No. 11-698

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS CBS CORPORATION AND CBS BROADCASTING INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit correctly upheld and retained future jurisdiction over media broadcast ownership rules promulgated by the Federal Communications Commission, where the D.C. Circuit previously held that the very local television ownership rule approved by the Third Circuit was arbitrary and capricious and not necessary in the public interest.

LIST OF PARTIES

Pursuant to Rule 24.2 of the Rules of this Court, Respondents CBS Corporation and CBS Broadcasting Inc. adopt the list of parties set forth in the National Association of Broadcasters' Petition for Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows:

CBS Broadcasting Inc. is a wholly owned indirect subsidiary of CBS Corporation, which is a publicly traded corporation. National Amusements, Inc. and its wholly-owned subsidiary, NAI Entertainment Holdings LLC, are privately-held companies, which, in the aggregate, own the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge without inquiry, GAMCO Investors, Inc. ("GAMCO") filed a Schedule 13D/A with the Securities and Exchange Commission on March 15, 2011 indicating that GAMCO and certain persons and entities affiliated therewith (any of which may be publicly held) own in the aggregate 10.1% of CBS Corporation's voting stock.

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OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 24.2 of the Rules of this Court, Respondents CBS Corporation and CBS Broadcasting Inc. adopt the recitation of the Opinions Below, the statement of Jurisdiction, and the statement concerning Constitutional and Statutory Provisions Involved set forth in the National Association of Broadcasters' Petition for Writ of Certiorari.

INTRODUCTION

Pursuant to Rule 12.6 of the Rules of this Court, respondents CBS Corporation and CBS Broadcasting Inc. (collectively, "CBS") submit this response in support of the Petition for a Writ of Certiorari filed by the National Association of Broadcasters ("NAB"). *See* Petition for a Writ of Certiorari, National Association of Broadcasters v. FCC, No. 11-698 (Dec. 5, 2011) ("NAB Pet.").

This Court's review is needed to resolve a conflict between the Circuits concerning the proper interpretation of § 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). The 1996 Act is itself one of the most significant laws affecting communications industries that Congress has enacted over the last three-quarters of a century. Section 202(h) is among its fundamental features, and requires the Federal Communications Commission ("FCC" or

"Commission") to conduct periodic reviews[1] of all of its structural broadcast ownership rules and to "repeal or modify" any such rule that it finds to be "no longer necessary in the public interest as the result of competition."

In a decision issued prior to the Third Circuit's decision below, the D.C. Circuit had recognized the unmistakable Congressional purpose behind § 202(h), holding that "[i]n the [1996 Act] the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries," and that § 202(h) was intended to require the FCC "to continue the process of deregulation" that Congress had commenced. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *see also Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002). Yet the Third Circuit panel reached the opposite conclusion, and instead countenanced an interpretation of § 202(h) that establishes a presumption in favor of seemingly indefinite maintenance of the regulatory status quo. The Third Circuit decision—combined with its previous decision concerning an earlier § 202(h) review and the purported "retention of jurisdiction" over intervening and successive periodic review proceedings by the same three-judge panel—has left the broadcast industry in regulatory stasis. Indeed, these circumstances have created the legal

[1] These reviews initially were required to be conducted biennially, and Congress subsequently amended § 202(h) to require reviews on a quadrennial basis. NAB Pet. 11 n.3.

equivalent of "Groundhog Day," leaving broadcasters subject to archaic regulations that harm the industry and the public while the cycle of quadrennial reviews followed by judicial decisions that allow for no change continues on. This situation directly contravenes Congress' intent and conflicts with the prior ruling of the D.C. Circuit regarding the proper interpretation of § 202(h).

Section 202(h) governs the Commission's continuing periodic reviews of *all* of its structural broadcast ownership regulations. Thus, absent this Court's review, the standard of review that the lower courts deem § 202(h) to impose would apply in each successive review proceeding and affect the structure of the media marketplace in the United States for the foreseeable future. If left undisturbed, there is a real risk that the decision below will condemn the entire broadcast industry to operating under outmoded and destructive restrictions on ownership for years to come and weakening stations in a media market that grows more competitive by the day. Accordingly, NAB's Petition for a Writ of Certiorari should be granted.

