

**In the  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, <i>et al.</i> ,	)	
	)	
Petitioners	)	
	)	
v.	)	<b>Nos. 03-3388, <i>et al.</i></b>
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and THE UNITED STATES OF AMERICA,	)	
	)	
Respondents	)	

**FEDERAL COMMUNICATIONS COMMISSION’S CONSOLIDATED OPPOSITION  
TO MOTIONS FOR STAY PENDING JUDICIAL REVIEW**

The Court should deny the motions for stay pending judicial review because movants have failed to make the necessary showing of irreparable harm and a likelihood of success on the merits.

First, movants will not be harmed, much less irreparably, if the Federal Communications Commission’s new media ownership rules go into effect pending judicial review. While the new ownership rules set forth the general principles that will guide the exercise of the Commission’s discretion, they by themselves approve no new transactions; under the Communications Act, a party seeking to acquire a radio or television broadcast station must still obtain Commission approval for each license transfer. 47 U.S.C. 310(d). And, under that Act, any party in interest is free to file a petition to deny approval of any proposed acquisition, 47 U.S.C. 309(d), and to file for review (if aggrieved) with the U.S. Court of Appeals for the District of Columbia Circuit, which is vested with

exclusive jurisdiction over such appeals. 47 U.S.C. 402(b)(6). Thus, movants will have ample opportunity to challenge any specific transaction that threatens the “massive consolidation of the broadcast industry” (Prometheus 2) they profess to fear.

Moreover, movants have not shown that they are likely to prevail on the merits. The order under review is the result of a comprehensive undertaking by the Commission to determine whether the media ownership rules at issue remain “necessary in the public interest as the result of competition.” Telecommunications Act of 1996 (1996 Act), § 202(h), Pub. L. No. 104–104, 110 Stat. 111–12. After an exhaustive analysis of a voluminous record, the Commission determined that it should promulgate a revised framework for broadcast ownership regulation, designed to take account of the numerous changes that have taken place in the modern media marketplace. Movants provide no basis for concluding that the rules exceed the Commission’s authority or represent arbitrary decisionmaking, much less the strong showing necessary to support a stay pending appeal. A stay pending appeal would also disserve the public interest in ensuring that rules that are designed to advance important regulatory goals go into effect without unnecessary delay and harm the interests of parties seeking to engage in transactions that would be permitted by the revised rules.

## **BACKGROUND**

1. The Communications Act vests the Commission with “broad authority to allocate broadcast licenses ‘in the public interest.’” *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (*NCCB*). In exercising that authority, the Commission has for many years promulgated rules that restrict the number and

types of media outlets a single entity may own in order, among other things, to advance competition in the marketplace and promote a diversity of viewpoints. *See, e.g., NCCB, supra; United States v. Storer Broad. Co.*, 351 U.S. 192, 203–04 (1956); *National Broad. Co. v. United States*, 319 U.S. 190, 222–24 (1943).

In the 1996 Act, Congress directed the Commission to make a number of changes to its ownership rules. *See* 1996 Act, § 202(a)–(f), 110 Stat. 110–12. Section 202(h) of the Act also directs the Commission to review its ownership rules “biennially,” to “determine whether any of such rules are necessary in the public interest as the result of competition,” and to “repeal or modify any regulation that it determines to be no longer in the public interest.” 110 Stat. 111–12.

2. In the 1998 biennial review, the Commission decided to retain most of its media ownership rules.<sup>1</sup> The Commission decided, however, that its newspaper-broadcast cross-ownership rule, which prohibited a single entity from owning both a daily newspaper and a television or radio broadcast station in the same local market, could be more finely “tailored to address contemporary market conditions,” 15 FCC Rcd at 11109 ¶ 95, and therefore initiated a rulemaking to re-examine the rule.<sup>2</sup> The Commission also decided to re-examine its local radio ownership rule, which limited how many radio stations a party could own in a local market based on the number of commercial radio stations that were in the market.

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<sup>1</sup> *1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report, 15 FCC Rcd 11058 (2000) (*1998 Biennial Report*), *pet. for rev. pending sub nom., Newspaper Ass’n of Am. v. FCC*, No. 00-1375 (D.C. Cir.).

