No. 14-1090
Consolidated with 14-1091, 14-1092, 14-1113

In The

United States Court of Appeals For The District of Columbia Circuit

HOWARD STIRK HOLDINGS, LLC.

Appellant,

vs.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

On Petitions For Review Of An Order Of The Federal Communications Commission

BRIEF OF *AMICI CURIAE* INTERNATIONAL CENTER FOR LAW AND ECONOMICS AND AFFILIATED SCHOLARS IN SUPPORT OF THE PETITIONS FOR REVIEW FILED BY PETITIONERS HOWARD STIRK HOLDINGS, LLC, NATIONAL ASSOCIATION OF BROADCASTERS, AND NEXSTAR BROADCASTING, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

Petitioners in these consolidated proceedings are Howard Stirk Holdings, LLP ("HSH"), the National Association of Broadcasters ("NAB"), Nexstar Broadcasting Inc. ("Nexstar") (jointly, "Broadcast Petitioners"), and Prometheus Radio Project ("Prometheus"). All petitioners have also been granted status as intervenors for respondents.

Respondents are the Federal Communications Commission (the "Commission") and the United States of America.

Minority Media and Telecommunications Council is an intervenor for petitioner Prometheus, and Mission Broadcasting Inc. is an intervenor for the Broadcast Petitioners. Benton Foundation, Common Cause, Media Alliance, Media Council Hawai'i, the National Association of Broadcast Employees and Technicians-Communications Workers of America, the National Organization for Women Foundation, and the Office of Communication of the United Church of Christ, Inc. are intervenors for respondents.

Cox Media Group and the International Center for Law and Economics are *amici curiae* in support of the Broadcast Petitioners. ICLE is joined by affiliated scholars in the field of law, economics or communications. These scholars, listed in Appendix A along with their university affiliations, are Babette E. Boliek, Henry

N. Butler, Richard Epstein, Stan Liebowitz, Fred McChesney, Paul H. Rubin, and Michael E. Sykuta.

(B) Rulings under Review. The ruling under review is an order of the Commission captioned *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; 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; Rule and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Further Notice of Proposed Rulemaking and Report and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) ("2014 Order"), JA__. The order consists of a Further Notice of Proposed Rulemaking and a Report and Order adopting new rules addressing arrangements between broadcasters known as Joint Sales Agreements or JSAs. Separate synopses of both parts of the order were published in the Federal Register on May 20, 2014, at 79 Fed. Reg. 28996 and 79 Fed. Reg. 29010. JA__. The 2014 Order appears in full at JA__.

(C) Related Cases.

This case was not previously before this Court or any other court. This proceeding consists of four petitions for review challenging the same agency order; the latter three were consolidated with lead case No. 14-1090:

1. Howard Stirk Holdings, LLC v. FCC, et al., No. 14-1090
2. Nexstar Broadcasting Inc. v. FCC, et al., No. 14-1091
3. National Association of Broadcasters v. FCC, et al., No. 14-1092
4. Prometheus Radio Project v. FCC, et al., No. 14-1113

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Rule 29(a) Statement

In accordance with Federal Rule of Appellate Procedure 29(a), *amici* state that all parties to this petition to review have either consented or stated that they have no objection to the filing of this brief.

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2008 Order	*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, et al., Report and Order and Order on Reconsideration*, 23 F.C.C.R. 2010 (2008).
2014 Order	*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; 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; Rule and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Further Notice of Proposed Rulemaking and Report and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) ("2014 Order"), JA__.
1996 Act	The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. (1996).

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2010 Guidelines	U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 6522010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.
Broadcast Petitioners	Howard Stirk Holdings, LLP, the National Association of Broadcasters , and Nexstar Broadcasting Inc.
DOJ	United States Department of Justice
FCC or Commission	Federal Communications Commission
FTC	Federal Trade Commission
HHI	Herfindahl-Hirschman Index
HSR Act	Hart-Scott-Rodino Premerger Notification Act, 15 U.S.C. § 18a.
ICLE	International Center for Law and Economics
JA	Joint Appendix
JSA	Joint Sales Agreement
NAB	National Association of Broadcasters
Prometheus I	*Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).
Prometheus II	*Prometheus Radio Project v. FCC*, 652 F.3d 431(3d Cir. 2011).

Section 202(h)	Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111-12,), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 9-100 (2004).
SSA	Shared Services Agreement

INTERESTS OF AMICI CURIAE

Amicus ICLE is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will enable businesses and innovation to flourish. ICLE is joined as amicus curiae by seven affiliated scholars, who are professors of law, economics, or communications at leading U.S. universities: Babette E. Boliek, Henry N. Butler, Richard Epstein, Stan Liebowitz, Fred McChesney, Paul H. Rubin, and Michael E. Sykuta. Their titles and academic affiliations are listed in Appendix A. As set out in their motion for leave to file, ICLE and these affiliated scholars all have an interest in the proper application of competition principles in media markets.

ICLE and these affiliated scholars support the petitions for review filed by the Broadcast Petitioners challenging the decision by the FCC to retain its local television duopoly rule and to extend that rule to certain Joint Sales Agreements ("JSAs") without completing the statutorily-mandated 2010 Quadrennial Review of its local media ownership rules. *See* JA__(2014.Order¶¶271-72).