STATEMENT OF THE CASE

Pursuant to Rule 24.2 of the Rules of this Court, CBS adopts the statement of the case set forth in the NAB Petition. In addition, CBS provides the following additional background concerning the decisions of the FCC and the Third Circuit regarding the local television ownership rule, as well as background concerning the decisions of the agency and that court regarding the radio/television cross-

ownership rule, the dual network rule, and the local radio ownership rule, all of which are subject to periodic reviews under § 202(h).

1. As NAB explains, in the order underlying the decision below the Commission reinstated the very same local television ownership rule that the D.C. Circuit in *Sinclair* had found to be arbitrary and capricious and violative of § 202(h). NAB Pet. 10-14; Pet. App. 214a-225a.[2] Pursuant to that rule, a single entity may own two televisions stations with overlapping contours within the same Nielsen Designated Market Area ("DMA") (a so-called "duopoly") only if: (1) at least one of the stations is not rated among the top-four in the DMA, and (2) at least eight independent full-power television stations would remain in the DMA post-merger. NAB Pet. 11. The decision to revert to this rule, as NAB demonstrates, not only conflicted with the D.C. Circuit's decision in *Sinclair*, but also constituted an administrative reversal of conclusions reached in the immediately preceding § 202(h) review. *Id.* at 7-9.

During that 2003 review proceeding, the FCC determined, among other things, that allowing the ownership of up to three stations (so-called "triopolies") in very large markets would not

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[2] As explained in NAB's Petition, to minimize the burdens on the Court and the parties, NAB requested and received permission from the Clerk's Office to cite to the appendix filed by Tribune Company, *et al.* in Case No. 11-696. *See* NAB Pet. 1 n.1; *see* Tribune Company, *et al.* v. FCC, *et al.*, No. 11-696 (Docketed Dec. 6, 2011). Unless otherwise specifically indicated, all appendix cites in this brief are to that appendix.

threaten localism, competition, or diversity, and that failure to allow such combinations rendered the local television ownership rule "overly restrictive." *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620, 13,668 (¶ 133), 13,675 (¶ 150) (2003) ("*2003 Order*").

In its 2004 *Prometheus I* decision, the Third Circuit agreed that consolidation can improve localism and that media other than television contribute to diversity, and did not question the Commission's basic decision to allow triopolies in some circumstances. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 414-15 (3d Cir. 2004) ("*Prometheus I*"). However, the Third Circuit remanded the local television ownership rule to the agency so that the FCC could correct certain inconsistencies that the Third Circuit had identified in the modified rule. *Id.* at 418-19.

Nevertheless, after some five years of uncertainty in the broadcast arena and notwithstanding the Commission's continued recognition that common ownership of local television stations has real benefits, *see* NAB Pet. 11-12, the FCC in its *2008 Order* reinstated the version of its rule that had been found unlawful in *Sinclair*, which did not allow triopolies in any market, Pet. App. 221a-223a.

2. The Commission's actions with respect to the radio/television cross-ownership rule followed a

similar pattern. That rule restricts common ownership of radio and television stations in a particular local market, allowing varying levels of such cross-ownership depending on the number of "voices" remaining in the market post-merger. NAB Pet. 14. In 2003, the FCC found that the rule in its then-existing form was too restrictive. *2003 Order*, 18 F.C.C.R. at 13,768 (¶ 371). The agency therefore replaced both that rule and the newspaper/broadcast cross-ownership rule with new "cross-media limits," which would have restricted radio/television combinations only in the nation's very smallest markets unless they were co-owned with a newspaper. *Id.* at 13,768 (¶ 371), 13,801 (¶ 460); *see* NAB Pet. 9. In the resulting Third Circuit litigation, no party challenged the Commission's decision to eliminate the radio/television cross-ownership rule, but some challenged the decision to replace the newspaper/broadcast cross-ownership rule with the cross-media limits. As a result of these challenges, the Third Circuit in *Prometheus I* remanded various aspects of the cross-media limits, finding that the limits suffered from certain inconsistencies and that a better explanation was required for particular aspects of the FCC's approach. *Prometheus I*, 373 F.3d at 403.

