

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

PROMETHEUS RADIO PROJECT, et al.,)	
)	
Petitioners)	
)	
v.)	Nos. 03-3388, et al.
)	(and consolidated cases)
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and THE UNITED STATES OF AMERICA)	
)	
Respondents)	

**Joint Reply of Petitioners Prometheus Radio,
Media Alliance and National Council of Churches
in Support of Motion for Stay Pending Judicial Review**

Although the Respondent FCC and Intervenor Networks have submitted 40 pages of opposition briefs, they fail to rebut Petitioners’ showing of irreparable harm to their members and the public at large if a stay is not granted, make no effort to show that a stay would cause any harm to the FCC, the networks or any one else, and fail to rebut Petitioners’ showing that they are likely to prevail on the merits.

I. Grant of Stay will Prevent Irreparable Harm to Petitioners and the Public while Causing No Harm to the FCC or Intervenor

A. The Possibility of Challenging Specific Merger Transactions does Not Ameliorate the Harm to Petitioners

The FCC claims that Petitioners would not be harmed by allowing the new rules to take effect because the new rules do not prevent them from challenging specific transactions they believe will injure their interests. FCC Opp. at 9-10. However, this is simply not the case.

First, Petitioners are harmed because the new rules will allow many mergers not

permitted under the prior rules. Petitioners cannot effectively prevent the mergers by challenging specific transactions. For example, assume that Viacom, which already owns two television stations in Philadelphia (the CBS stations KYW-TV and UPN affiliate WPSG), with a total audience market share of 25%, were to acquire the fifth-ranked WPHL, or that the Philadelphia Inquirer was to purchase the top-ranked WPVI-TV.¹ Neither acquisition would be permitted under the old FCC rules, but both are allowed under the new rules. Although Prometheus would have a legal right to file Petitions to Deny the license transfers at the FCC under Section 309(d) of the Communications Act, that right would be hollow because the FCC will not disapprove a license application that complies with its rules. *See, e.g., Committee to Save WEAM v. FCC*, 808 F.2d 113 (D.C. Cir. 1986)(affirming denial of citizen group petition to deny involving changed format and affirming transfer of station to Viacom where FCC had previously determined in rulemaking that public interest in format diversity better served through reliance on market forces rather than by case-by-case approach and FCC refusing to consider specific circumstances of this transfer).

Indeed, the FCC has made it clear that if a merger is consistent with the new rules, it will not entertain a case-by-case challenge to it. Intervenors even note that “the FCC did admonish parties not to ‘use the petition to deny process to relitigate the issues resolved in this proceeding.’” Int. Opp. at 15, citing Order ¶ 453 n.980. Commissioner Adelstein also observed that the “Order actually makes a special effort to state explicitly that the Commission has no interest in the facts of particular cases since the new rules are the be-all and end-all of what is in the public interest.” Adelstein dissent at 18.

¹Market share figures and rankings come from BIA Financial Network, *Investing in Television Market Report*, 2003, First Ed.

Second, the harm flowing from the FCC’s erroneous understanding of its public interest responsibilities and how information affects democratic society cannot be remedied in the context of specific mergers. Petitioners and the public are harmed by the cumulative effect of the mergers, not just particular transactions. Mergers in one community can have an effect on diversity, competition and localism in other communities. For example, the Order recognizes that the national audience limits affect the balance of power between affiliates and networks. Order at ¶ 546-552. Thus, a network’s acquisition of television stations in markets where Prometheus lacks members could affect program decisions in Philadelphia by altering the balance towards the network even though Prometheus could not challenge those acquisitions. Yet, Prometheus would have difficulty establishing standing to challenge license transfers in communities where it does not have members. Even if Prometheus could establish standing, as a practical matter, it would not be possible to file challenges against all transactions that might have a negative impact on diversity, competition and localism.