INTRODUCTION AND SUMMARY OF ARGUMENT

"Capricious" is defined as "given to sudden and unaccountable changes of mood or behavior."[1] That is just the word to describe the FCC's decision in its *2014 Order* to reverse a quarter century of agency practice by a vote of 3-to-2 and suddenly declare unlawful scores of JSAs between local television broadcast stations, many of which were originally approved by the FCC and have been in place for a decade or longer. The FCC's action was not only capricious, but also contrary to law for two fundamental reasons.

First, the *2014 Order* extends the FCC's outdated "duopoly" rule to JSAs that have never before been subject to it, many of which were blessed by the agency, without first determining whether that rule is still in the public interest. The "duopoly" rule — first adopted in 1964 during the age of black-and-white TV — prohibits one entity from owning FCC licenses to two or more TV stations in the same local market unless there are at least eight independently owned stations in that market.[2] *See* 47 C.F.R. § 73.3555(b). Almost twenty years ago, Congress

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[1] Definition of "capricious," OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/capricious (last visited Feb. 26, 2015, 1:49 PM).

[2] Even the name of the rule is a misnomer. A duopoly is normally understood to be a market in which there are only two firms. *See* Definition of "duopoly," OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/duopoly (last visited Apr. 19, 2015, 1:56 PM).

recognized that this and other similar local media ownership rules were already becoming outdated with the growth of cable television and other new digital media. It, therefore, directed the FCC in Section 202(h) of the Telecommunications Act of 1996 to review all of its local ownership rules every four years to determine whether they were still "necessary in the public interest as the result of competition," and to repeal or modify those that were not. *1996 Act*, § 202(h).

The FCC's *2014 Order* makes a mockery of this congressional directive. In it, the Commission announced that, instead of completing its statutorily-mandated 2010 Quadrennial Review of its local ownership rules, it would roll that review into a new 2014 Quadrennial Review, while retaining its duopoly rule pending completion of that review because it had "*tentatively*" concluded that it was still necessary. JA__(2014.Order¶15) (emphasis added). This Court should not accept this regulatory legerdemain. The 1996 Act does not allow the FCC to retain its duopoly rule in its current form without making the statutorily-required determination that it is still necessary. A "tentative" conclusion that does not take into account the significant changes both in competition policy and in the market for video programming that have occurred since the current rule was first adopted in 1999 is not an acceptable substitute.

Second, having illegally retained the outdated duopoly rule, the *2014 Order* then dramatically expands its scope by amending the FCC's local ownership attribution rules to make the rule applicable to JSAs, which had never before been subject to it. The Commission thereby suddenly declares unlawful JSAs in scores of local markets, many of which have been operating for a decade or longer without any harm to competition. Even more remarkably, it does so despite the fact that both the DOJ and the FCC itself had previously reviewed many of these JSAs and concluded that they were not likely to lessen competition. In doing so, the FCC also fails to examine the empirical evidence accumulated over the nearly two decades some of these JSAs have been operating. That evidence shows that many of these JSAs have substantially reduced the costs of operating TV stations and improved the quality of their programming without causing any harm to competition, thereby serving the public interest.[3]

For these two reasons, ICLE join and its affiliated scholars join with the Broadcast Petitioners in asking this Court to hold unlawful, vacate, and set aside the FCC's *2014 Order* retaining the duopoly rule and extending it to JSAs.

[3] JSAs are often a part of broader joint operating arrangements that also include Shared Services Agreements ("SSAs"). In its *2014 Order,* the FCC acknowledges that SSAs may have public interest benefits, but says it lacks sufficient information to determine whether they are in the public interest. *See* JA__(2014.Order¶335, ¶340). It nevertheless extends its duopoly rule to JSAs, thereby implicitly condemning them as contrary to the public interest in many markets, without any inquiry into whether those JSAs may be a necessary part of these broader SSAs.

PROCEDURAL HISTORY

Nearly twenty years ago, with the passage of the 1996 Act, Congress directed the FCC to conduct a regular quadrennial review of its media ownership rules every four years to determine whether those rules continue to be "necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." *1996 Act*, § 202(h). Since then, the FCC has completed three reviews of its media ownership rules — one in 1999, one in 2003, and one in 2007. In each of the first two reviews, the FCC sought to relax its duopoly rule slightly. In the third, however, it reversed the changes it had made in 2003 to relax the rule, and reverted to the stricter limits it had adopted in 1999.

In its first review in 1999, the Commission concluded that the absolute ban on local TV duopolies that had been in place since 1964 was no longer necessary, given "the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership." *1999 Order* at 12904¶1. It therefore relaxed the rule to allow common ownership of two television stations in the same local market if they met a new two-part "top-four/eight-voices" test. *See id.* at 12907-08¶8.

Under this new test, a "duopoly" would be permitted only if (1) no more than one station was among the top-four stations in the market and (2) there would

remain at least eight independently owned stations in the market. On review, this Court upheld the Commission's "top-four" test, but remanded its "eight-voices" test for further consideration of whether limiting the voices to be counted to full-powered TV stations could be justified given the growing competition from other media. *See Sinclair Broadcast Grp., Inc. v. FCC*, 284 F.3d 148, 152, 162 (D.C. Cir. 2002).

