August 2016, two months after *Prometheus III*. The FCC retained its rules limiting the number of TV stations, radio stations, or radio/TV combinations, that could be commonly owned locally (respectively, "Local TV," "Local Radio," and "Radio/TV" rules). It also slightly modified the rule prohibiting common ownership of a broadcast outlet and newspaper in the same local market ("Newspaper/Broadcast rule"). Second R&O at 9913(JA-___).

a. Consideration of Ownership Rules' Impact on Race/Gender Diversity

The FCC equivocated on the relationship between the rules and race/gender ownership diversity by claiming they were "consistent with" but not adopted "with the purpose of" promoting such diversity. *Id.* at 9893-94, 9911-12, 9951-52(JA-___). It concluded retaining the two cross-ownership rules would not result in

consolidation and therefore would not harm race/gender diversity. *Id.* at 9913, 9944(JA-___).

The FCC rejected requests to tighten the Local TV and Local Radio rules to provide "increased opportunities for minority and female ownership," calling the requests "both speculative and unsupported by existing ownership data." *Id.* at 9894-95(JA-___). To reject them it turned instead—without prior notice—to simplistic comparisons using two unreliable data sets. Its justification deviated from decades of settled policy and attempted to show that previous consolidation did *not* harm race/gender diversity. The FCC compared its own flawed Form 323 data and data collected by the National Telecommunications and Information Agency ("NTIA") that it had considered inadequate since 1998. *Id*. at n.212(JA-___). The FCC described the television data:

> [NTIA] identified 32 minority-owned full power television stations in 1998 (racial and ethnic minorities)—the year before the Commission relaxed the former rule that had restricted ownership to a single television station in a market. Following a *decline* in the 1999/2000 NTIA data to 23 stations, the Commission's recent Form 323 ownership data demonstrate that minority ownership has grown since that rule was eliminated: 60 stations in 2009; 70 stations in 2011; and 83 stations in 2013.

Second R&O at 9895 (emphasis added)(JA-___). The FCC acknowledged that this paragraph-long analysis was unreliable because it contrasted data from different sources which "introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace" but nonetheless

relied on the unreliable data "in the absence of a continuous, unified data source." *Id.* at n.211(JA-___). The FCC did not address NTIA's lack of female ownership data.

Similarly, the FCC refused to tighten the Local Radio rule, again using simplistic analysis and incomplete NTIA data. *Id.* at 9911-12(JA-___). The NTIA radio data (which again did not track female ownership) showed a decline in minority ownership after Congress lifted the national radio limits in 1996, but in later years Form 323 data showed higher numbers of women and racial minority owners. *Id.*(JA-___). The FCC acknowledged it had previously found "NTIA's data collection methodology did 'not insure a complete listing of all commercial radio and television stations owned by minorities' and the data did not include separate data on female ownership"; nonetheless the FCC used them because "these are the only data from that time period that are available." *Id.* at n.326(JA-___).

While using this data to reject requests to tighten the rules, the FCC also found it too unreliable to justify eliminating or relaxing the rules. *Id.* at 9895; *see also id.* at 9911-12 (Local Radio rule, citing limits on the data's "probative value")(JA-___). __).

Instead of adopting rules to promote diversity, the FCC reaffirmed that it "remain[ed] mindful of the potential impact of consolidation in the radio industry

on ownership opportunities for new entrants, including small businesses, and minority- and women-owned businesses," and would "*continue to consider the implications in the context of future quadrennial reviews*." *Id.* at 9912 (emphasis added)(JA-___).

b. Eligible Entity Definition

The FCC readopted the same ineffective revenue-based definition of eligible entities this Court has criticized since 2003. While acknowledging its practice of "promulgating rules and regulations intended to promote diversity of ownership among broadcast licensees,…by facilitating the acquisition and operation of broadcast stations by…minority- and female-owned businesses," *id.* at 9962(JA-___), the FCC concluded it would re-adopt this definition to enhance participation by new entrants and small businesses but *not* ownership by women and racial and ethnic minorities. *Id.* at 9979-82(JA-__).

Interpreting the *Prometheus III* remand as an obligation to consider the small disadvantaged business ("SDB") definition, and, despite this Court's directive to obtain data if needed, the FCC did not procure new studies. Inevitably, it concluded it did not have sufficient data in support of those definitions to meet a strict scrutiny standard. *Id.* at 9987(JA-___). The FCC found the only study it did conduct, the Hispanic Television Study, 2016 WL2816112(JA-___), could not "materially impact our constitutional analysis" because it did not focus on "local

news and public affairs." *Id.* at 9991(JA-___). The FCC claimed it "never has asserted a remedial interest in race-or gender-based broadcast regulation" *id.* at 9996(JA-___), and could not support a remedial effort because it "lack[ed] a plausible way to determine the number of qualified firms owned by minorities and women." *Id.* at 9988(JA-___). It repeatedly blamed commenters for data inadequacies in its record. *See, e.g.*, *id.* at 9995(JA-___).

The FCC claimed it could not conduct studies because of "the lack of a reliable measure of viewpoint; small sample size; accounting for potential variations from differences in the way the data were collected rather than actual changes in the marketplace when combining old and new sets; and the lack of relevant data sets from before and after policy changes or marketplace developments (if any can be identified) that would help demonstrate causation regarding the impact of ownership on viewpoint diversity." *Id.* at n.944.

Instead of adopting rules that would promote race/gender diversity, the FCC described a number of pre-existing rules and practices without evaluating the success of those efforts. *Id.* at 9963-7(JA-___). It reviewed previous changes to improve Form 323 data collection (some of which were later repealed, see *infra* Section D) and described how some of that data had been used in studies that did not prove useful. *Id.* at 9975(JA-___).

2. Reconsideration Order

Several industry parties filed petitions for reconsideration. The FCC partially granted them in November 2017, adopting rules that would significantly consolidate local TV markets. The FCC relaxed the Local TV rule, eliminated the Newspaper/Broadcast rule, and eliminated the Radio/TV rule. Reconsideration Order at 9803(JA-____).