In its *2008 Order*, the agency again ignored its previous statements, along with statements elsewhere in the very same order, regarding the dramatic changes in the media marketplace, Pet. App. 120a-122a, the general benefits of common ownership, *id.* at 112a-115a, and the fact that radio stations play a lesser role than television as a source

for local news and information and therefore are less significant sources of viewpoint diversity, *id.* at 187a, 200a n.259, 205a n.279. Despite all of these findings, the Commission summarily stated that "[n]ow that the court has invalidated the cross-media limits, we must adopt diversity protection provisions to act in their place." *Id.* at 202a. Without further reasoning, the FCC reinstated its radio/television cross-ownership rule "to maintain the status quo." *Id.* at 205a. Although NAB and CBS challenged this decision as, among other things, inconsistent with § 202(h), the Third Circuit panel below affirmed the agency's reversion to the very same radio/television cross-ownership rule that it had previously found unnecessary. *Id.* at 45a-49a.

3. The combined actions of the panel below and the agency with respect to two of the Commission's other broadcast ownership rules—the local radio ownership rule and the dual network rule—have likewise resulted in no deregulatory changes despite the mandate of § 202(h). The local radio ownership rule restricts ownership of multiple radio stations to varying levels depending on the number of stations in the market, 47 C.F.R. § 73.3555(a), and the dual network rule effectively prohibits a single entity from owning more than one of the ABC, CBS, Fox, or NBC television broadcast networks, *id.* § 73.658(g). There are no limitations, by contrast, as to the number of websites that provide music programming or cable networks that a single entity may own.

In 2003, the FCC adopted changes to the local radio ownership rule that had the effect of increasing

its restrictiveness, *2003 Order*, 18 F.C.C.R. at 13,712-13 (¶ 239), 13,725-26 (¶¶ 275-78), 13,743 (¶ 317), and made no changes to the dual network rule, *id.* at 13,850-55 (¶ 599-610). The Third Circuit in *Prometheus I* affirmed the decision to tighten the local radio ownership rule and, indeed, expressly held that the Commission has leeway to adopt "more stringent regulation" in the course of a § 202(h) review. *Prometheus I*, 373 F.3d at 395, 423-30.

In its 2008 Order—and here again despite acknowledging that common ownership has benefits, that the media marketplace has undergone a dramatic transformation, and that competition continues to expand in that market—the FCC decided to retain intact both the local radio ownership rule and the dual network rule. Pet. App. 231a-253a, 258a-261a. And here again, over challenges to the agency's rulings as non-responsive to § 202(h)'s deregulatory thrust, the Third Circuit upheld the Commission's decisions to make no changes to these rules. *Id.* at 57a-62a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION CREATES A SPLIT OF AUTHORITY WITH THE D.C. CIRCUIT.

As NAB explains, the Third Circuit's affirmance of the FCC's decision with respect to the local television ownership rule directly conflicts with the D.C. Circuit's decision in *Sinclair*, which previously rejected that very same rule as arbitrary and inconsistent with the requirements of § 202(h) of the

1996 Act. NAB Pet. 18 (quoting *Sinclair*, 284 F.3d at 165); *see id.* at 18-20. This fundamental difference in approach is not limited to the local television ownership rule itself, but impacts *all* of the structural broadcast ownership rules, because all such rules are subject to review pursuant to the same statutory standard under § 202(h).

Even prior to *Sinclair*, the D.C. Circuit in *Fox* had reversed the Commission's decision in its first-ever § 202(h) review proceeding to retain intact the thirty-five percent cap on national television station ownership. *Fox*, 280 F.3d at 1040-45. The D.C. Circuit found that Congress in § 202 had "set in motion a process to deregulate the structure of the broadcast and cable television industries," and that § 202(h) required the FCC to "continue" that process. *Id.* at 1033; *see* NAB Pet. 21-23. Then, in *Sinclair*, the D.C. Circuit abided by the deregulatory mandate of § 202(h) and reversed the Commission's decision to retain the "eight voices" component of its local television ownership rule. As in *Fox*, the D.C. Circuit found that § "202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Sinclair*, 284 F.3d at 159 (quoting *Fox*, 280 F.3d at 1048); *see* NAB Pet. 6-7, 21-23.