<sup>2</sup> *Cross-Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rulemaking, 16 FCC Rcd 17283 (2001).

*Id.* at 11093 ¶¶ 65–66. The Commission eventually initiated two rulemaking proceedings to examine its method for defining radio markets and other issues related to the radio broadcasting market.<sup>3</sup>

3. Several parties challenged two of the rules that the Commission decided to retain in the *1998 Biennial Report*: (1) the cable-broadcast cross-ownership rule, which prohibited a party from owning both a cable television system and a television broadcast station in a local market and (2) the national television ownership rule, which prohibited a party from owning television stations that reach more than 35% of U.S. households. In *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, *reh'g granted*, 293 F.3d 537 (2002), the D.C. Circuit held that the Commission had not provided a sufficient explanation of its reasons for retaining those rules. *Id.* at 1043–44, 1051–52. The *Fox* court accordingly directed the Commission to vacate the cable-broadcast cross-ownership rule, but remanded the national television ownership rule without vacating it because the court believed the Commission could “justify a future decision to retain” the rule. *Id.* at 1053.

A few months later, the D.C. Circuit reviewed the local television multiple ownership rule, which the Commission had revised in a separate proceeding. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002). This rule restricted the number of television stations a party could own in a local market based in part on the number of “voices,” *i.e.*, the number of independent television station owners, that would remain in the market after a transaction. *Id.* at 155. In *Sinclair*,

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<sup>3</sup> *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861 (2001); *Definition of Radio Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 25077 (2000).

the court generally upheld the Commission's revised rule, but remanded for further justification of the rule's counting of only television station owners as voices. *Id.* at 162–65.

4. In the wake of *Fox* and *Sinclair*, the Commission commenced a comprehensive review of six media ownership rules.<sup>4</sup> In the *2002 Biennial NPRM*, the Commission specifically sought comment on the local television multiple ownership rule and the national television ownership rule, as well as the radio-television cross-ownership rule (which limited radio-television combinations in local markets) and the dual network rule (which prohibits mergers among the top four television networks—ABC, NBC, CBS, and Fox). 17 FCC Rcd at 18505–06 ¶ 6. The Commission also incorporated the pending proceeding on the newspaper-broadcast cross-ownership rule and the two pending proceedings on the local radio ownership rule. *Id.* at 18506 ¶ 7. To help guide its analysis, the Commission established a Media Ownership Working Group, which commissioned twelve studies ranging from consumer surveys to economic analyses of media markets.<sup>5</sup> And the Commission invited interested parties to submit their own studies and analyses on the media marketplace and justifications for the various ownership rules. *See, e.g.*, 17 FCC Rcd at 18516 ¶ 32.

Interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and

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<sup>4</sup> *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503 (2002) (*2002 Biennial NPRM*).

<sup>5</sup> *See FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, 17 FCC Rcd 19140 (2002).

consumer data to support their various positions. In addition, over a half a million individuals took advantage of Internet filing and other means to voice their opinion on media ownership. The result of this mammoth proceeding was a 256-page order<sup>6</sup> (accompanied by a number of appendices) in which the Commission analyzed the record and determined, by a three-to-two vote, to modify its ownership rules as follows:

- *Local television multiple ownership rule.* The Commission modified its local television multiple ownership rule to permit a single party to own up to two television stations in markets with 17 or fewer television stations and up to three television stations in markets with 18 or more stations. Order ¶ 186. A party may not, however, acquire a television station if the acquisition would cause it to own two of the top-four rated television stations in the market. *Id.*
- *Local radio ownership rule.* The Commission retained the limits on the number of radio stations a party may own in a single market, but revised the manner in which it defined radio markets. Order ¶¶ 273–74, 282–86. The Commission also began counting noncommercial radio stations in determining the size of a radio market. *Id.* ¶ 295.
- *Newspaper-broadcast cross-ownership rule and radio-television cross-ownership rule.* The Commission replaced its newspaper-broadcast and radio-television cross-ownership rules with a set of cross-media limits governing radio, television, and daily newspaper combinations. Order ¶¶ 369, 390.
- *National television ownership rule.* The Commission revised the national television ownership rule to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience. Order ¶ 580.
- *Dual network rule.* Finally, the Commission decided to retain its “dual network rule,” which prohibits a merger between any two of the top four broadcast television networks.