The rule changes adopted in the Reconsideration Order are sweeping and will have tremendous impact. The changes to the Newspaper/Broadcast rule and the Local Television rule are the most dramatic. After eliminating the former, a single entity may own a newspaper plus a television or radio station in any market. The latter prohibited a single entity owning more than two TV stations in a local market if fewer than eight voices—strictly measured by the number of fully independently owned commercial and non-commercial TV stations—would remain. *See* 47 C.F.R. §73.3555(b), note 2k (2016)(eight voices test and attributing ownership of stations using joint sales agreements). The rule changes mean mergers will be permitted in many more markets.

Several large transactions that could not have occurred under the old rules have been proposed, and more are expected. For example, Nexstar recently announced its planned acquisition of Tribune, a deal that would bring together approximately 216 stations in 118 markets, fifteen of which could not be common

owned under the prior rule. *See Acquisition of Tribune Media Company*, Nexstar Media Group Inc. (Dec. 3, 2018)(JA-___). The FCC recently approved the Gray/Raycom merger, permitting Gray to retain to retain control, in two markets, of two of the top four stations in violation of the prior rule. Applications to Transfer from Raycom Media, Inc. to Gray Television, Inc. et al, DA 18-1286 at 2 (rel. Dec. 20, 2018)(JA-___). Prior to withdrawing its merger, Sinclair's acquisition of Tribune would have meant acquiring stations in twelve markets that it would not have been able to own under the prior rule. More transactions are predicted. *See* Sara Fischer, *The local TV consolidation race is here*, Axios (Aug. 10, 2018)(JA-___).

The Reconsideration Order pointed to the same faulty and simplistic count used in the Second R&O to reject such loosening. *Id.* at 9823, 9839, 9911(JA-___).

The FCC announced, without details, its intention to adopt an incubator program to promote race/gender diversity, and simultaneously issued an NPRM to develop the program. *Id*. at 9858-9864(JA-___). It sought comments on the appropriate eligible entity definition for incubator program participation. *Id.* at 9861(JA-___).

Commissioners Rosenworcel and Clyburn dissented. Commissioner Rosenworcel said, *inter alia*:

[W]e are not going to remedy what ails our media today with this

> rush of new consolidation…. Study a bit of history and you can only come to one conclusion: consolidation will make our stations look less and less like the communities they serve. Women and minorities have struggled for too long to take the reins at media outlets. A modest rulemaking on an incubator isn't going to get us where we need to go. It's a high price to pay for the damage this order does and that is an exchange I am unwilling to make.

Id. at 9901(JA-___). Commissioner Clyburn hardly knew where to begin cataloging the deficiencies:

> Do I start by describing why the wholesale elimination of key media ownership rules will harm localism, diversity, and competition? Do I focus on the number of loopholes this Commission blesses through this Order? Or do I highlight how the FCC majority has chosen to take some of the same facts used by this Commission just over a year ago to reach the exact opposite conclusions?...[T]his is really about helping large media companies grow even larger[.]

Id. at 9890(JA-___). She warned "the floodgates to more consolidation will come without transparency or accountability." *Id.* at 9891(JA-___).

3. Incubator Order

On August 3, 2018, the FCC released the Incubator Order, three days before the deadline this Court set in its order dated February 7, 2018 (denying Prometheus and MMP's request for a writ of mandamus seeking enforcement of the *Prometheus II* and *Prometheus III* mandates in Docket No. 19-1167).

The Incubator Order did not address any TV consolidation permitted in the Reconsideration Order because it applied *only* to radio, purportedly to "promote ownership diversity by fostering entry…by entrepreneurs and small businesses,

including those owned by women and minorities." Incubator Order at 7913(JA-___). "[A]n incubator program seeks to provide an established broadcaster with an inducement in the form of an ownership rule waiver or similar benefit to invest the time, money, and resources needed to facilitate broadcast station ownership by new and diverse entrants." *Id.* at 7912(JA-___).

To determine who can participate in the program, the FCC developed a new definition of eligible entities with two prongs—combining its previous revenue-based standard with a new-entrant criterion. The revenue-based prong requires an eligible entity to be a small radio station, as defined by the Small Business Administration, which the FCC acknowledged encompasses 99.9 percent of all radio stations. *Id.* at 7951(JA-___).

The other prong limits an eligible entity to attributable interests in no more than three full-service AM or FM radio stations and no TV stations. *Id.* at 7919(JA-___). The FCC based this criterion on previous definitions used to limit eligibility for bidding credits in broadcast auctions and claimed that "data provided in the record show that the new entrant bidding credit—a modified version of which we adopt herein—has increased successful participation of small businesses owned by women and minorities in the auction of construction permits for AM, FM, and TV stations." *Id.*(JA-___).

The numerical analysis justifying this claim was not, by the FCC's own admission, sophisticated. It mimicked two similar submissions in the record and "did not conduct any complex or technical study" but "merely tallied the responses of bidders in specified FCC broadcast auctions from information that is publicly available." *Id.* at n.49(JA-___). Petitioner Free Press showed that 81 percent of the entities meeting this criterion would *not* be women or racial and ethnic minorities. González/Turner Letter at 4 (July 3, 2018)(JA-___). Rather than incorporating or responding to this more sophisticated analysis, the FCC hewed to its simplistic treatment, ignoring that the criterion selected would not increase race/gender ownership diversity because it would not increase the relative share of stations controlled by women or racial/ethnic minorities. Incubator Order at n.43.(JA-___).

Commissioner Rosenworcel forcefully dissented:

> I fail to see how [the incubator program] will make a material difference in the diversity of media ownership. Its scope is too narrow, its consequences too small, and its impact on markets too muddled. Moreover, I fail to see how this will satisfy the Court of Appeals for the Third Circuit which on—count them—three occasions has directed the FCC to take meaningful actions to address the shameful lack of racial and gender diversity in broadcast station ownership.