By contrast, and to the detriment of the broadcast industry, the Third Circuit has ignored Congress's deregulatory purpose. Its decision below, therefore, is inconsistent with the D.C. Circuit's rulings in *Fox* and *Sinclair*. This inconsistency is plain on the face of the decision below, which endorses an interpretation of § 202(h) under which the FCC

needs to do nothing more than "give a rational reason for retaining existing limits as necessary in the public interest." Pet. App. 52a. It is also shown by the Third Circuit's actions with respect to the various rules it has reviewed; that Court has upheld every single FCC refusal to deregulate, and even its return to strict limitations that the agency itself previously had relaxed, while selectively striking down the few modest attempts that the Commission has made to relax its ownership rules. *See* NAB Pet. 16. These Third Circuit rulings conflict with the D.C. Circuit's two earlier reviews, in which it found fault with each of the agency's decisions to maintain such restrictions intact. *See generally, Sinclair*, 284 F.3d 148; *Fox*, 280 F.3d 1027. Indeed, had the D.C. Circuit's interpretation of the FCC's § 202(h) mandate prevailed, the broadcast industry would likely have received the relief that it so urgently needs, *see infra* pp. 15-16, almost a decade ago.

This Court's review is needed to establish consistency among the courts of appeal that may review the FCC's future quadrennial review decisions, and to prevent the Third Circuit's decision from perpetuating a regime under which the Commission is free to disregard the deregulatory mandate that Congress unambiguously imposed upon the FCC in the 1996 Act.

II. RESOLUTION OF THE PROPER STANDARD OF REVIEW UNDER § 202(h) IS CRITICALLY IMPORTANT.

As NAB points out, this Court has found that the 1996 Act was "an unusually important legislative

enactment." NAB Pet. 24 (quoting *Reno v. ACLU*, 521 U.S. 844, 857 (1997)). Accordingly, this Court has granted *certiorari* to review a significant number of cases arising out of the Commission's implementation of that law. *See id.* (citing *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (reviewing FCC's decision to classify cable modem service as an "information service" pursuant to the 1996 Act); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (reviewing Commission's decision regarding petition for preemption filed pursuant to the 1996 Act); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (reviewing FCC's decision implementing the pole attachment provisions of the 1996 Act).[3]

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[3] This Court has also reviewed many more cases arising under the 1996 Act generally. *See, e.g.*, *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011) (reviewing decision concerning proper interpretation of 47 U.S.C. § 251(c)(3), which was added to the Communications Act by the 1996 Act); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007) (reviewing suit involving alleged violations of regulations adopted by the FCC pursuant to 47 U.S.C. § 276(b)(1)(A), which was added to the Communications Act by the 1996 Act); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) (reviewing case arising under § 332 of the Communications Act, as amended by the 1996 Act); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (addressing question whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under the antitrust laws); *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S.

As a testament to the national importance of the structure of the country's media marketplace, this Court also frequently has reviewed Commission decisions relating to the media ownership rules, even in the absence of a circuit split. *See* NAB Pet. 23-24 (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358 (1955); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)). The Third Circuit panel's decision poses questions of equal if not greater significance than those presented in those cases, particularly given the challenges facing the broadcasting industry in competing with an ever-expanding array of new media in an Internet-dominated environment.

III. THE THIRD CIRCUIT'S DECISION CONTRAVENES CONGRESSIONAL INTENT AND THREATENS CONTINUED HARM TO THE ENTIRE BROADCAST INDUSTRY AND THE PUBLIC.

1. Under the Third Circuit's interpretation of § 202(h), the FCC remains free to conduct its periodic

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635 (2002) (deciding question whether the federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates the 1996 Act); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000) (resolving constitutionality of § 505 of the 1996 Act).

review proceedings in a manner directly at odds with Congress's clear intention. The purpose of the 1996 Act in general was expressly "to promote competition and *reduce regulation*." H.R. Rep. No. 104-204, pmbl. (1995) (emphasis added); *see, e.g.*, S. Rep. No. 104-23, at 1 (1995) (Congress meant to provide a "pro-competitive, *deregulatory*, national policy framework") (emphasis added).