B. It is Extremely unlikely that Judicial Review could be Completed before the FCC must act on Merger Applications

Intervenors claim that a stay is unnecessary because “judicial review will likely be over and done with by the time any merger could be approved.” Int. Opp. at 17. If Intervenors are right about the timing, then granting a stay cannot possibly have an adverse impact on either them or the FCC. Intervenors cite no proposed acquisitions that would have to be put off as a result of granting a stay nor any concrete harm to themselves.² And if companies are wary of

²Instead, they make the vague claim that “media companies like the undersigned intervenors have a right to engage in free speech, and media-ownership rules burden that right.” Int. Opp. at 20. However, the Supreme Court has found that media ownership limits do not violate the First Amendment rights of broadcasters. *NCCB v. FCC*, 436 U.S. 775 (1978). And to the extent the first amendment interests of broadcasters may conflict with the public’s first

engaging in acquisitions or mergers until Congress has concluded its deliberations on the matter, as the Intervenors suggest at n. 22, they would not be injured by a stay.

Intervenors' claim that judicial review will likely be over by the time any merger could be approved itself rests on a chain of unsupported speculation. First, that few mergers have been announced in the almost three months since the FCC adopted its order, Int. Opp. at 17, does not indicate that mergers are unlikely to be acted on by the FCC under the new rules. Rather, it reflects the fact that FCC did not release the text of the actual rules and the accompanying 258-page Order for a whole month, and then it took some time for parties to assess the possibilities opened up by the new rules. It also reflects the fact that until August 14, 2003, the FCC had a freeze on applications to transfer or assign broadcast licenses. See FCC Public Notice DA 03-2642, rel. Aug. 14, 2003 (announcing end to the freeze on the filing of applications). Less than two weeks after lifting the freeze, the FCC has already placed on public notice applications to transfer or assign the licenses of some 57 commercial radio stations and 7 commercial television stations.³ These numbers suggest that rapid restructuring of the broadcast industry will likely occur if a stay is not granted.

Second, Intervenors' claim that a stay is unnecessary because the FCC takes many months to act on license transfer applications is not supported. Int. Opp. at 17. The two cases

amendment interest in having access to diverse programming serving local need, it is the public's first amendment rights that are paramount. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

³See F.C.C. Media Bureau Broadcast Application Reports: No: 25552 Rel. 8/19/2003 MB DOC 237897A1, No: 25553 Rel. 8/20/2003 MB DOC 237898A1, No: 25554 Rel. 8/21/2003 MB DOC 238085A1, No: 25555 Rel. 8/22/2003 MB DOC 238088A1, No: 25556 Rel. 8/25/2003 MB DOC 238091A1, No: 25557 Rel. 8/26/2003 MB DOC 238180A1, No: 25558 Rel. 8/27/2003 MB DOC 238182A1.

cited by Intervenor in n. 23, which took ten and five and one-half-months respectively, involved major transactions that were vigorously contested and required consideration of multiple waiver requests.⁴ Thus, they are not representative of typical transactions reviewed by the FCC. Moreover, even large acquisition of this type will not likely require as much time in the future because the new rules have so radically relaxed the restrictions that few waivers will need to be requested.

Third, Intervenor's contention that judicial review could be completed before any acquisitions could be approved is premised on the assumption that the FCC will not request the court to hold the proceeding in abeyance pending reconsideration, or if it does, that the court will not grant it. Int. Opp. at 18. The FCC gives no indication that it would depart from its usual practice of asking the court to hold the appeal in abeyance. And while certainly this Court could decide to hear the appeal while reconsideration is pending, it is relatively rare for courts to do so.⁵ Even if a court did not hold the appeal in abeyance pending reconsideration, it seems unlikely that it would be able to conclude its review in a short period of time, given the large

⁴In *UTV of San Francisco*, 16 FCC Rcd 14975 (2001), the Commission reviewed and ultimately approved subject to conditions Fox's acquisition of ten television stations in major markets. Approval of the transaction required temporary waivers of the duopoly rule, national television limits, and newspaper-broadcast cross-ownership rule. The Commission also had to consider the allegations presented in a Petition to Deny and it "stopped the clock" several times because Fox delayed submitting information requested by FCC staff. Similarly, *Shareholders of CBS Corp.*, 15 FCC Rcd 8230 (2000), involved multiple station transfers, waiver requests, and petitions to deny. The FCC has established a transaction team for handling major merger transactions which has developed an informal timetable to ensure that most applications are proceeded within 180 days. See <http://www.fcc.gov/transaction/>. Smaller transactions can usually be acted on more quickly.