Id. at 7963(JA-___).

D. History of Ownership Data and Studies

1. Form 323 Ownership Data Is Not Accurate

The FCC has persistently failed to obtain reliable data on which broadcast outlets are controlled by women and ethnic or racial minorities. Moreover, it has identified gaps in reporting and errors in its numercial tracking, but never corrected them.

In 2000, the FCC began collecting race/gender broadcast ownership data on Form 323 to fulfill its statutory mandate to promote race/gender ownership diversity, *1998 Biennial Regulatory Re*view, 13 F.C.C.Rcd. 23056, 23095 (1998)(JA-___), and because of NTIA data's flaws. *Id.* at 23096-7(JA-___).

Over the years, however, significant flaws in the FCC's own data collection became apparent. It was unreliable, difficult to use, and impossible to verify. *Prometheus II*, 652 F.3d at 470-71. Over time, the FCC adopted some improvements. *See, e.g.*, *Promoting Diversification of Ownership in the Broadcast Services*, 24 F.C.C.Rcd. 5896 (2009) (uniform filing date, broadened mandatory filers)(JA-___).

Two problems remain with the FCC's data—the tracking numbers used to submit it and its completeness.

The tracking numbers filers use to submit data have been unreliable. One used by up to 30 percent of all filers, *Seventh 323*, FNPRM, 30 F.C.C.Rcd. 1725,

1732 (Feb. 12, 2015)(JA-___), called a Special-Use FRN, "offers no way for the Commission to identify individuals reliably." Second R&O at 9973(JA-___). The number is automatically generated with no verifying information, and in many cases one individual used multiple numbers or multiple individuals used the same number. *Promoting Diversification of Ownership*, 31 F.C.C.Rcd. 398, 421 (2016)(JA-___). The FCC recently eliminated the use of the less-reliable number for most, but not all, filers. *Promoting Diversification Reconsideration Order*, 32 F.C.C.Rcd. 3440 (2017)(JA-___). But it never corrected previous erroneously-filed data.

Form 323 data also suffers because some broadcasters fail to file in some years, so trend analysis between years is problematic. For example, in 2013, the number of AM stations that did not file (759) far exceeded the number of stations controlled by women (310), calling into question conclusions based on that data. UCC FNPRM Comments at 18 (citing *2014 323 Report*, Table D(1a))(JA-___). In 2011, 165 more full-power TV stations filed than in 2009, calling into question whether apparent increases in ownership by various ethnic groups were real. *2012 323 Report*, 27 F.C.C.Rcd. 13814 at n.10 (2012)(JA-___). In 2012 the FCC acknowledged these limits on trend analysis using its own data. *Id.* at n.10 ("several factors counsel caution" with trend analysis, noting 85% of full-power TV stations filed in 2009 but 98% filed in 2011)(JA-___). By 2015, full-power TV

reporting was at 99%, *2015 323 Report* at 25, Table A(1b)(JA-___), but radio reporting continued to be incomplete. *See, e.g., id.* at 55, Table D(1b)(no data for 980 of the total 4,489 AM radio stations)(JA-___).

Even with these improvements over time, the FCC never went back to improve past data, and data sets are not consistent year-to-year.

To date, broadcasters have filed Form 323 data in 2009, 2011, 2013, 2015 and 2017 and the Media Bureau summarized it in regular reports between 2009-2015, but the FCC made clear these reports are "not studies…that would help support the adoption of race- or gender-based preferences or policies." Second R&O at 9975(JA-___). The FCC has not yet released a report summarizing the 2017 data, although the filing period ended on March 5, 2018. Media Bureau Restricted FRN Public Notice, DA 17-1088, 32 F.C.C.Rcd. 9330 (2017)(JA-___).

2. Media Ownership Studies

Over more than twenty years of ownership reviews and related proceedings, the FCC has procured or conducted forty-one media ownership studies and reports; yet has not conducted or identified studies adequately focused on the intersetion between its ownership rules and race/gender ownership diversity.

While the FCC started with some promising *Adarand* studies in 2000, *Prometheus II*, 373 F.3d at 471 n.42, it has not followed suit since. For example, it procured 33 studies over the course of Quadrennial Reviews between 2000 and

2010, and one expert 465-page report. Waldman, *The Information Needs of Communities.* Yet only two of those attempted to examine racial ownership diversity. *Research Studies on Media Ownership,* 22 F.C.C.Rcd. 14313 (2007)(JA-___). And as this Court found, those two were based on inadequate Form 323 data, making reliance on them "fraught with risk." *Prometheus II,* 652 F.3d at 468.

Despite the FCC's limitations, two important non-FCC studies were conducted during the 2006 Review. Commenter Free Press reviewed and corrected the FCC's and NTIA's historical data to produce two reports, *Out of the Picture* (television) and *Off the Dial* (radio). The television study tracked transactions of stations owned by women and people of color between 1998 and 2007, finding that "[p]ro-consolidation policies enacted by the FCC in the late 1990s had a significant impact on minority ownership, indirectly or directly contributing to the loss of 40 percent of the stations that were minority-owned in 1998." *Out of the Picture* at 4(JA-___). The radio study did not track changes over time. It analyzed, *inter alia,* market concentration and race/gender ownership diversity, finding that "media consolidation is one of the key factors keeping female and minority station ownership at low levels." *Off the Dial* at 4(JA-___).

During the 2014 Review, the FCC considerably scaled back its undertakings. The Hispanic Television Study turned out to be irrelevant. Second R&O at

9991(JA-___). And in a dramatic turnaround, the FCC spent 18 months in 2012 and 2013 developing a Critical Information Needs ("CIN") comprehensive literature review and research design "[t]o develop policies that ensure that the critical informational needs of Americans are being met and that would advance the goal of diversity, including the promotion of greater women and minority participation in media" to assist the FCC with its obligations pursuant to Section 257 and 202(h) reviews. Public Notice, 28 F.C.C.Rcd. 9776 (2013)(JA-___). By February 2014, however, the FCC summarily cancelled the CIN studies. Statement on Critical Information Needs Study, 2014 WL842728 (2014)(JA-___).