The FCC folded that remand into its next quadrennial review, which it completed in 2003. Finding that the "media marketplace" was "characterized by abundance," *2003 Order* at 13647-48¶86, it concluded that its duopoly rule was no longer needed to promote diversity or localism and could be justified only to the extent necessary to protect competition. *See id.* at 13668-69¶133. The Commission therefore amended the rule to relax its "eight-voices" test, which this Court had earlier questioned. The amended rule continued to restrict common ownership of two top-four ranked stations, but allowed common ownership of smaller stations in a manner designed to ensure that all but the smallest markets would have at least six independent stations. *See id.* at 13693-706¶¶189-220. The Commission viewed six stations as sufficient because a market with six equal-sized

competitors would not be considered highly concentrated under the then-current DOJ/FTC Horizontal Merger Guidelines.[4]

On review, the Third Circuit Court of Appeals rejected the FCC's assumption of equal-sized competitors to determine how many independent TV stations were needed to protect competition. *See Prometheus I*, 373 F.3d at 418-20. Noting that the shares of stations within local markets vary substantially, the court held that there was no rational basis for treating a merger of two stations with small market shares the same as a merger of two stations with larger shares. It therefore remanded to the Commission with a direction that it further "support and harmonize its rationale" for relaxing its limits on local TV duopolies. *Id.* at 420.

On remand, rather than doing as the Third Circuit directed, the FCC, in its third Quadrennial Review, instead reversed its prior decision to relax the duopoly rule and reinstated its decade-old "top-four/eight-voices" test. *See 2008 Order*, at 2018-19¶13. The only explanation the FCC offered for this about-face was that it now believed four independent stations were needed in addition to the four major network affiliates to promote competition in every market. *Id.* at 2065¶99. The

4 DOJ & FTC, HORIZONTAL MERGER GUIDELINES (1992) (rev. 1997), available at http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter cited as "1992 Guidelines"]. Market concentrations are measured using the Herfindahl-Hirschman Index ("HHI"), which is calculated by summing the squares of the individual market shares of each firm. Markets with an HHI greater than 1800 are regarded as highly concentrated under the 1992 Guidelines. A market with six stations with equal shares would have an HHI of only 1666.

Commission did not explain why this number of stations was required, nor did it explain why it chose not to take into account the market shares of the merging stations as the Third Circuit had suggested. Viewing this as "a line-drawing exercise," which it saw as "'the agency's responsibility,'" the Third Circuit affirmed the FCC's reinstatement of its "eight-voices" test. *Prometheus II*, 652 F.3d at 460 (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)).

In the seven years since it completed its third Quadrennial Review at the end of 2007, the FCC has failed to complete another Quadrennial Review. The FCC commenced its next 2010 Quadrennial Review in 2009. Five years later, in 2014, it still had not completed that review. Instead, it announced in April 2014 that it would roll that uncompleted 2010 Review into its next 2014 Quadrennial review, and would leave its existing duopoly rule in place until it completes that review. *See* JA__(2014.Order¶1). Because this new review is not scheduled to be completed until the second half of 2016 at the earliest, the effect is to retain the duopoly rule in its current form for more than eight-and-a-half years since it was last amended at the end of 2007 — more than twice what section 202(h) allows. *See* JA__(Pai.Dissent.217).

ARGUMENT

I. THE FCC ACTED CONTRARY TO LAW BY RETAINING ITS DUOPOLY RULE WITHOUT MAKING THE REQUIRED DETERMINATION THAT THE RULE IS STILL "NECESSARY IN THE PUBLIC INTEREST."

It would be hard to find a more direct disregard of a statutory directive than the FCC's decision to retain its duopoly rule without completing its already overdue 2010 Quadrennial Review. Section 202(h) does not allow the FCC to retain any of its local media ownership rules without making an *affirmative* determination *every four years* that the rule is still necessary to protect competition. Here, the Commission's action will result in *more than eight years* passing since it last made that required determination. Even worse, the Commission has not only failed to determine that its current duopoly rule continues to be necessary as required by statute, but has not even satisfactorily explained why it "tentatively" believes that it is. *See* JA__(2014.Order¶__). The Commission's decision to retain that rule pending further rulemaking should, therefore, be set aside both for its failure to make the statutorily-required determination in a timely manner and for its failure to explain satisfactorily why the rule is still needed.[5]

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[5] Any effort by the FCC to claim that its retention of the duopoly rule is not reviewable must fail. *See* 5 U.S.C. § 551(13) ("agency action" includes "failure to act"); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) ("failure to act" includes "failure to promulgate a rule or take some

In its *2014 Order*, the Commission relies largely on findings from its earlier Quadrennial Reviews to support its "tentative" conclusion that the duopoly rule in its current form is still needed to protect competition. *See* JA__(2014.Order¶15).[6] By relying on these earlier findings, the *2014 Order* fails to examine the significant changes both in competition policy and in the market for video programming that have occurred since the current form of the rule was first adopted in 1999. JA__(2014.Order¶21n.48).

The Commission's failure to consider these changes in its *2014 Order* renders its retention of the duopoly rule in its current form pending further rulemaking arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (internal quotation marks omitted)); *see also Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[T]he agency must explain why it decided to act as it did. The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it

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decision by a statutory deadline"). Acceptance of such an argument would immunize the FCC's systematic evasion of Section 202(h) from judicial review. *See* JA__(Pai.Dissent.217, 226, 232).