⁵The case cited by the Networks in fact indicates that while it is not an "iron-clad rule," the D.C. Circuit usually holds petitions for review in abeyance pending the FCC's further proceedings. Int. Opp. at 24, n. 24, citing *Teledesic LLC v. FCC*, 275 F.3d 75, 82-83 (D.C. Cir. 2001).

number of parties, the size of the record, and the large number of issues likely to be raised. As this Court is well aware, nine petitions for review were filed in the first ten days after the Order was published, and the time for filing Petitions for Review has not yet expired. On average, courts of appeals need nine to twelve months to decide appeals.⁶ A complex case such as this one will undoubtedly take more time than the average case. For all of these reasons, it is extremely unlikely that judicial review could be completed before the FCC could approve broadcast mergers.

C. The Irreparable Harm is not Contradicted by the FCC’s Authority to Require Divestiture

The harm to Petitioners and the public is not eliminated by the Commission’s claim that it has authority to order divestiture. FCC Opp. at 8; Int. Opp. at 18. Petitioners do not challenge the FCC’s authority. But we do question the FCC’s will to require divestiture. In the only case cited by the FCC in which it required divestiture – *FCC v. NCCB* – the Commission only required divestiture in a small number of the most “egregious” cases of rule violations.⁷ Intervenors cite no cases, much less any recent cases, where the FCC has actually required

⁶See <http://www.uscourts.gov/cgi-bin/cmsa2002.pl>. See also Report of Chief Judge Douglas H. Ginsburg, available at <http://www.cadc.uscourts.gov/common/refdesk/01AUSCA.pdf> (finding that average case processing times in the D.C. Circuit for filing to argument ranged from 352 to 377 days, and 72 to 81 days from argument to disposition).

⁷And, even in some of these egregious cases, licensees were able to get repeated extensions of time or ultimately obtain permanent waivers. In the case of Owosso and Anniston broadcasting companies, the Commission granted several temporary waivers that extended years beyond the divestiture deadline for newspaper/broadcast cross-ownership. *Owosso Broadcasting Co.*, 77 FCC 2d 54 (1986). In *Field Communications Corp.*, 65 FCC 2d 959 (1977), the Commission allowed the publisher of two Chicago daily newspapers to reacquire ownership of a Chicago television station through a permanent waiver. *Id.* at 961.

divestiture, and the absence of any such cases illustrate Petitioners' concern with reliance on the FCC divestiture authority.

We also question whether as a practical matter, once a merger has been consummated, it is feasible to require divestiture. Indeed, the FCC Opposition emphasizes that the Commission decided to allow common ownership of television stations because of "tangible economic efficiencies, such as the sharing of technical support staff." FCC Opp. at 11, citing Order at ¶ 347. *See also* Order at ¶ 439 (discussing how newspaper-broadcast combinations could share accounting, marketing, and human resource functions.) Once functions of this type are combined, joint facilities have been constructed, and "duplicate" employees have left or been fired, it would be extremely difficult to return the stations to separate hands. In fact, the Order declines to require divestiture because the FCC "agree[s] with the commenters that argue that compulsory divestiture would be too disruptive to the industry." Order at ¶ 484 & n.1029.

D. Petitioners have Acted Promptly to Request a Stay

That Petitioners filed the stay motion eight days after Federal Register publication instead of on the first day should not be interpreted as somehow undermining the assertion of irreparable harm. Int. Opp. at 19. The cases cited by Intervenors, in which courts found delay undermined claims of irreparable harm, involved delays of substantial periods of time.⁸ By contrast, here

⁸In *Brown v. Gilmore*, 533 US 1301 (2001), the party seeking a stay pending Supreme Court review waited until the law it challenged had been in effect for over one year before seeking a stay. In *Beame v. Friends of the Earth*, 434 U.S. 1310 (1977), the party waited the maximum 90 days after the Court of Appeals denied rehearing. In *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964 (2nd Cir. 1995), the party waited nine months after the alleged injury to file the law suit and an additional four months to request a preliminary injunction.

Petitioner promptly filed its Petition for Review within the first 10 days,⁹ and filed the Motion for Stay at the same time.