E. Incentive Auction

Petitioners have repeatedly argued, *see, e.g.*, UCC et al. 2014 Review Comments at 28-30)(JA-___), that the FCC must take into account the impact of the broadcast incentive auction, which permitted full-power television stations "to relinquish their spectrum entirely [or]…relinquish their current channel in order to share a channel with another station" in exchange for a monetary payment from bidders—mostly mobile telephone companies. Second R&O at 9864, 9865(JA-___). The incentive auction placed the broadcast industry "on the precipice of great change" and, before the auction, the FCC predicted it "may have a dramatic impact on the television landscape in many local markets." *Id.*(JA-___)

The auction concluded in March 2017, with winning bids totaling more than $19 billion and 145 broadcasters completely relinquishing their spectrum. *Incentive Auction Closing*, Public Notice, 32 F.C.C.Rcd. 2786 (2017)(JA-___).

SUMMARY OF ARGUMENT

The FCC is required to promote race/gender ownership diversity. Supreme Court and FCC precedent hold that the FCC's media ownership rules impact race/gender ownership diversity. Because of this impact, the FCC must—at minimum—evaluate the impact of broadcast ownership rules on race/gender ownership diversity. This Court, in its *Prometheus* cases, has repeatedly directed the FCC to consider this impact—most particularly with regard to its definition of "eligible entities"—and to acquire data needed to consider that impact.

The FCC decisions under review are arbitrary and capricious, fail to supply substantial evidence, and result in agency action unlawfully withheld and unreasonably delayed in violation of the Administrative Procedure Act ("APA").

Specifically, the Second R&O and the Reconsideration Order arbitrarily and capriciously concluded that FCC rules do not impact ownership diversity, basing that conclusion on *two paragraphs* of simplistic numerical tabulations that fall dramatically short of "substantial evidence." And while both the Second R&O and the Reconsideration Order relied on the same insubstantial data, the Second R&O cited it when refusing to tighten the rules, making clear the data was insufficient to

support relaxation. In contrast, the Reconsideration Order—without explanation—reversed course and found the data sufficient to justify wholesale repeal and significant relaxation of several rules.

Not only does the evidence fall below the required standard, the FCC failed to provide APA-required notice. Moreover, the Reconsideation Order ignored this Court's directive to consider the impact of the recently-completed incentive auction.

The FCC also unlawfully withheld and unreasonably delayed implemetation of its obligation to promote race/gender broadcast ownership diversity. It produced many studies and reports over the decades, but none addressed the connection between media ownership rules and race/gender diversity. It deprived scholars and FCC staff of reliable data sets for study and policymaking.

The orders on review also fail to answer this Court's detailed and specific remands with regard to the definition of eligible entity. The Second R&O adopted a definition that it admits will not promote race/gender diversity, offering no replacement to accomplish that stautorily-required objective. And the Incubator Order adopts a definition of eligible entities using analysis virtually indistinguishable from the definition already found wanting by this Court in prior rounds: the new definition will not promote diversity either. That order's

inadequate single paragraph of brief and simplistic data tabulation is not close to the substantial evidence required.

ARGUMENT

I. STANDARD OF REVIEW

Under the APA, 5 U.S.C. §706(2)(A), (E), the Court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...[or] unsupported by substantial evidence." The Supreme Court's opinion in *Motor Vehicle Mfr. Assoc. v. State Farm*, 463 U.S. 29 (1983) requires:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choices made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43 (internal quotations and citations omitted). Further, "an agency changing its course must supply a reasoned analysis," *id.* at 57, and must indicate that "prior policies and standards are being deliberately changed, not casually ignored." *Prometheus II*, 652 F.3d at 465 (internal quotations and citations omitted).

The APA requires notice and comment in rulemaking. The notice "must disclose in detail…the data upon which that rule is based." *Id.* at 449 (internal

quotations and citations omitted); *Solite Corp. v. E.P.A.*, 952 F.2d 473, 484 (D.C. Cir. 1991) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.").

Finally, under Section 706(1), a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." To make that determination, this Circuit applies a four-part test: 1) length of time the agency has been under a duty to act; 2) reasonableness of the delay in context of the authorizing statute; 3) consequences of the agency's delay; and 4) "any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." *Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998); *Prometheus III*, 824 F.3d at 48.

II. THE FCC HAS NOT CONSIDERED THE IMPACT OF ITS MEDIA OWNERSHIP DECISIONS ON OWNERSHIP DIVERSITY

A. FCC is Obligated to Promote Race/Gender Ownership Diversity

The Communications Act requires the FCC "to make the broadcast spectrum available to all people 'without discrimination on the basis of race.'" *Prometheus I*, 373 F.3d at 420-21, n.58 (citing 47 U.S.C. §151). "Federal law imposes on the Commission an obligation to promote ownership by minorities and women.…As such, we have described promoting minority and female ownership as an

'important aspect of the overall media ownership regulatory framework.'" *Prometheus* III, 824 F.3d at 48; *see also* 47 U.S.C. §§257; 309(j)(4)(D); 309(j)(3)(B). "[T]he conclusion that there is a nexus between minority ownership and broadcasting diversity...is corroborated by a host of empirical evidence," *Metro Broadcasting Inc. v. FCC,* 497 U.S. 547 at 580 (1990), and "both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity," *id.* at 579. *Metro Broadcasting,* 497 U.S. at 580, overruled on other grounds in *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995).

The FCC continues to adhere to this view. *See* Second R&O at 9962-63(JA-___); *see also Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1042 (D.C. Cir. 2002)("'the public interest' has historically embraced diversity…").

This Court has made clear this obligation with respect to FCC eligible entity definitions, *Prometheus III*, 824 F.3d at 42-48, the FCC's other broadcast ownership rules and the incentive auction. *Id.* at 54 n.13.