[6] As in its earlier *2008 Order*, the FCC justified this "tentative" conclusion solely on the need to protect competition, saying that it did not "feel the need to consider whether [the rule] is also necessary . . . in order to promote [its] localism or viewpoint diversity goals." JA__(2014.Order¶43n.106).

must 'articulate a satisfactory explanation' for its action.") (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)).

A. The *2014 Order* Fails to Consider Important Changes in Competition Policy Since the "Top-Four/Eight-Voices" Test Was First Adopted in 1999.

The first important development since the "top-four/eight-voices" test was originally adopted in 1999 the Commission failed to consider is the major revision to the Horizontal Merger Guidelines adopted by the DOJ and FTC in 2010.[7] The FCC itself had looked to earlier versions of the Guidelines to determine what limits on ownership of local TV stations were necessary to protect competition. *See 2003 Order* at 13693¶192 (relying on the Guidelines to "evaluat[e] the competitive harms of an increase in horizontal market concentration"). Despite that, the Commission failed to consider how the 2010 revision might affect its assessment of that question today.

Reflecting nearly 20 years of enforcement experience since the merger guidelines were last revised in 1992, the 2010 Guidelines substantially increase the concentration threshold at which a merger may be presumed to raise competitive concerns from 1800 to 2500 on the HHI Index — a nearly fifty percent increase. *See 2010 Guidelines*, at 19. Under this new threshold, a merger would have to

[7] *See* DOJ & FTC, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf [hereinafter cited as "2010 Guidelines"].

leave no more than four equally-sized competitors in a market to give rise to concerns about a potential harm to competition.[8] Even then, a merger exceeding this threshold would only give rise to a rebuttable presumption of potential harm to competition, which is a far cry from the FCC's current flat ban on all duopolies that leave fewer than eight independent TV stations in any local market.[9]

The 2010 Guidelines emphasize the need for a highly fact-specific review of the likely competitive effects of any merger, as opposed to the kind of simplistic headcount on which the FCC duopoly rule relies. *See id.* at 1-2.[10] They require that the antitrust agencies examine, among other things, (i) the market shares of the merging parties, (ii) the effect of past consummated mergers, (iii) comparisons across markets showing the relationship between concentration and pricing, (iv) the extent of head-to-head competition between the merging parties, and (v) the

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[8] For example, a market in which there are five equal-sized competitors would have an HHI of only 2000, well below the 2500 threshold.

[9] The 2010 Guidelines expressly provide that any presumption of possible harm to competition arising from a level of concentration above this threshold "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." *2010 Guidelines*, at 19; *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 335 (1963).

[10] *See generally* Carl Shapiro, *The2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010); *cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., concurring in part and dissenting in part) (warning against reliance on "antitrust theories so abbreviated as to prevent proper analysis").

potential cost savings and other efficiencies the merger is likely to generate. *See 2010 Guidelines*, at 2-4.

Applying this kind of fact-specific analysis, the DOJ and FTC rarely challenge mergers that leave more than four significant competitors in a market and almost never challenge mergers that leave more than five. A recent study by the FTC Bureau of Economics shows that from 1996 to 2011, a 15-year period over which it challenged nearly 900 mergers, the FTC challenged only 30 mergers that left more than four competitors in a market and only ten that left more than five.[11]

Although both the FCC and the Third Circuit had previously looked to the earlier 1992 Guidelines for guidance in determining what limits should be imposed on local TV duopolies, the FCC makes no effort in its *2014 Order* to explain why it continues to rely on a simplistic head count of stations to determine when a local TV duopoly is likely to harm competition, rather than considering the market shares of the merging stations as the Third Circuit suggested in *Prometheus I,* or any of the other factors identified in the 2010 Guidelines. Nor does it make any effort to explain why it continues to believe that at least eight independent stations

[11] *See* Malcolm Coate, *et al.*, FTC Bureau of Economics, Horizontal Merger Investigation Data, Fiscal Years 1996-2011 12 (2013), available at https://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011.

are needed in every local market to protect competition when the antitrust agencies rarely challenge mergers leaving more than four competitors.

While "[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets" regardless of whether the conduct in question "rises to the level of an antitrust violation," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997), the Commission in its *2014 Order* expressly disavows relying on that policy, but instead attempts to justify retaining its duopoly rule solely on the need to protect competition. *See* JA__(2014.Order¶43n.106) (disavowing "need to consider whether [the rule] is also necessary . . . to promote [its] localism or viewpoint diversity goals"). In these circumstances, the Commission should, at a minimum, be required to explain why its assessment of the number of competitors needed to ensure effective competition differs so dramatically from that of the federal antitrust agencies, with which it shares responsibility for reviewing television station mergers.

B. The *2014 Order* Fails To Consider Important Changes in the Market for Video Programming Since the "Top-Four/Eight-Voices" Test Was First Adopted in 1999.

In retaining its duopoly rule in its *2014 Order*, the FCC also failed to consider a second important change since it first adopted the "top-four/eight-voices" test over fifteen years ago: namely, the continuing evolution in the market for video programming. As we all know, competition from non-broadcast sources

of programming has increased dramatically since 1999. Today, over 85 percent of American households watch TV over cable or satellite.[12] Most households now have access to nearly 200 cable channels that compete with broadcast TV for programming content and viewers.[13] In 2014, these cable channels attracted twice as many viewers as broadcast channels.[14] And since the last quadrennial review was completed in 2007, online video services such as Netflix, Amazon Prime, and Hulu have begun to emerge as major new competitors for video programming, leading 179,000 households to "cut the cord" and cancel their cable subscriptions in the third quarter of 2014 alone.[15] Today, forty percent of U.S. households

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[12] *See* FCC, *Fifteenth Annual Assessment of Report: In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 12-203 (rel. July 22, 2013) (estimating that 101 million out of 117 million occupied U.S. households subscribe to cable or DBS services).