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<sup>6</sup> 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, 18 FCC Rcd 13620 (2003) (Order).

5. On August 6, 2003, the day after an extended summary of the Commission's order was published in the Federal Register, *see* 68 Fed. Reg. 46286, three petitions were filed in the D.C. Circuit seeking review of the Commission's media ownership order and its rules.<sup>7</sup> One week later, on August 13, Prometheus Radio Project, an "unincorporated collective of radio activists" who "assist in the creation of low power FM radio stations and regularly listen to commercial and non-commercial radio and television," (Petition for Review in No. 03-3388, at 1-2) filed a petition for review in this Circuit of the same order and the same rules, accompanied by a motion for a stay pending judicial review. On the same day, two other organizations—Media Alliance, a non-profit "training and resource center for media workers," and National Council for Churches of Christ in the United States (NCC), "a community of Christian communions \* \* \* work[ing] for peace and justice in the United States"—filed petitions for review (along with nearly identically-worded motions for a stay pending review) in the Second and Ninth Circuits.<sup>8</sup> On August 15, three more petitions for review were filed in the D.C. Circuit.<sup>9</sup> On August 19, pursuant to 28 U.S.C. 2112(a), the Judicial Panel on Multidistrict Litigation consolidated the cases and ordered them transferred to this Court.<sup>10</sup>

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<sup>7</sup> *Media General, Inc. v. FCC*, No. 03-1231; *National Association of Broadcasters v. FCC*, No. 03-1232; *Network Affiliated Stations Alliance et al. v. FCC*, No. 03-1234.

<sup>8</sup> *See* Petition for Review in *Media Alliance v. FCC*, No. 03-72910 (9th Cir.), at 2; Petition for Review in *National Council of the Churches of Christ in the United States v. FCC*, No. 03-40334 (2d Cir.), at 2. None of the parties that moved for a stay first moved before the agency. *See* Fed. R. App. P. 18.

<sup>9</sup> *Fox Entertainment Group, Inc. v. FCC*, No. 03-1240; *Viacom, Inc. v. FCC*, No. 03-1241; *National Broadcasting Company, Inc. v. FCC*, No. 03-1242.

<sup>10</sup> On August 18, 2003, the Second Circuit issued a temporary stay pending determination of the motion for stay that NCC filed with that court. If the Second Circuit does not withdraw the

## ARGUMENT

Stays pending appeal are granted in this Circuit only after consideration of the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). None of these factors weigh in favor of a stay of the Commission’s media ownership rules.

### **I. Movants cannot show irreparable harm because they have other means to protect their interests.**

“[A] showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of *immediate* irreparable injury.” *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992) (internal quotation omitted). *See also Holiday Inns of Am., Inc. v. B&B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969) (the Court’s injunctive power “may not be used simply to eliminate a possibility of remote future injury”). To support a stay, the harms alleged must be “concrete and specific.” *See Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 358–59 (3d Cir. 1980). Finally, movants must show that a stay is “the *only* way of protecting [them] from harm.” *Campbell Soup Co.*, 977 F.2d at 91 (internal quotation omitted).

Movants cannot make the necessary showing here because the new ownership rules do not prevent them from challenging specific transactions that

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temporary stay before transferring its case to this Court, and if this Court denies the motions for stay, we request that the Court make explicit in its order that the temporary stay is no longer in effect.

they believe will injure their interests. The Communications Act requires any party seeking to acquire radio or television stations to file an application with the Commission and to obtain the agency's consent before consummating the transaction. 47 U.S.C. 310(d). The Communications Act also requires that public notice be given to each such application, 47 U.S.C. 309(b), and permits any interested party to file a petition to deny the application and to submit facts to show that grant of the application would be "prima facie inconsistent" with the public interest, 47 U.S.C. 309(d). Because the new media ownership rules do not alter these procedures, movants have an avenue for seeking relief if they believe that a particular transaction threatens to cause them harm.