B. The Second R&O and Reconsideration Order Violate the FCC's Statutory Obligations, are Arbitrary & Capricious and Violate the *Prometheus* Remands Because They Failed to Consider How Rule Relaxation Will Impact Race/Gender Ownership Diversity

After decades of FCC and judicial opinions confirming the connection between FCC ownership rules and race/gender diversity, the FCC changed course dramatically and concluded otherwise.

The APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions" that are "unsupported by substantial evidence." 5 USC §706(2)(A), (E). An agency cannot "fail[] to consider an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. Moreover, "an agency changing its course must supply a reasoned analysis...." *Id.* at 57. The FCC failed all three of these tests and also failed to comply with this Court's remand.

Both the Second R&O and the Reconsideration Order lacked substantial evidence because they conducted a simplistic, invalid numerical analysis. The Reconsideration Order arbitrarily and without explanation relied on this evidence when the Second R&O rejected it for that purpose. Neither order complied with the APA's notice provision. And the Reconsideration Order ignored an important aspect of the problem when it failed to consider the impact of the then-completed incentive auction on race/gender ownership diversity.

1. The FCC's Numerical Analysis is Insubstantial

a. Second R&O

The FCC tried, but failed, to show through simplistic numerical analysis that relaxing ownership rules does not harm race/gender ownership diversity. The FCC relied on data it knew to be incomplete and inaccurate. It pointed to increased diverse ownership levels when the data showed a *decline* in the relevant time

period. The FCC: compared two different data sets even though it knew the results were invalid; did not control for any variables; incorrectly claimed a study supported its results when it did not; and ignored that same study's documentation of the FCC's flawed data and methodology.

The FCC used NTIA data which did not track female ownership at all. The FCC knew racial data was inaccurate both from its own analysis, Second R&O at n.326(JA-___), and because a report upon which it relied documented the NTIA data's shortcomings. Second R&O at n.215 (citing *Out of the Picture* at 21)(JA-___).

The FCC then made an invalid comparison between incomplete NTIA data and the FCC's own Form 323 data from later years. It knew that comparing two different data sets "introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace," but nonetheless relied on the flawed data "in the absence of a continuous, unified data source." *Id.* at n.211(JA-___). The FCC used this data even though it found a comparison combining old and new data sets unacceptable later in the same order. *Id.* at n.944 (considering study of gender and viewpoint diversity)(JA-___).

Regardless, the FCC claimed that the rule change did not harm ownership diversity, when the data cited by the FCC showed a *decline* from 32 stations to 23 stations the year after the relevant rule change in 1999. *Id.* at 9895(JA-___).

The analysis is also insufficient because the FCC conducted a simple count without controlling for any variables. For example, as *Out of the Picture* explains, the total number of TV stations in the U.S. increased in the period studied (between 1998 and 2007): the relative percentage of stations cannot be ascertained without accounting for that increase. *Out of the Picture* at 22(JA-___). The FCC also didn't consider the level of ownership diversity that might have been achieved if not for the initial decrease in 1999. *Out of the Picture* at 23 ("Had these stations not been sold, minority ownership would be 20 percent higher than the current level.")(JA-___) Further, it did not acknowledge that race/gender ownership increases reported between 2009-2013 could be the result of improved reporting. *Supra* Statement Section D.1.

The orders on review also cite *Out of the Picture* as consistent with a finding of no harm when the report concluded the opposite: "[t]he change from 1998 to 2000 is likely a direct result of the change in the duopoly rule." *Out of the Picture* at 22(JA-___).

The FCC's errors were just as significant in its analysis of radio. The FCC used the same flawed NTIA data to conclude that radio ownership was not negatively impacted by Congress' decision to lift the national radio ownership caps in 1996. Second R&O at 9911-12(JA-___). As in the television analysis, NTIA's reports showed a *decline* in the years immediately following the change. *Id.* at

9912 (312 minority-owned radio stations in 1995, 284 in 1996/97 and 305 in 1998)(JA-___). Not until 2000 does the FCC identify an increase, but as NTIA itself explained half of the increase was attributable to improved methodology, *i.e.*, NTIA was able to *locate* 60 more stations. Such changes do not represent "actual" changes. As it did for television, the FCC again compared apples to oranges, indicating that its own data showed 644 minority-owned radio stations in 2009, 756 in 2011, and 768 in 2013, before concluding race/gender ownership diversity increased after it declined. The FCC again failed to account for increased reporting during those years.

The FCC justified using the flawed data because it didn't have any other data. *Id.* at n.325(JA-___). The FCC did not control for variables such as increases in the total number of radio stations (which prior FCC reports acknowledged), or consider what ownership rates might have been if initial consolidation had not occurred. *See id.*(JA-___).

Just as for television, the FCC claimed *Off the Dial* corroborated increased ownership, but the report said it could *not* be used to draw "conclusions about changes over time" and explicitly disclaimed comparisons with NTIA or FCC data. *Off the Dial* at 4(JA-___). Instead, the report concluded "[a]llowing further industry consolidation will unquestionably diminish the number of female- and minority-owned stations." *Id.* at 7(JA-___).

The FCC cited this flawed analysis again in the 2018 review. 2018 NPRM at ¶¶37, 72.

b. The Insubstantial Analyses Fail the APA Test

This incompetent use of data falls far below the arbitrary and capricious standard. *Prometheus II* reversed the FCC, in part, due to use of data with problems identical to NTIA's data. *Prometheus II*, 652 F.3d at 470 (no data on television ownership or female radio ownership). In another case directly on point, the D.C. Circuit found the FCC's first Section 202(h) review insufficient when it "merely listed" numbers "without defining the relevant markets, let alone assessing the state of competition therein" and therefore "failed even to address meaningfully the question that Congress required it to answer." *Fox Television Stations*, 280 F.3d at 1044. *State Farm* explains the situation here precisely, noting that even when data is complex and uncertain, it is insufficient "for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." *State Farm*, 463 U.S. at 52. The FCC relied on uncertain data to draw an unsubstantiated conclusion.