[13] *See* Megan Geuss, *On Average, Americans Get 189 Cable TV Channels and Only Watch 17*, ARSTECHNICA (May 6, 2014), http://arstechnica.com/business/2014/05/on-average-americans-get-189-cable-tv-channels-and-only-watch-17/.

[14] Kevin Caves & Hal Singer, *Competition in Local Broadcast Television Advertising Markets* 8 (Aug. 6, 2014), JA__-__.

[15] *See* Shalini Ramachandran, *Pay-TV 'Cord Cutting' Accelerates*, WALL ST. J. (Nov. 6, 2014), http://www.wsj.com/articles/pay-tv-cord-cutting-accelerates-1415321442.

subscribe to an online streaming service; as a result, cable ratings among adults fell by nine percent in 2014.[16]

As viewers have shifted away from broadcast TV for news, sports, and entertainment — first to cable and now to online video — so, too, have advertisers. In 2013, cable captured more than 45 percent of all TV advertising revenue.[17] That same year, total online advertising surpassed broadcast TV for the first time with $42.8 billion in revenues, a tenfold increase since 1999 when the FCC first adopted its "top-four/eight-voices" test.

The introduction and nearly universal adoption of smartphones and tablets is one major reason for these ongoing shifts in how we view video programming. At the end of 2007, when the FCC completed its last quadrennial review, the iPhone had just been introduced, and the launch of the iPad was still more than two years away.[18] Today, two-thirds of Americans have a smartphone or tablet over which

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[16] *See* Cecilia Kang, *Streaming Services Eroding Appetite for Regular Old TV*, WASH. POST, Mar. 12, 2015, at A18; *see also* Cecilia Kang, *As the Bundle Unravels, Cable Channels Try to Hang On*, WASH. POST, Apr. 7, 2015, at A1 (noting double-digit declines in audience for six major cable networks).

[17] *See* PwC & Interactive Advertising Bureau, *IAB Internet Advertising Revenue Report: 2013 Full Year Results* 19 (Apr. 2014), http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf.

[18] *See* Timothy B. Lee, *Everything You Need To Know About Apple: How Did Steve Jobs Turn Apple Around?*, VOX.COM (Nov. 17, 2014), http://www.vox.com/cards/apple/how-did-steve-jobs-rescue-apple.

they can receive video content, using technology that did not even exist when the FCC last amended its duopoly rule.[19] Yet, by relying on evidence from its last review to support its "tentative" conclusion that the duopoly rule is still necessary, the FCC largely ignores the impact these devices are having.

In its *2014 Order*, the FCC acknowledges that its previous two Quadrennial Reviews defined the market for "delivered video programming" as including non-broadcast video programming. JA__(2014.Order¶21n.48). The Commission nevertheless insists — as it did in those earlier reviews — that even though they are part of the market, "non-broadcast sources of video programming should not be included in [its] analysis of the local television ownership rule." *Id.* It offers three reasons for this paradoxical position, none of which withstands scrutiny.

First, the Commission says, "these programming alternatives compete largely in national markets" because their programming is "generally uniform across all markets." *Id.* at JA__¶23. This assertion — for which the Commission cites no support — seriously understates the extent to which cable and satellite systems deliver programming of local interest. The best example is sports. Through regional sports networks and cable channels co-sponsored with professional and college sports leagues, cable now offers far more coverage of

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[19] *See* Jon Fingas, *Two-thirds of Americans Now Have Smartphones*, ENGADGET.COM (Feb. 11, 2014, 10:26 PM), http://www.engadget.com/2014/02/11/two-thirds-of-americans-now-have-smartphones/.

local teams in every local TV market than broadcast does.[20] Similarly, for entertainment programming, while each cable network may offer uniform programming nationally, cable and satellite services decide which cable networks to carry in each local market, based on audience preferences in each market, just as local broadcast stations decide which nationally-syndicated programming they will carry.

Second, the Commission argues that broadcast's "strong position in the local advertising market supports our view that non-broadcast video programmers are not yet meaningful substitutes in local television markets." *Id.* at JA__¶24. Again, however, it cites no evidence to support that assertion. In fact, the most recent publicly available data show that cable now captures roughly 26 percent of all local TV advertising revenues.[21] It is hard to understand why a form of video

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[20] *See* Richard Sandomir, *Regional Sports Networks Show the Money*, N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/sports/regional-sports-networks-show-teams-the-money.html. In Washington, D.C., for example, a Nationals fan can watch many more Nationals games on cable than on any local broadcast station. *See Washington Nationals Calendar, 2014-15*, http://washington.nationals.mlb.com/schedule/?c_id=was (last visited Apr. 2, 2015).