II. Petitioners have Established a Strong Likelihood of Prevailing on the Merits

The FCC claims that Petitioners made an insufficient showing that they are likely to succeed on the merits because the FCC has broad authority to determine to allocate licenses in the public interest and the scope of review of agency action under the APA is narrow. FCC Opp. at 10. While this is true, it does not mean that the FCC's authority is boundless nor that its decisions are never found to be arbitrary, capricious, an abuse of discretion or otherwise contrary to law. Here, Petitioners have provided ample illustration of the arbitrary and unlawful nature of the FCC's decision making. The dissents of Commissioners Copps and Adelstein also establish how the majority has acted arbitrarily and in violation of the law. And the Court need not conclude that Petitioners have shown a strong likelihood of success with regard to every single rule in order to grant a stay, Int. Opp. at 13. The NPRM states that all of the local ownership rules are interrelated and that the Commission must "consider these rules collectively, as any change to one rule may affect the need for other rules to be retained, modified or eliminated." 17 FCC Rcd 18503, ¶ 8. *See also* Order at ¶¶ 3, 6 (notes new rules form a "comprehensive framework.").

The FCC also asserts that possibility of legislative action is not grounds for a stay. FCC Opp. at 12. While it is generally true that no one can be sure how Congress will act on any given issue, this case appears to be unprecedented in two respects. First, the House appropriations bill is quite specific in reinstating the prior television ownership limits. Second, this is the first

⁹For purposes of 28 U.S.C. § 2112(a), all Petitions for Review filed within the first ten days are treated as if they were filed at the same time.

appeal arising during application of the Congressional Review Act, which was intended to give Congress a “legislative veto” over administrative agency actions. Moreover, the concerns displayed by members of Congress, many of whom voted for the 1996 Telecommunications Act, which the FCC claims required it to take the actions it did, suggest that perhaps the FCC has misconstrued Congressional intent expressed in that Act. Finally, Petitioners are not asking to Court to apply laws that have not yet been written, but to retain the *status quo* while it decides whether the FCC’s actions are consistent with the existing law.¹⁰

For similar reasons, the Court should reject Intervenors’ argument that it lacks authority to issue a stay because FRAP 18 and 28 USC § 1651 only authorize stays necessary or appropriate in aid of the court’s jurisdiction, not in aid of the jurisdiction of Congress. Int. Opp. at 11-12. Petitioner’s motion, clearly captioned as “Motion for Stay Pending Judicial Review,” discusses as extensively as possible, given the 20 page limit, how the FCC’s Order is arbitrary and capricious and in violation of both the Communications Act and the APA, and is thus likely to be reversed by the Court. Mot. at 8-14. In any case, this Court has broad jurisdiction to issue stays not only under 29 USC § 1651, but also under 5 USC § 705, which provides that a reviewing court “may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”

¹⁰However, the case it cites present very different factual and legal questions. In *National Audubon Society v. Watt*, the issue was whether the District Court properly granted an injunction to enforce a stipulation between environmental groups and the Secretary of the Interior not to undertake construction of a water project until certain studies had been completed, proposed legislation was submitted to Congress and Congress acted on it. When after five years Congress failed to enact legislation, the court found that the Secretary was no longer bound by the stipulation.

III. The Petitioners have Met the Procedural Requirements

The FCC does not challenge the Petitioners' claim that it would be futile to first ask the agency to stay its rules. This omission should be sufficient to dispose of Intervenor's claims that the motion is procedurally infirm under FRAP 18. See Int Opp. at 9. Should the Court desire more evidence that seeking a stay from the agency would be futile, Petitioners note that the Commission has not acted on a Motion for Stay Petition filed on August 18 by Capitol Broadcasting Company, Communications Workers of America, Consumers Union, Parents Television Council and the United States Conference of Catholic Bishops. See Ex. A. In addition, at a press conference on August 21, FCC Chairman Michael Powell, explicitly stated twice, in response to questions, that the FCC would not stay the ownership rule. See Ex. B. Instead of staying or changing the ownership rules, the Chairman proposed advancing the goal of localism and responding to public concerns by speeding up the licensing of low-power FM stations and conducting further inquiries. *Id.*

CONCLUSION

The Court should grant the motion for stay.