As in *National Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 162 (3d Cir. 2015) this Court should refuse to accept admittedly flawed analysis. *Id.* (rejecting EPA decision that "offered scant justification for [its] position, apart from its own assurances that the multiple flaws…did not impact the reasonableness of its

conclusions."); *see also Earth Island Institute v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007).

2. The Reconsideration Order is Arbitrary and Capricious Because it Relied Upon Data Previously Rejected to Justify Ownership Rule Relaxation and Ignored Decades of Holdings that Ownership Rules Relate to Race/Gender Diversity

a. Without Explanation, the FCC Relied Upon Data it Had Rejected

The Reconsideration Order arbitrarily and capriciously claimed—without acknowledgement or explanation—that a dramatic rollback of media ownership limits would *not* impact race/gender diversity even though the Second R&O found the very same evidence too unreliable to support a decision to relax or repeal the rules. *See* Second R&O at 9895, 9911-12(JA-___). The FCC did not respond to comments in the record pointing out the NTIA data's inadequacy. Leanza 2017 Letter at 2-3 (Nov. 9, 2017)(JA-___).

The FCC's error is straightforward: an "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016).

b. The FCC Casually Ignores Decades of Precedent

Perhaps because it has not obtained the necessary data, the FCC attempted to side-step the remands of this Court and its statutory obligation by asserting that its ownership rules are not adopted with the goal of promoting race/gender diversity.

The Reconsideration Order and Second R&O claim the FCC's ownership rules were not adopted "with the purpose of preserving or creating specific amounts of minority and female ownership," Second R&O at 9944(JA-___), even as the FCC said its rules were "consistent with the Commission's goal to promote minority and female ownership," *id.* at 9893(JA-___); *see also* Reconsideration Order at 9823(JA-___). This curious circumlocution cannot relieve the FCC of decades of precedent and record data that show the ownership rules—whether adopted for that purpose or not—*do impact* race/gender ownership diversity. *Supra* II.A.

The attempt to avoid decades of holdings using flimsy, invalid analyses violates the statute and is arbitrary and capricious. An agency must indicate that "prior policies and standards are being deliberately changed, not casually ignored." *Prometheus II*, 652 F.3d at 465. "A reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S.Ct. at 2126. In *Encino Motorcars*, the Supreme Court found that a Department of Transportation decision to change more than 20 years of statutory interpretation required more than a "summary discussion." *Id.* Likewise this Circuit rejected the FCC's previous attempt to change years of policy regardless of the historical record. *CBS Corp. v. F.C.C.*, 663 F.3d 122, 145, 151 (3d Cir. 2011)(agency contention that it previously distinguished between fleeting words and fleeting images in enforcing indecency policy not born out by

"precedent over thirty years of indecency enforcement [that] demonstrates otherwise"). The change in *CBS* was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 151. The FCC's attempt here likewise fails.

3. The FCC Failed to Give Notice of Its Numerical Comparison

Unsurprisingly, given their defects, the FCC's numerical analyses were not subject to notice and comment as the APA requires. 5 U.S.C. §553(b). Nowhere in the proceeding prior to the Second R&O did the FCC or any commenter suggest that comparison of NTIA and FCC data, or comparison between various years of NTIA data, would demonstrate media ownership rules would not impact ownership diversity.

In *Prometheus II*, this Court reversed the FCC's planned changes to the Newspaper/Broadcast rule because it failed to adequately explain the proposed rule and subject them to comment, noting that an agency "must disclose in detail … the data upon which that rule is based." *Prometheus II*, 652 F.3d at 449. As the D.C. Circuit has explained, "[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it. An agency's denial of a fair opportunity to comment on a key study may fatally taint the agency's decisional process." *NARUC v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir.

1984). And here, unlike in NARUC, the FCC did not use its Reconsideration Order as an opportunity to consider the data's flaws; those flaws remain untested even though commenters raised concerns before the FCC acted. Letter from Cheryl A. Leanza 2017 Letter at 2-3(JA-___).

Chamber of Commerce is particularly apt. In that case, the SEC relied on extra-record materials to support a proposed rule. Although the proposed rule was adequately noticed, the D.C. Circuit found the agency must "do what it can to apprise itself…of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 901 (D.C. Cir. 2006). The same is true here.

4. The Commission's Decision to Reverse the Second R&O without Considering the Impact of the By-then-complete Incentive Auction Violates the *Prometheus* Remand and is Arbitrary and Capricious

Prometheus III unambiguously said that "the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership." *Prometheus III*, 824 F.3d at 54 n.13. The Second R&O concluded that it was premature to assess the impact of the auction on race/gender ownership diversity because, in August 2016, the results would "not be known for some time" and "the incentive auction is a unique event without precedent." Second R&O at 9896(JA-___).

When the Reconsideration Order issued in November 2017, however, the incentive auction had been complete for seven months. The Reconsideration Order did not address the new information then available, claiming it was still too soon to evaluate the changes though all the successful auction participants were known and the FCC had enough information to posit "the overwhelming majority of commercial, full-power winning bidders have elected to channel share once they surrender their spectrum." Reconsideration Order at n.248(JA-___). The FCC did not, for example, consult Form 323 data to produce a list of the stations owned by women and ethnic minorities that had elected to stop broadcasting.

Instead it deflected its obligation: "the Commission cannot—and did not in the Second R&O—use the auction as an excuse for delaying action and refusing to fulfill its obligations under Section 202(h)." Reconsideration Order at 9840(JA-___). The FCC did not explain in any way how the facts now available to it prevented it from making at least a preliminary analysis with respect to the impact of the auction on race/gender ownership diversity. As such, the FCC violated this Court's remand.

C. The FCC Unlawfully Withheld and Unreasonably Delayed Its Obligation to Promote Race/Gender Diversity in Broadcast Ownership and Violated this Court's Remand to Obtain Data

Prometheus III leaves no question that the FCC unlawfully withheld and unreasonably delayed implementing its obligation to promote race/gender diversity

and violated this Court's remand directing the FCC to obtain data needed to implement that obligation.