[21] *See Local Advertising Revenue Share Estimates, by Media Channel,* MARKETING CHARTS (Nov. 14, 2013), http://www.marketingcharts.com/traditional/local-advertising-revenue-share-estimates-by-media-channel-38096/.

programming that captures over one-quarter of local TV advertising dollars is not a "meaningful substitute" for broadcast TV.[22]

Third, the Commission claims that broadcast continues to provide viewers with the "most popular programming on television" and is "the primary source of local news and public interest programming." *Id.* at JA__¶25. But this is like saying that, because one shoe store does not carry the most popular brand of shoes and is not the largest outlet for shoes in its market, that store is not relevant to an analysis of the local retail market for shoes. Again, the Commission offers no evidence to support its assertion. Many of the most popular TV shows, such as *Walking Dead*, *Mad Men*, and *House of Cards*, are now on cable or online video.[23] More tellingly, the Nielsen data show that cable networks now attract twice as many viewers as broadcast stations.[24] Similarly, Pew Research data show that the

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[22] In a footnote, the *2014 Order* seeks to buttress this argument by citing several recent DOJ complaints challenging acquisitions of local broadcast TV stations in which it alleged that the relevant market was "the sale of broadcast television spot advertising." *See* JA__(2014.Order¶25n.62). The FCC neglects to mention that all of these cases involved much higher levels of concentration than would be permitted by the current duopoly rule.

[23] *See, e.g.*, Aimee Picchi, *Is Netflix More Popular Than TV?*, CBS MONEYWATCH (Apr. 16, 2015, 12:44 PM), http://www.cbsnews.com/news/is-netflix-more-popular-than-tv/ (A "'survey of more than 2,000 U.S. consumers also found that almost half spent more time watching Netflix than traditional television.'").

[24] *See* Caves & Singer, *supra* note 14, at JA__-__.

Internet is now the second largest source of local news for consumers, having surpassed newspapers and gaining rapidly on broadcast TV.[25]

In the face of this contrary evidence, the FCC's dismissal of the growing competition from cable and other digital media as being "of limited relevance" does not satisfy the standards this Court has historically applied in reviewing FCC rulemakings. *See, e.g.*, *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d at 162-65 (holding that the Commission had failed adequately to explain its exclusion of non-broadcast media for purposes of its "eight-voices" test). Applying these standards, the Court should find that the FCC has not satisfactorily explained its exclusion of online and cable video programming from its analysis of competition within "the delivered video programming market" for purposes of determining how many independent stations are needed to protect competition.

II. THE FCC ACTED UNLAWFULLY BY EXTENDING ITS DUOPOLY RULE TO JOINT SALES AGREEMENTS WITHOUT CONSIDERING SUBSTANTIAL EVIDENCE IN THE RECORD THAT THEY CAN SERVE THE PUBLIC INTEREST WITHOUT HARMING COMPETITION.

In its *2014 Order*, the FCC did not merely retain its outdated duopoly rule without completing its statutorily-mandated 2010 Quadrennial Review. Even more capriciously, it also abruptly reversed a quarter century of agency practice by

[25] The Pew Research Center, *The State of the News Media 2013: An Annual Report on American Journalism* (2013), http://www.stateofthemedia.org/2013/overview-5/.

amending its local ownership attribution rule to extend that rule to JSAs that had not previously been subject to it. Many of these have been in place for a decade or longer and had been found by both the DOJ and the FCC not to pose any threat to competition. *See* JA__(Pai.Dissent.219).

Television stations first began entering into JSAs and other similar arrangements nearly 25 years ago as a way to capture economies of scale that would otherwise have been denied them by the duopoly rule's then-absolute ban of local TV station mergers.[26] In 1999, when the FCC relaxed its duopoly rule slightly by adopting the current "top-four/eight-voices" test, it considered subjecting JSAs to its revised duopoly rule, but decided against doing so. *See* JA__(*Review of the Comm'n's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 F.C.C. Rcd. 12559, 12596 (1999)). The Commission's view at the time was that these agreements did not convey a sufficient "degree of influence or control over station programming or core operations" to justify extending its duopoly rule to them, and that doing so might harm the public interest because JSAs could "help promote diversity by enabling smaller stations to stay on the air." *Id.* at 12612.

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[26] *See* Michael E. Lewyn, *When is Time Brokerage a Transfer of Control? The FCC's Regulation of Local Marketing Agreements and the Need for Rulemaking*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 3 (1995).

Relying on that decision, broadcasters over the last 15 years have entered into JSAs in a large number of local markets. By some estimates, there are now well over 100 JSAs in local markets all around the country. *See* JA__(O'Rielly.Dissent.234). According to another commissioner, the FCC itself has approved 85 of these JSAs just since 2008. *See* JA__(Pai.Dissent.228).

By amending the FCC's local ownership attribution rule and refusing to grandfather existing JSAs, the *2014 Order* now makes many, if not most, of these JSAs illegal. The Commission offers no explanation as to why it now believes that extending the duopoly rule to JSAs, many of which it had previously approved, is suddenly necessary to protect competition or otherwise serve the public interest. Nor does the FCC cite any evidence that it is. In fact, the record evidence points overwhelmingly in the opposite direction. That evidence shows that JSAs often serve the public interest by allowing stations to capture important economies of scale and thereby offer more and better programing at a lower cost to advertisers.

In the face of this evidence, the Commission's action in reversing 25 years of agency practice and extending its duopoly rule to most JSAs is both arbitrary and capricious. *See Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) ("[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so."); *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("The FCC 'cannot

silently depart from previous policies or ignore precedent' . . . ." (citations omitted)); *see also Verizon v. FCC*, 740 F.3d 623, 662 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part) ("factual determinations that underly [*sic*] regulations must still be premised on demonstrated — and reasonable — evidential support").