Respectfully submitted,

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EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

<i>In the Matter of</i>)	
)	
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)	MB Docket 02-277
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MM Docket 01-235
)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets)	MM Docket 01-317
)	
Definition of Radio Markets)	MM Docket 00-244
)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area)	MB Docket 03-130
)	

MOTION FOR STAY

Capitol Broadcasting Company, Communications Workers of America, Consumers Union, Parents Television Council and the United States Conference of Catholic Bishops [hereinafter “Movants”] respectfully move for a stay of the effectiveness of the Commission’s June 2, 2003 actions as set forth in its *2002 Biennial Review Order*, 18 FCCRcd 13620 (2003). Absent grant of this motion, the 2002 Biennial Review Order will become effective on September 4, 2003. Movants ask that the Commission delay the effectiveness of all rules and policies modified in the *2002 Biennial Review* until 60 days after adjournment of the First Session of the 108th Congress *sine die*.

This stay is requested in light of the pendency of legislation which would suspend enforcement, or overturn, part or all of the *2002 Biennial Review Order*,¹ and because of the interdependence of the Commission’s local and national broadcast ownership rules. Prudence and respect for the legislative process require that the Commission stay its decision.

¹On July 23, 2003, by a vote of 400-21, the House of Representatives adopted HR 2799, which would preclude the Commission from enforcing the modified 45% national TV ownership cap for the next fiscal year. As of August 18, 2003, there were 176 co-sponsors of HR 2052, and 44 co-sponsors of S. 1046, bills which would permanently reinstate the 35% national TV ownership cap. S. 1046 has been passed by the Senate Commerce Committee, which amended it to reinstate the Commission’s newspaper/broadcast cross-ownership rules. In addition, there were 20 co-sponsors of S.J. Res 17, which would rescind the *2002 Biennial Ownership Order* in its entirety. Senator Dorgan has posted a discharge petition for S.J. Res 17, which has been signed by 35 Senators.

The above-listed Movants are not necessarily in agreement among themselves as to the merits of each particular issue decided in the *2002 Biennial Review Order*. They do, however, share the belief that the Commission's acts and omissions have undermined localism, the defining characteristic of the licensing scheme set forth in Title III of the Communications Act. For this reason, and because the interrelated nature of the Commission's ownership policies make it impossible to effectuate the new decision in part without exacerbating the harm arising from it, Movants ask that all aspects of the Commission's *Biennial Review Order* be stayed.

There are two fundamental reasons why the new rules should be stayed.

First: While there are powerful legal and factual arguments in support of granting the requested stay, Movants emphasize that the most important reason for granting the stay is the pendency of legislative action.² Simply stated, the Commission should demonstrate its respect for the large number of members of both Houses of Congress who have unambiguously demonstrated their disapproval of all or part of the *2002 Biennial Review Order*.

Second: Comity aside, absent a stay, chaos will be the order of the day. As soon as the new rules become effective, the Commission will surely receive applications, probably many applications, for permission to transfer broadcast properties.³ Movants urge the Commission to consider the consequences:

- ! Scarce Commission staff time and resources will have to be devoted to considering matters which may well be moot. Citizens, such as those on whose behalf Movants are

²It is not necessary to review here the merits of the Commission's decision to meet the legal requirements for a stay. Given the substantial Congressional opposition to the FCC's June 2, 2003 decision, and the extraordinary speed with which it has been manifested by legislative action, there is a very high likelihood that Congress will pass at least one measure modifying the *2002 Biennial Review Order*, and a significant possibility that Congress will rescind the action in its entirety. This is effectively equivalent to the "likelihood of success on the merits" of the kind which the Commission has ordinarily recognized in considering stay motions. See, e.g., *Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 14 FCCRcd 9305, 9307 (1999) (applying *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958)).

³Every major liberalization of the FCC's ownership rules since 1984 has presaged a wave of transfer applications. Because, in many instances, the new rules offer limited opportunities for consolidation in a particular market, applicants will have strong incentives to be the first to file.

acting, will be put to the effort and expense of preparing challenges which may never have to be filed.

- ! It will be impossible for the Commission to make reasoned decisions on proposed station transfers so long as legislative action to overrule the Commission remains pending. Given the interdependence of the ownership rules, the Commission cannot assess the merits of any proposed transaction without knowing which rules, if any, will be overturned by Congress.
- ! It is virtually inevitable that, if Congress does, indeed, overturn all or part of the Commission's *Biennial Review Order*, the Commission will have to reexamine all of its interdependent rules in light of the Congressional action. It might even become necessary for the Commission to consider whether broadcasters would have to divest properties obtained prior to the enactment of such legislation.