Movants' only response is that petitions to deny transactions that comply with the new ownership rules "are unlikely to succeed." Prometheus 19; Media Alliance 19. But a party who is injured by the Commission's rejection of its petition may seek judicial redress by filing an appeal in the D.C. Circuit, 47 U.S.C. 402(b)(6), which has the power to ensure that the Commission has acted within the bounds of its statutory authority to determine the public interest in approving the transaction. Nor is there any basis for movants' assertion (Prometheus 18; Media Alliance 10; NCC 9) that combinations are impossible to undo; the Commission has the authority to order divestiture as required by the public interest. *See, e.g., NCCB*, 436 U.S. at 814; *Fox*, 280 F.3d at 1053. There is thus no basis on which to conclude that the media consolidation which movants allege will be the result of the Commission's order will either adversely affect the public interest or inevitably (and irreversibly) occur before this Court has a chance to resolve the issues in these cases. Movants alleged harms are, therefore, not irreparable.

**II. Movants have not made a strong showing that they are likely to succeed on the merits.**

Movants' failure to demonstrate that they will be irreparably harmed absent a stay is by itself sufficient to deny their motions in this case. But movants have also failed to make the "strong showing," *see Westinghouse Elec. Co.*, 949 F.2d at 658, of likelihood of success on the merits that is necessary to support a stay pending appeal.

A. *The Standard of Review is Narrow.* At the outset, this Court's review the Commission's rules is highly circumscribed. The Communications Act vests the Commission with "broad authority" to allocate broadcast licenses in the public interest, *NCCB*, 436 U.S. at 795; *see, e.g.*, 47 U.S.C. 303; 310(d), and the 1996 Act states that it is the Commission that "shall determine whether any of [its ownership] rules are necessary in the public interest as the result of competition." 1996 Act, § 202(h), 110 Stat. 112. Under the Administrative Procedure Act, moreover, an agency's action cannot be overturned unless it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." 5 U.S.C. 706(2)(A). *See New Jersey Coalition for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978). The scope of review "is narrow"—"a court is not to substitute its judgment for that of the agency," and the agency's rules must be upheld so long as the agency has "examine[d] the relevant data and [has] articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Commission's order amply satisfies these well-settled standards.

B. *The Commission's Order Provides a Comprehensive and Detailed Examination of the Basis for its Rules.* In this case, the Commission's order is based on the agency's comprehensive examination of the voluminous record regarding the modern media marketplace, undertaken in light of the public interest goals the agency is obligated by statute to serve. *See* Order ¶¶ 17–85; 86–128. The order contains a detailed and lengthy explanation of each of the changes the Commission decided to make in its ownership rules, as well as the justifications for those changes in light of the Commission's public interest objectives. *Id.* ¶¶ 132–621.

Thus, for example, the order explains that, “in light of myriad sources of competition to local television broadcast stations,” the Commission found it appropriate to modify its local television ownership rule to permit common ownership of two (and in some cases three) television stations in those markets where there are a sufficient number of remaining participants to ensure that robust competition can continue. Order ¶ 133. The order likewise explains that, based upon the Commission's analysis of the diversity of media outlets in local markets, *id.* ¶ 442, as well as the Commission's conclusion that there may be “tangible economic efficiencies, such as the sharing of technical support staff, which can be realized through common ownership of two media outlets,” *id.* ¶ 347, the Commission would replace its newspaper-broadcast and radio-television cross-ownership rules with cross-media limits designed to protect diversity in “those markets most susceptible to high levels of viewpoint concentration.” *Id.* ¶ 443.

The order also sets forth how, using the knowledge gained from its evaluation of the record, the Commission was able to conclude that a national

television audience limit of 35% is no longer necessary to “preserve the balance of bargaining power between networks and affiliates,” Order ¶ 501, and that a “modest relaxation” of the limit—to 45%—would “help [broadcast] networks compete more effectively with cable and DBS [direct broadcast satellite] operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks.” *Id.* ¶ 501. And the order explains that the record and the Commission’s experience with its local radio ownership rule led it to refine its methodology for defining radio markets to eliminate the considerable conceptual and practical problems that had arisen in the administration of that rule. *Id.* ¶¶ 256–60, 273–74. In sum, the Commission’s order amply sets forth the record for, and reasoning underlying, the Commission’s media ownership rules.