The evidence that JSAs can serve the public interest without harming competition comes from two principal sources, both of which the *2014 Order* disregards. The FCC's failure to consider this evidence before extending its duopoly rule to JSAs requires that extension to be set aside.

First, over the past two decades, the DOJ has analyzed the likely competitive effects of many JSAs in connection with merger reviews under the Hart-Scott-Rodino ("HSR") Premerger Notification Act, 15 U.S.C. § 18a. Based on a review of competitive conditions in each relevant local market, the DOJ has generally allowed JSAs to proceed where the two stations had a combined share of less than 40 percent of local broadcast TV advertising revenues, even if they involved top-four stations and would leave fewer than eight independent stations in the market, with the FCC interposing no objection.

Second, empirical studies in the record show that the JSAs the FCC and DOJ have permitted to proceed have not harmed competition. Instead, they have

significantly benefited the public interest through lower operating costs, improved programming, and lower advertising rates.

A. The *2014 Order* Extends the Duopoly Rule to JSAs the FCC and DOJ Have Previously Found Were Not Likely to Harm Competition.

When a JSA is part of a larger transaction that meets the requirements for premerger notification under the HSR Act, 15 U.S.C. § 18a, it is subject to premerger review by the DOJ Antitrust Division.[27] Over the last 25 years, the DOJ has therefore reviewed dozens, if not scores, of JSAs that were part of larger transactions. In so doing, it has applied the kind of fact-specific, case-by-case analysis required by the Merger Guidelines, and has generally challenged JSAs only when the participating stations had a combined share of 40 percent or more of local broadcast TV advertising revenues — usually substantially more.[28] In all but

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[27] The HSR Act requires parties to mergers above a certain dollar threshold to notify both the FTC and DOJ and observe a mandatory waiting period so the agencies can review the transaction before it is consummated.

[28] *See, e.g.*, *United States v. Media Gen., Inc.*, No. 14-01823 (D.D.C. Jan. 13, 2015) (requiring Media General to divest stations in four DMAs where the combined market shares were 83%, 59%, 55%, and 54%); *United States v. Gannett Co.*, No. 13-01984 (D.D.C. Nov. 18, 2014) (requiring Gannett to divest a station in St. Louis, Missouri where combined market share was 50%); *United States v. Raycom Media, Inc.*, No. 1:08-cv-01510-RMU (D.D.C. Dec. 4, 2008) (requiring Raycom to divest a station in the Richmond, Virginia DMA where combined market share was more than 50%).

two cases where the combined shares were less than 40 percent,[29] the DOJ has allowed transactions that included a JSA to proceed even if they involved two top-four stations or were in markets with fewer than eight independent stations.[30] In each case, the FCC approved the parties' related license transfer application once the DOJ had cleared the transaction under the antitrust laws.[31] The *2014 Order* does not explain why JSAs that both agencies had previously found were unlikely to lessen competition should now suddenly be declared unlawful.

In a footnote to its *2014 Order*, the FCC cites an "ex parte submission" by the DOJ Antitrust Division as supporting its extension of the duopoly rule to JSAs.

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[29] *See United States v. Media Gen., Inc.*, *supra* note 28 (requiring Media General to divest station in Birmingham, Alabama where the combined market shares were 34%); *United States v. Sinclair Broadcast Grp., Inc.*, No. 14-cv-01186 (D.D.C. Nov. 14, 2014) (requiring Sinclair to divest station in Harrisburg, Pennsylvania, where Sinclair already operated two stations and a JSA with a third station would have given it a 38% combined market share).

[30] *See, e.g.*, Press Release, Sinclair Broadcast Group, *Sinclair Broadcast Group Closes on Acquisition of Barrington Stations* (Nov. 25, 2013), http://www.sbgi.net/site_mgr/temp/Barrington%20Closes.pdf (announcing acquisition of 18 TV stations, including two stations in Flint, Michigan where Sinclair already owned a third station and the combined share was 36 percent); Ira Teinowitz, *Justice Eyes Local TV Accords: Deal Guidelines Could Redirect FCC Scrutiny*, ADVERTISING AGE (Feb. 2, 1998), http://adage.com/article/news/justice-eyes-local-tv-accords-deal-guidelines-redirect-fcc-scrutiny/66980/ (reporting that DOJ was about to clear the formation of a JSA between the Fox and ABC affiliates in Columbus, Ohio where the two stations had a combined 40 percent share).

[31] *See, e.g.*, *In the Matter of Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc., FCC Memorandum Opinion and Order*, 28 F.C.C.R. 1686759 (2013).

See JA__(2014.Order¶348), citing *Ex Parte* Submission of the U.S. Dep't of Justice (Feb. 20, 2014), http://www.justice.gov/atr/public/comments/303880.pdf. That submission, however, does no such thing. While DOJ agreed that a JSA should be treated no differently than a full merger for purposes of analyzing its competitive effects, it did not endorse extending the current version of the FCC's duopoly rule to JSAs. Instead, consistent with its own Merger Guidelines, DOJ suggested that the Commission conduct a "case-by-case review" in evaluating each JSA and that it apply "established antitrust principles in . . . analyzing the competitive effect" of those agreements. *See Ex Parte* Submission, at 2, 13-18. This is hardly an endorsement for extending to JSAs a flat ban of all local TV duopolies in markets with fewer than eight competitors without any case-by-case review of their likely effect on competition.