Prometheus III found the Commission's inaction met this Circuit's test in *Oil, Chemical*. *See Prometheus III*, 824 F.3d at 48. With regard to the first two parts of the test, nothing has changed, except two more years of delay. The delay is no more reasonable now than in 2016.

With respect to step three of *Oil, Chemical*, the consequences in this case are much more severe than in 2016. Whereas the previous FCC ruling allowed no additional consolidation, the Reconsideration Order adopted sweeping changes that will severely impact ownership by women and people of color. Incubator Order at 7996 (Rosenworcel dissent)(JA-___). The incentive auction also removed many more stations from the airwaves, resulting in fewer owners. And the Incubator Order addresses none of the increased consolidation in TV markets because it focuses on radio only.

The FCC has more than failed the fourth and final prong of *Oil, Chemical*. This Court has twice "determined that difficulty in collecting data does not justify the delay here." *Prometheus III* at 48 (citing *Prometheus II*, 652 F.3d at 471 n.42). *Oil, Chemical's* directive to "balance the importance of the subject matter being regulated with the regulating agency's need to discharge all of its statutory responsibilities under a reasonable timetable," *Oil, Chemical*, 145 F.3d at 123,

weighs completely against the FCC in this case. The FCC has spent resources on media ownership studies over twenty years but never focused sufficiently on the issue it must pursuant to its statutory mandate and judicial remands.

Even worse, the FCC still fails to understand its burden to analyze, with data, the impact of its rules on ownership diversity. The principle articulated in the *Prometheus* line of cases is: **given the FCC's statutory obligation to promote non-discrimination and race/gender ownership diversity, the FCC cannot take action that has a strong probability of harming race/gender ownership diversity until it has affirmatively studied the issue.** The FCC repeatedly mistakes that obligation for a need to consider whether a race or gender specific standard would meet strict scrutiny. *See, e.g.*, *Prometheus III*, 824 F.3d at 46 (FCC "never considered whether [SDB rules] would increase minority and female ownership. Rather, it rejected them on the ground that they would not, on the current record, survive constitutional scrutiny"). The FCC is putting the cart before the horse. The mandate is not to consider a race- or gender-conscious rule; the mandate is to analyze its decisions' impact on race/gender ownership diversity.

The FCC further errs by attempting to foist the burden of data production and analysis on commenters. *See, e.g.*, Reconsideration Order at 9839(JA-___). This Court must now make clear: *it is the FCC* that bears a statutory mandate to promote race/gender ownership diversity, not commenters. As this Court

previously told the FCC, "*If it needs more data to do so, it must get it.*" *Prometheus III*, 824 F.3d at 49.

This Court, once again, "must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Id.* at 37 (citing *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 158 (3d Cir. 2002)). Specific relief, as outlined below, is compelled.

D. The FCC's Eligibility Entity Definitions Violate the Act and this Court's Remands and are Arbitrary and Capricious Because They Will Not Promote Race/Gender Ownership Diversity

1. Second R&O Definition

The Second R&O adopted the same rule previously rejected by this Court as arbitrary and capricious because it would not promote race/gender ownership diversity. The FCC attempted to side-step this Court's remand to study the impact on race/gender ownership diversity by concluding the definition no longer was intended to improve such diversity. Second R&O at 9962(JA-___). This action is arbitrary and capricious because the FCC did not and cannot set aside its goal of promoting race/gender ownership diversity.

The agency continues to find ownership diversity to be at low levels and in need of improvement, *see id.* at 9868 (citing 2012 323 Report)(JA-___), but takes no action to pursue the statutory goal. Instead it cites to preexisting efforts that have not been shown effective, *Id.* at 9963-67(JA-___), despite requests in the

record that it study the impact of race-neutral policies on race/gender diversity. *See, e.g.*, *id.* at 9981, 10,001 (UCC *et al*. argues race-neutral proposals will not promote race/gender ownership diversity)(JA-___).

This Court previously rejected the FCC's revenue-based eligible entity definition because it would not promote race/gender ownership diversity. *Prometheus II*, 652 F.3d at 470, 472. *Prometheus III* required that "the Quadrennial Review must also, per our previous decisions, include a determination about 'the effect of [the] rules on minority and female ownership.'" *Prometheus III*, 824 F.3d at 54 n.13. The Second R&O adopts an eligible entity definition that the FCC admits is not intended to promote ownership diversity and takes no other action proven to accomplish the objective. As such, it violates the remand and is arbitrary and capricious.

2. Radio Incubator Definition

The FCC adopted a new definition of eligible entity as part of the radio incubator program, which is focused on promoting entry by women and ethnic minorities. Incubator Order at 7919-7921(JA-___). The eligible entity definition is virtually indistinguishable from the definition found arbitrary and capricious by this Court for its failure to promote race/gender ownership diversity. The FCC's new definition will assist four people who are not women or ethnic minorities for each person who is.

The FCC's analysis admits that 99.9 % of all radio stations meet the revenue-based criterion, rendering it near-worthless, and does not posit how many corporate owners would be included or excluded. *Id.* at n.53 (citing one example, of the largest radio owner in the country, as not meeting the threshold)(JA-___).

The second criterion, requiring an eligible entity to be a new entrant, i.e., that it hold attributable interests in no more than three full-service AM or FM radio stations and no TV stations, *id.* at 7919(JA-___), fares no better than the revenue-based criterion.

The Commission's analysis in support of this definition is arbitrary and capricious and contrary to the record. To support its new entrant criterion, the FCC relied on three analyses: a submission by NAB, a footnote in the Commission's Advisory Committee on Diversity and Digital Empowerment ("ACDDE") report, and the FCC's own analysis. The FCC claimed these analyses "has increased successful participation of small businesses owned by women and minorities in the auction of construction permits for AM, FM, and TV stations," *Id.*(JA-___).