*C. The Possibility of Legislative Action is not Grounds for a Stay.* Movants contend there is a “very strong” chance that Congress will overturn “[a]ll or part of the FCC’s Order,” and that likelihood “is effectively equivalent to a substantial likelihood of success on the merits” justifying a stay pending appeal. Prometheus 7–8. *See* Media Alliance 11–12; NCC 4. Congress has not acted, however, and “no one can predict or promise that Congress will act on any given substantive issue,” *National Audubon Society v. Watt*, 678 F.2d 299, 309–10 (D.C. Cir. 1982); *accord Havana Club Holdings, S.A. v. Galleon, S.A.*, 203 F.3d 116, 132 (2d Cir.), *cert. denied*, 531 U.S. 918 (2000).

Moreover, it is not the “job [of the courts] to apply laws that have not yet been written.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). Congress is free to exercise its legislative authority to disapprove, amend, or revoke the Commission’s rules on grounds having nothing at all to do

with whether the rules are valid under current law. Invalidity under current law, however, is precisely what movants must show to succeed on their claims before this Court. Whatever action Congress may take, it can provide no assistance to movants' attempts to show that they are likely to prevail on the merits.

D. *There Was Ample Public Notice.* Prometheus and Media Alliance (but not NCC) contend that the Commission “failed to provide adequate public notice” of the rules under the Administrative Procedure Act (APA). Prometheus 14; Media Alliance 18–19. But as they acknowledge (*id.*), the APA simply requires agencies to publish notice of a proposed rule making that contains “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b). “[T]he adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the ‘subject and issues’ before the agency,” and “the submission of a proposed rule for comment does not of necessity bind an agency to undertake a new round of notice and comment before it adopts a rule which is different—even substantially different—from the proposed rule.” *James v. Quinlan*, 866 F.2d 627, 631 (3d Cir.), *cert. denied*, 493 U.S. 870 (1989) (quoting *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978)). *Accord Fertilizer Inst. v. Browner*, 163 F.3d 774, 779 (3d Cir. 1998). Indeed, “[t]he whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different— and improved—from the rules originally proposed by the agency.” *Trans-Pacific Freight Conf. v. Federal Maritime Comm’n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980), *cert. denied sub nom.*, *Sea-Land Serv. Inc. v. Federal Maritime Comm’n*, 451 U.S. 984 (1981).

Prometheus and Media Alliance complain that the public was not afforded an opportunity for an additional round of comment on the final rule changes, and how they “might work in concert.” Prometheus 14; Media Alliance 18. But nothing in the APA requires an agency to provide an opportunity for public comment on its final rules; on the contrary, the statute by its terms requires only that a public notice contain “the terms or substance of the proposed rule *or a description of the subjects or issues involved.*” 5 U.S.C. 553(b) (emphasis added). Indeed, if “every alteration in a proposed rule” had to be “issued for notice and comment \* \* \*, an agency could ‘learn from the comments on its proposals only at the peril of’ subjecting itself to rulemaking without end.” *First American Discount Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973)). See also *American Iron & Steel Inst.*, 568 F.2d at 293.

In this case, as the Commission explained, Order ¶ 1, it initiated its biennial rulemaking by a public notice identifying and calling for comment on the issues underlying its review of the national television ownership rule, the local television multiple ownership rule, the radio-television cross-ownership rule, and the dual network rule.<sup>11</sup> (The Commission had previously initiated rulemaking proceedings on the local radio ownership rule<sup>12</sup> and the newspaper-broadcast cross-ownership rule.<sup>13</sup>) Subsequently, the Commission issued each of its twelve Media Ownership

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<sup>11</sup> See, *supra*, note 4.

<sup>12</sup> See, *supra*, note 3.

<sup>13</sup> See, *supra*, note 2.

Working Group studies for public comment.<sup>14</sup> Notice of the Commission’s media ownership rulemaking proceeding was thus voluminous, repeated, and detailed.