B. The FCC Failed to Consider the Empirical Record Evidence that JSAs Can Serve the Public Interest Without Any Harm to Competition.

Because of the widespread use of JSAs and other similar arrangements since 1991, there is now a large body of empirical evidence showing that many of the JSAs that would now violate the duopoly rule have served the public interest through lower operating costs and improved programming without any harm to competition.

1. Lower operating costs. The FCC itself has repeatedly recognized that common ownership and joint operating arrangements between stations in the same local market are likely to yield "cost savings, which can lead to programming and other service benefits that enhance the public interest." *1999 Order* at 12920¶34; *see also 2003 Order* at 13674¶147 (noting that "common ownership of stations may result in consumer welfare enhancing efficiencies"). Commissioner Pai, in his dissenting statement to the *2014 Order*, offered a number of examples. *See* JA__(Pai.Dissent.222). In one of these, a JSA enabled two stations in Joplin, Missouri to use their $3.5 million of cost savings from a JSA to upgrade their Doppler radar system, which helped save lives when a devastating tornado hit the town in 2011. The record evidence shows that these cost savings can be essential to the survival of stations in smaller markets with declining advertising revenues and increasing competition from other media.[32]

2. Improved programming. Several econometric studies in the record provide empirical evidence that duopolies and JSAs enable stations to improve the quality of their programming. They show that stations operating under these agreements are likely to carry significantly more news, public affairs, and current

[32] *See* Jeffrey A. Eisenach & Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* 18-19 (June 27, 2011), attached to Comments of the NAB on the Amendment to the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71 (June 27, 2011), http://apps.fcc.gov/ecfs/comment/view?id=6016825631.

affairs programming than other stations in their markets. *See, e.g.*, Eisenach & Caves, *supra* note 32, at 45-47. Again, Commissioner Pai provides several examples of these benefits in his dissenting statement. *See* JA__(Pai.Dissent.222). In one of these, a JSA in Wichita, Kansas enabled one of the two stations to provide Spanish-language HD programming, including news, weather, emergency and community information, in a market where that Spanish-language programming had not previously been available.[33] As a result of such programing improvements, one empirical study found an eleven percent increase in audience shares for stations acquired through a duopoly. *See* Eisenach & Caves, *supra* note 32, at 79.

3. Lower Advertising Rates. The *2014 Order* cites no empirical evidence to show that any existing JSA has led to any increases in advertising rates. This prompted one of the Broadcast Petitioners, the NAB, to commission an econometric study to analyze the relationship between pricing of advertising and JSA status across all 210 local markets nationwide. That study shows that markets with JSAs have advertising prices that, on average, are roughly 16 percent *lower*

[33] *See also* JA__(Pai.Dissent.222-25) (citing additional examples of how JSAs have served to promote diversity and localism through new programming directed to smaller segments of the community).

than in non-duopoly markets — not *higher*, as would be expected if JSAs harmed competition.[34]

The most persuasive empirical evidence that JSAs do not harm competition may be the absence of complaints from advertisers. This is a classic case of the dog that didn't bark.[35] Since JSAs are used to sell advertising, the entities most likely to be directly affected are advertisers who purchase time on those stations. If a JSA had harmed competition and resulted in higher prices for advertising, one would expect a chorus of complaints from advertisers. Yet the *2014 Order*, which was released after a four-year long rulemaking process, does not identify even a single complaint by any advertiser about any JSA.

In extending its duopoly rule to JSAs, the FCC wholly disregarded this empirical evidence showing that JSAs can benefit the public interest without any harm to competition. The Commission's failure to consider this evidence or to provide any reasoned explanation for why extending its duopoly rule to JSAs is necessary to protect competition makes its action arbitrary and capricious, and therefore contrary to law. *See Verizon Tel. Cos.*, 570 F.3d at 305 ("In cases such as this one, in which the agency 'has failed . . . to explain the path that it has taken,

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[34] *See* Caves & Singer, *supra* note 14, at JA__-__.

[35] *See* SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 1-28 (1892).

we have no choice but to remand for a reasoned explanation.'" (alteration in original)).

CONCLUSION

For the reasons set forth herein, ICLE and its affiliated scholars join the Broadcast Petitioners in urging this Court to find unlawful and, therefore, to vacate and set aside the FCC's *2014 Order* retaining its duopoly rule and extending that rule to JSAs.

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ADDENDUM

Duopoly Rule, 47 C.F.R. § 73.3555(b)

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684) do not overlap; or

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(2) [Reserved]

The Telecommunications Act of 1996,
Pub. L. No. 104-104, 110 Stat. (1996),
***as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 9-100 (2004).**

(h) Further Commission Review.

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

5 U.S.C. § 551(13)

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

Hart-Scott-Rodino Premerger Notification Act,
15 U.S.C. § 18a

(a) Filing.

Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person—

(A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19 (a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

(B)

(i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published); and

(ii)

(I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;

(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

(III) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's February 20, 2015 briefing schedule because this brief contains 6,956 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: April 20, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, I electronically filed the foregoing *Amici Brief* of International Center of Law and Economics and Affiliated Scholars with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 20, 2015

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