Conclusion

WHEREFORE, in light of these compelling circumstances, Movants respectfully ask that the Commission grant this Motion, and issue a stay of enforcement of all rules and policies modified in the *2002 Biennial Review* until 60 days after adjournment of the First Session of the 108th Congress *sine die*.

Respectfully submitted,

/s/

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August 18, 2003

EXHIBIT B

Transcript of Powell Press Conference on August 20, 2003

Source: Telecomweb <http://www.telecomweb.com/release0820.htm> (visited August 28, 2003)

FCC's Powell Bends To Pressure, Undertakes 'Broadcast Localism' Initiatives

In what is being seen by many as a clear response to both public and political pressure, FCC Chairman Michael Powell during a Wednesday morning news conference said the agency would immediately undertake several initiatives aimed at improving and expanding broadcast media outlets in local communities.

Powell said the agency will immediately launch a Localism Task Force to advise the FCC on steps it can take and, if warranted, will make legislative recommendations to Congress that would strengthen localism in broadcasting. The Task Force will be led by FCC Deputy General Counsel Michele Ellison and Deputy Chief of the Media Bureau Robert Ratcliffe, who will serve as co-chairs

“This past June, the commission completed the most comprehensive review of its structural broadcast ownership rules in history. This 20-month study produced a balanced set of structural rules, faithful to the directives of Congress and the courts, to promote and protect diversity, competition and localism in the 21st century broadcast media marketplace,” Powell said.

“Our exhaustive ownership review demonstrated that the United States’ boasts the most diverse media marketplace in the world and is by no means concentrated and the rules adopted in that proceeding are well-designed to prevent any media company from having excess power over competition or viewpoints. During the proceeding and in the months that followed, however, we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns,” Powell said, “and we are going to tackle it head on.”

Powell continued: “It is important to understand that ownership rules have always been, at best, imprecise tools for achieving policy goals like localism. That is why the FCC has historically sought more direct ways of promoting localism in broadcasting. These include things such as public interest obligations, license renewals, and protecting the rights of local stations to make programming decisions for their communities.”

“The Senate Commerce Committee recently held hearings and brought greater attention to the issue of localism in broadcasting. I applaud the Committee’s efforts and hope to work in concert with them and the many Members of Congress who support localism,” Powell said.

A verbatim transcript of Powell's news conference, including the Q&A portion of it, follows:

PRESS CONFERENCE WITH MICHAEL POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

RE: UPCOMING FCC ISSUES
FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.
10:06 A.M. EDT, WEDNESDAY, AUGUST 20, 2003

MR. POWELL: Well, good morning and welcome to the Federal Communication Commission. It's really a pleasure to welcome you here on this summer morning. I want to take this opportunity to announce some new and important initiatives here at the Federal Communications Commission that I think are going to be very, very important to our public.

We're announcing today a localism in broadcasting initiative. As many of you know, this last June, we

completed the most comprehensive review of media ownership rules in the history of the Federal Communications Commission. It produced a set of balanced, structural rules, faithful to the directives of Congress and the courts to promote diversity, competition and localism in the 21st century marketplace. It is a real check on market power. And in our exhaustive ownership review, it demonstrated that the United States boasts the most diverse media marketplace in the world and is not unduly concentrated, but the rules are adopted in that proceeding are well-designed to prevent any media company from having excess power over competition or viewpoints.

But during that proceeding and in the months that follow, we heard the voice of public concern loud and clear, that localism remains a core concern of our public, and thus, I think it is time the commission address it head-on. I think it's important to understand that ownership rules have always been, at best, a very imprecise tool to achieving the policy goals of localism. That is why the FCC historically has sought other ways to more directly promote that objective in broadcasting, including such things as public interest obligations and a careful review of local performance during license renewals.

Indeed, recently the Senate Commerce Committee, under the leadership of Senator John McCain, held hearings and brought an even greater focus and attention on the issue of localism in broadcasting. And I commend the committee's efforts and hope to work together with them in this initiative and others.

Toward that end, the localism task force will advise the commission on steps it can take, if warranted, that will make -- and also make legislative recommendations to Congress that will strengthen localism in broadcasting.

I also want to commend the commitment of my colleagues here at the commission toward the advancement of localism. All of them have consistently shown deep and unwavering commitment in this important policy area.

Let me now take a few moments to outline some specific steps that we're going to take.