Prometheus and Media Alliance also contend that the Commission failed to provide adequate notice that it was considering counting noncommercial radio stations in the market for purposes of its local radio ownership rule. Prometheus 14; Media Alliance 18–19. The *Local Radio Ownership NPRM* explained that the Commission was undertaking a “comprehensive examination” of the radio industry to develop a “new framework” for the rule. 16 FCC Rcd at 19870 ¶ 19, and the Commission specifically asked whether the rule should focus on “competition for listeners” or “competition for advertisers.” *Id.* at 19878 ¶ 40. The 2002 *Biennial NPRM* reiterated this question. *See* 17 FCC Rcd at 18523 ¶ 57. Moreover, as the Commission stated, its local television multiple ownership rule had counted noncommercial stations in determining the size of the television market, *see* 47 C.F.R. 73.3555(b), and it saw no reason to treat “noncommercial radio stations differently.” Order ¶ 295. The Commission’s notice was thus sufficient to fairly apprise interested persons of the possibility that the Commission might include noncommercial stations in determining the size of the market for purposes of its local radio ownership rule.

E. *The Remaining Criticisms of the Commission’s Order are Unfounded.*

Movants proffer a series of criticisms of isolated portions of the Commission’s order, none of which have any merit.

1. Movants contend that the Commission’s order “arbitrarily and capriciously fails to analyze the impact of newspaper-broadcast combinations on

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<sup>14</sup> See, *supra*, note 5. The studies themselves were posted on the Commission’s website.

the delivery of local news.” Prometheus 9; Media Alliance 13; NCC 5–6. On the contrary, the Commission’s order engages in a detailed evaluation of the impact of such combinations on competition, ¶¶ 332–41, on localism, ¶¶ 342–54, and on diversity, ¶¶ 355–67. Among other things, the order explains that the Commission found that “cross-ownership of newspapers and broadcast outlets” could “create[] efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public.” Order ¶ 356.

Movants also contend that the order is inconsistent because it points to evidence regarding the high costs of producing local news programming, but suggests that media outlets have the potential to expand their distribution of content at low marginal cost. Prometheus 9–10; Media Alliance 13; NCC 5–6. In doing so, movants are comparing apples and oranges. The fact that it may be costly to *produce* news programming does not mean that it is costly to *distribute* such programming.

2. Movants criticize the Commission for prohibiting common ownership of the top four TV stations in any local market, while permitting a daily newspaper and a television station to be commonly owned in certain markets without reference to whether either or both are dominant. Prometheus 10; Media Alliance 14; NCC 6. But as the Commission explained in detail, while television stations compete in the same market, “most advertisers do not view newspapers, television stations, and radio stations as close substitutes,” Order ¶ 332, and that newspaper-broadcast combinations permit “efficiencies and cost savings” that “may allow radio and television stations to offer more news reporting \* \* \* than otherwise may be possible.” *Id.* ¶ 383. The Commission carefully evaluated the potential

“that some particular viewpoint might be censored or foreclosed” through consolidation, and designed its cross-media limits “to check the acquisition by any single entity of dominant position”—“in the sense of being able to dominate public debate”—“through combinations of cross-media properties.” *Id.* ¶ 432.

3. Movants argue that the Commission’s order is contradictory in its treatment of UHF stations, because it counts such stations towards the local television ownership limits and the cross-media limits, but discounts their reach by 50% in applying the national television ownership rule. Prometheus 11; Media Alliance 15; NCC 6–7. As the Commission explained, however, the “UHF discount” recognizes not only that UHF stations have a diminished signal area and higher operating costs compared to their VHF counterparts, but preserves competition by “promot[ing] entry by new broadcast networks.” Order ¶ 589 (noting that the establishment of the Paxson and Univision networks was aided by the UHF discount).<sup>15</sup>

4. Prometheus and Media Alliance (but not NCC) contend that the Commission’s order claims to “keep the local radio limits the same, while actually raising them.” Prometheus 12; Media Alliance 16. In fact, the order makes quite clear that, while the Commission was retaining the “numerical limits in the local radio ownership rule,” it had decided to modify the relevant market definition by “replac[ing] the contour-overlap market definition with an Arbitron Metro market,” and to “count noncommercial stations in the radio market.” Order ¶ 239.