The Third Circuit's interpretation also conflicts with the text and structure of § 202 as a whole. Section 202 directly required the Commission to relax, and in some cases even eliminate, many of its media ownership limits, based on the recognition that increased multiple ownership opportunities would allow broadcasters to realize efficiencies that would ultimately benefit the public. *See* NAB Pet. 4. Section 202(h) is the coda to these consistently deregulatory provisions of § 202, and its meaning is necessarily informed by that relationship. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (explaining "the doctrine of *noscitur a sociis*" ("a word is known by the company it keeps") as a "rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Reading § 202(h) to require approval of FCC decisions that maintain—seemingly in perpetuity—antiquated regulatory restrictions in the face of exponentially increasing competition cannot be squared with the statute. In essence, allowing the panel's decision to stand will leave the industry in a time-trap, bound by outdated rules that threaten to work serious harm on broadcasters and the public, in the face of a statute that was designed

to cause the agency to engage in meaningful, continuing, regulatory reform.

Indeed, the Third Circuit panel's construction of § 202(h) could be interpreted to impose no obligation on the agency at all other than to robotically undertake a quadrennial review that results in no modifications to the ownership rules whatsoever. In fact, it could—and has—resulted in changes to the rules that are *more* restrictive than ever before.

As a matter of generally applicable administrative law, "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *Am. Trucking Ass'ns Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967); *see NBC v. United States*, 319 U.S. 190, 225 (1943) (holding that the Commission cannot retain a rule if "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[]"). Common sense and rudimentary principles of statutory interpretation require the conclusion that Congress must have intended to impose on the FCC *some* standard of review beyond that which already applies under the Administrative Procedure Act—particularly given that Congress ordered the FCC to review its broadcast ownership rules *every four years*. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it

can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). But the Third Circuit's interpretation of § 202(h) as requiring nothing more than generic "public interest" review renders the statute meaningless. Such a result should not be allowed to stand.

2. As NAB demonstrates, the Third Circuit's decision upholding the Commission's decision with respect to the local television ownership rule also threatens serious harm to television broadcasters and, ultimately, to the public. NAB Pet. 28-31. By depriving television broadcasters of the efficiencies that increased common ownership opportunities can deliver, maintenance of the rule as it existed in 1999—particularly in light of the dramatic transformation of the media marketplace in the intervening period—threatens the viability of many local stations and impedes the ability of others to provide important programming to the public. *Id.* at 29-30. The court's similar actions with respect to the remaining rules, including the radio/television cross-ownership rule, the local radio ownership rule, and the dual network rule, are equally likely to cause significant harm to the entire broadcast industry, radio included. That is because the Third Circuit decision sanctions the FCC's freezing in place of the other media ownership rules as well, thus necessarily preventing broadcasters, and ultimately American media consumers, from enjoying the benefits that a broad range of ownership combinations can deliver.

3. The risks of allowing the decision below to stand unreviewed are exacerbated by the Third Circuit panel's attempt to "retain jurisdiction" over successive § 202(h) review proceedings and the recurrent nature of the Commission's § 202(h) review obligation. As NAB explains, questions concerning the proper interpretation of § 202(h) will necessarily arise again in the context of the next media ownership review.[4] *Id.* at 31-32. Although the panel below stated its intent to review the next such proceeding, that action stands directly at odds with the statutory provisions applicable to judicial review of agency rulemaking proceedings. *See id.* at 32-33. Without this Court's review, broadcasters will likely be stuck in an endless series of agency review proceedings followed by judicial reversals of any deregulatory actions that the FCC attempts to take, with the same three-judge panel attempting to retain jurisdiction over all future challenges to the agency's decisions. Because § 202(h) mandates regular, iterative reviews in which the media ownership rules are to be updated to reflect increases in competition, this Court's intervention is urgently needed to end the cycle that the Third Circuit has attempted to create and perpetuate.

CONCLUSION

For the foregoing reasons, CBS respectfully requests that NAB's Petition for Writ of Certiorari be granted.

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[4] Although such review was required in 2010, the FCC just issued its Notice of Proposed Rulemaking in that proceeding on December 22, 2011.

Respectfully submitted,

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