First of all, one of the areas we've heard greatest concern about is localism in radio. One of the things we're going to do immediately is take steps to speed the activation of licensing more low-power FM radio stations. We are going to waive processing rules in order to permit mutually exclusive applications to use available frequencies and to quickly get more of these services out into the market.

The low-power FM rules were adopted in the year 2000, and they're designed to foster a fundamentally different kind of community service. These non-commercial educational stations serve neighborhoods. They serve schools. They serve churches and other local community audiences. And so these rules give licensing priority to organizations with an established community presence that pledge to provide daily local news programming.

Second, we will create this localism task force, and the task is going to be modeled on other successful task forces the commission has held, such as in wireless spectrum.

It will play a critical role in gathering empirical data and grassroots information on broadcasting localism, and advise the commission and Congress on concrete steps to be taken to promote localism.

Specifically, the task force will conduct studies to rigorously measure localism and how it can be better promoted by existing FCC rules and potentially new ones. We will also organize a series of public hearings on localism around the country to hear from individual citizens of what is being -- what failings they're seeing in the community and things that they would prefer to see that government policy can contribute to helping. It will advise the commission on recommendations to Congress this fall relating to the licensing of additional low-power FM stations. And it will make recommendations to the commission on how the commission can promote localism in television and radio.

Finally, I have directed the Media Bureau staff to deliver to the commission a Notice of Inquiry on localism this September. This NOI will operate in parallel with the work of the localism task force. The NOI will seek comment on a wide range of FCC rules and procedures aimed to promoting localism. The NOI will ask, among other things, whether various localism-based rules continue to work effectively, and whether they should be changed or supplemented. This inquiry is expected to address such long-standing areas as license renewals, network affiliate rules, as well as newer localism issues such as voice tracking on radio.

And the record developed in the NOI, in conjunction with the research of the task force, will provide the commission and Congress with a sound basis on which to comprehensively advance localism broadcast in television and radio.

And I am thrilled to announce that this task force will be chaired by Deputy General Counsel Michele Ellison and Deputy Media Bureau Chief Bob Ratcliffe. I want to thank them for their willingness to serve on this important task, and recognize them here today, to my right.

I also would like to announce again the formation of our Blue Ribbon Panel on Diversity. It has long been a passion of mine to find more creative ways to promote opportunity in communications for small businesses and women. Indeed, for years I have been a strong supporter of legislation, that has now been introduced by Senator McCain, to promote new and rich opportunity for small businesses in the communication landscape.

I'd like to announce today that the federal advisory group will now be headed and chaired by Julia Johnson, the former chairwoman of the Florida Public Utilities Commission. The first meeting of that federal advisory committee will take place in September on September 29th. Their charge will be to wrestle with the difficult legal questions associated with finding more productive ways to promote the interests of other communities in ownership. And we're very, very excited about that initiative that will kick off next month.

With that, I'll be happy to take a handful of questions before we close out.

Yes, ma'am?

Q Brigitte Greenberg with Communications Daily. Your critics would probably say that this comes a little too late. How would you respond to that? In other words, shouldn't you have done all of this before the FCC decided on its media ownership rules?

MR. POWELL: I don't think so. Something in the public interest, to my mind, is never too late. We don't concern ourselves with the critics. We concern ourselves on trying to be responsive to the public. And clearly, we've heard concerns expressed by the public that I think are not best addressed by the ownership rules that were recently promulgated, but are better addressed more openly and directly through the kinds of traditional rules focused on localism that this task force will look at. I think that's a constructive thing for the commission to do. I think that's what the American public has asked that policymakers do.

You know, one of our obligations to the public is to take their concerns, and it's our job to figure out where best to channel them. It's our obligation to figure out what the most constructive policy approaches are, and I think that this effort will be important to the commission, and just as importantly, to Congress as it tries to understand the debate and contribute to the public good.

Yes, sir?

Q Under the FCC —

STAFF . : (Off mike.)

Q Right. Ira Teinowitz from Advertising Age. Under the FCC new rules that were adopted, when you add more local -- more low-power stations, won't that result in more consolidation of the radio market, because there are more stations in the market, and therefore, the big companies can buy more stations?