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<sup>15</sup> Moreover, the Commission explained, it planned to eliminate the application of the discount for the top four networks “on a market by market basis” as the transition to digital television is completed, since at that time “UHF and VHF signals will be substantially equalized.” Order ¶ 591.

As the Commission explained, “Arbitron’s market definitions are an industry standard and represent a reasonable geographic delineation within which radio stations compete.” *Id.* ¶ 276.<sup>16</sup> In addition, the Commission stated, “although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets,” and can “receive a listening share in their respective [geographic] markets.” *Id.* ¶ 295.

Contrary to movants’ contention, nothing in the Commission’s order suggests that the agency “fail[ed] to recognize” (Prometheus 12; Media Alliance 16) that revising its market definition to include noncommercial stations would have an impact on the local radio ownership limits. In any event, movants make no effort to challenge the Commission’s reasons for concluding that the “presence [of noncommercial stations] in the market \* \* \* exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners.” Order ¶ 295.

5. Movants claim that the order violates the Communications Act’s requirement that approval of license transfers be supported by a public interest finding, *see* 47 U.S.C. 309(d), because the Commission will “refus[e] to subject applications proposing transactions not barred by the [cross-media limits] to anything more than ‘routine Commission review.’” Prometheus 13; Media Alliance 17–18; NCC 7. On the contrary, the order makes clear that the

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<sup>16</sup> The Commission initiated a new rulemaking proceeding to define radio markets “for areas of the country not located in an Arbitron Metro,” and adopted “a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.” Order ¶ 274.

Commission retains its “discretion to review particular cases,” and is “obligated to give a hard look both to waiver requests, where a bright line ownership limit would proscribe a particular transaction, *as well as to petitions to deny.*” *Id.* ¶ 85 (emphasis added). Because movants remains free, by filing petitions to deny, to persuade the Commission to withhold its approval of transactions that otherwise comply with the new ownership rules, their contention that the “new rules will allow transactions contrary to the public interest” (Prometheus 13; Media Alliance 18) is unfounded.<sup>17</sup>

### **III. The remaining factors also weigh against a stay.**

The interests of other parties affected by the Commission’s order, as well as the public interest generally, also weigh against a stay.

As the petitions for review initially filed in the D.C. Circuit illustrate, there are numerous parties whose interests—diametrically opposed to those of movants—will not be served by the granting of a stay pending appeal in this case. More importantly, the public interest is likely to be harmed if a stay were to be granted. As we have explained, the Commission is vested by statute with the authority to determine the public interest. 47 U.S.C. 309(a), 310(d); 1996 Act, § 202(h). In this case, the Commission has determined that its revised media ownership rules will advance the agency’s goals of promoting “competition, diversity and localism \* \* \* in highly targeted ways,” and that “working together,” the rules form a “comprehensive framework that is responsive to today’s media

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<sup>17</sup> Movants complain that the Commission “[will] refus[e] to consider how its “Diversity Index” applies to particular transactions.” But as the Commission explained, the Diversity Index is simply a “tool to inform [the Commission’s] judgments about the need for ownership limits.” Order ¶ 391. Because the Diversity Index is “useful \* \* \* only in the aggregate,” it is not properly employed “to measure diversity in specific markets.” *Id.* ¶ 392.

environment.” Order ¶ 5. The Commission therefore concluded that the revised rules were “necessary in the public interest.” *Id.* ¶ 8. “[T]he Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). *See Delaware River Port Auth. v. Transamerican Trailer Transp.*, 501 F.2d 917, 924 (3d Cir. 1974).

### CONCLUSION

Movants’ motions to stay the Commission’s media ownership rules pending review of the order should be denied.

Respectfully submitted,

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August 25, 2003

## CERTIFICATE OF SERVICE

I, Nandan M. Joshi, hereby certify that the foregoing "Federal Communications Commission's Consolidated Opposition to Motions for Stay Pending Review" was served this 25<sup>th</sup> day of August 2003 by sending copies by first-class mail to the following persons at the addresses shown below.

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