The FCC's incubator analysis suffers from similar flaws to those in the Second R&O. All of the studies based their analysis on Form 175 data even though the FCC admits that "the ability to make definitive statements about the participation of minorities and women in Commission broadcast auctions is

limited" because "*applicants are not required to provide information about their race, ethnicity, or gender*" on Form 175. *Id.* at n.43 (emphasis added)(JA-___).

Even if the underlying data were reliable, the methodology was unsound. The FCC admits the methodology of these studies was *not* "complex or technical" but "merely tallied the responses of bidders in specified FCC broadcast auctions." *Id.* at n.49(JA-___). A sophisticated Free Press analysis of NAB's data demonstrated a fact not contested by the NAB or the FCC: "approximately 81 percent of the permits awarded to entities using the new entrant bidding credit (445 of the 547) were awarded to entities that were NOT owned by a woman or a person of color." González/Turner Letter at 1(JA-___). Free Press analyzed the data for statistical significance at the auction and individual levels and found the impact was exceedingly small, and that "the high variation of use of the new entrant bidding credit by owners of color between each auction indicates a strong lack of general applicability of these new entrant bidding credit findings to other situations." *Id.* at 2(JA-___).

The FCC did not contest this analysis or offer a different analysis of the statistical significance or generalizability of the data.[1] It responded by restating its

[1] The raw data for the FCC's and the ACCDE's analysis was not submitted into the record, but from what commenters could ascertain, they share the same flaws. Leanza 2018 Letter at 3-4 (July 26, 2018)(FCC data showed "88 percent of the new entrant bidding credit winners were men and 86 percent …were white";

conclusion claiming "merely that the criterion provides a known mechanism for identifying smaller entities and that entities that indicated eligibility for the bidding credit often also indicated that they were minority or female owned businesses. Because use of the criteria in the auction context appears to have led to greater female and minority participation, we anticipate similar results in the instant context." Incubator Order at n.43(JA-___). The record shows that conclusion is wrong.

This analysis fails for the same reason the Ninth Circuit rejected EPA analysis in *Earth Island Institute*. In that case the court rejected studies that were, just like the FCC's, "ungeneralizable" and that did not produce "reliable results," because deference to an agency is not due "when the agency's decision is without substantial basis in fact." 494 F.3d at 766 (citing *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972)). As in that case, the FCC's analysis below has no basis in fact and must be set aside.

Moreover, the FCC doesn't contest the definition will help far more people who are not women and ethnic minorities than those who are. This definition therefore is inadequate for the same reasons this Court rejected the previous eligible entity definition in *Prometheus II*, where the number of women and ethnic

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ACCDE data showed "87.6 percent of new entrants were white, and 89.2 percent…were men")(JA-___). The ACCDE did not endorse the new entrant criterion supposedly supported by its data. *Id.* at n.46(JA-___).

minorities encompassed in the eligible entity definition exceeded the number in the general population by only 1%. *Prometheus II*, 652 F.3d at 470.

Even if the FCC's data had been compelling, the FCC never addressed concerns that a program that gave bidders a 25 or 35 percent financial boost in an auction is not analogous to the significantly more complex incubator program. Leanza 2018 Letter at 4-5 (July 26, 2018)(JA-___).

The FCC did not offer a "satisfactory explanation for its action[,] including a rational connection between the facts found and the choices made" and "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

RELIEF

After 15 years of delay, Petitioners respectfully seek specific and time-limited relief. The FCC is poised to continue permitting further broadcast consolidation without regard to its harm to race/gender diversity. The relief requested will ensure any changes to ownership rules are made in conformity with the decisions of this Court, and prevent renewed litigation on the same topic in each successive Quadrennial Review.

This Court should vacate the Reconsideration Order in its entirety. It should reverse and remand the Second R&O and Incubator Order insofar as they permit additional consolidation by repealing or modifying ownership rules without the

required race/gender diversity analysis. The Court should hold that the FCC may not take action to repeal or modify any ownership rule until after it completes studies that assess the impact of any proposed change on race/gender diversity. It should retain jurisdiction to supervise compliance with its mandate, and direct the FCC to report on its progress every 90 days.

Petitioners request that this Court appoint a mediator or master, perhaps a jurist such as a senior judge in this Court, to ensure timely compliance with this Court's decisions. *See, e.g.*, *Public Citizen Health Research Group*, 314 F.3d at 159. Any mediators' fees should be borne by the FCC.

In addition, this Court should direct that:

1) the FCC expeditiously correct radio/television Form 323 ownership data to remedy omissions and errors;

2) within one year, the FCC correct historical NTIA ownership data to remedy omissions and errors as needed to conduct studies;

3) with the mediator or master's assistance, the FCC and Petitioners agree on outside expert(s) at FCC's expense to make recommendations to the FCC and the mediator with respect to future studies. These recommendations should, at a minimum, include methods to assess the efficacy of previous race-neutral efforts and a

literature survey and recommendations for methods that will: account for any remaining omissions in the ownership data; measure ownership viewpoint; and measure small sample-size populations. Petitioners and the FCC should agree on a research program and timetable so that such studies will be completed in time to be considered in the 2018 Quadrennial Review in compliance with the APA.

Petitioners further request all such other relief as may be just and proper.

Dated: December 21, 2018

s/ Cheryl A. Leanza
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CERTIFICATES OF COMPLIANCE

Nos. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335

Caption: ***Prometheus Radio v. FCC, etc., et al.***

1. I, Cheryl A. Leanza, certify that I am a member of the bar of this Court pursuant to Third Circuit Rules 28.3(d) and 46.1(e).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 9,767 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt. Times New Roman.

4. I, Cheryl Leanza, hereby certify that on December 21, 2018, I electronically filed the foregoing BRIEF with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

5. I certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that a virus detection program (Symantec Endpoint Protection version 9.0.1.1000) has been run on the file and that no virus was detected.

Dated: December 21, 2018

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