MR. POWELL: Not at all. First of all, it would be a question of whether we would count them as full participants under the ownership rules. And I think adding stations to a market is not going to increase its concentration. It's going to dilute concentration and provide local communities with products and stations that are focused on their local concerns.

Q Don't they count as full stations?

MR. POWELL: We'll have to see. I'm not sure.

STAFF: No.

MR. POWELL: No, they don't. There's your answer.

Yes, ma'am?

Q Stephanie Woods with "Nightly Business Report."

MR. POWELL: Well, I'll go to you and then I'll go to you.

Q (Laughs.) Okay.

MR. POWELL: Either way -- either direction. You'll both get a question.

Q Jessica Rosegarn (phonetic spelling) with CNN. You've said that one of your main concerns is the interference between the mobile phone industry and emergency radio communications in times of crisis. How big of a problem is that, and what kind of resources do you think are needed to solve it from, you know, personal human resources to financial resources?

MR. POWELL: I do think that in some frequency bands, we do have significant problems in this country between -- interference between commercial services and public safety/first responder services -- one of the reasons the commission is tackling one of the most complex proceedings I've ever been involved in, in the 800 megahertz band, in an attempt to find ways to mitigate that interference and provide long-term solutions so that first responders continue to have the spectrum they need, interference-free, as well as commercial entities able to continue to grow and provide the kinds of wireless mobile services that consumers are dependent on.

So I would say, in short, it's a high priority. It is a real problem and one that the commission's going to really work hard with the parties to solve.

Q Stephanie Woods with "Nightly Business Report." I'm curious why you're hearing the criticism now, when there was an 18-month process, rule-making process, on this, and several hearings and thousands of e-mails, demonstrations. Why now?

MR. POWELL: Well, any day is a good day to be doing something for the public, I think. I think we heard concerns all through the debate. I think the problem is trying to translate those concerns into constructive policy directions.

Ownership rules -- our structural ownership rules are in some ways very technical and economic. They're meant to check concentration in markets -- competitive power, antitrust kinds of concerns. And I think one of the things that both in the public debate in Congress and here in the commission is, we have to try to take those concerns, abstract as they may be, and we be the ones that translate those into a focused and more constructive direction.

My concern has consistently been that ownership rules are actually a very clumsy way to get at some of the things that consumers are actually concerned about. And this is an effort to address those concerns in a much more constructive way than the technical structural rules.

Q So if I could just follow up, was this a policy mistake or a political mistake?

MR. POWELL: I don't think it's mistake at all. I think it's a learning experience. And I think that the ownership rules were built based on the 1996 statute, and they were based on court opinions as to what they required. I completely believe that the rules that were passed in June were accurate, well-balanced and reflective of those particular directives.

But in the process, we learned something. We learned about a deep-seated anxiety in the American public about a commitment to local values and local communities.

And I think then it's incumbent on policymakers to try to hear those concerns and create constructive responses, if any, to them. And I think that this effort will be a major contributor to making that a productive exercise and not just an emotional one.

Frank?

Q In terms of specifics, in terms of the license renewal process, do you imagine a process that would make it more rigorous for the stations; they would have to prove public interest, that they've met their

public interest requirements, as opposed to the system now?

And B, do you take this action with any hope that it will derail or slow down the bills heading forward in Congress? And have you talked to anyone in Congress? Have you consulted with them before taking this action, thinking this is a political strategy as well?

MR. POWELL: Well, it isn't a political strategy. I think that it's an effort to be responsive to consumers. No matter – you know, I take the view very clearly that Congress makes the rules, and we implement them. And I think that Congress set rules in 1996, rules that the courts have held were to continue the process of deregulation, and in case we had any doubt about that, overturned all the rules that we had promulgated. And the commission attempted to strike a fair balance to do that.

But we're also an expert agency, and I think it's our obligation to advise Congress, as well as ourselves, about the most constructive direction you can take to keep the marketplace healthy and to address the concerns of the public. And no matter what the debate is in Congress, it remains our duty, my obligation, to continue to be a thoughtful adviser to Congress as we debate this, and I think that's what this is intended to do.

I'm sorry.

Q Specifics on license renewal -- do you have any specifics on what you might be --

MR. POWELL: At the moment, nothing is off the table. And one of the obligations of licensees at the time of a renewal, under the statute, is to demonstrate that they're acting in the public interest. That has long included service to local communities.

And I think what this effort will do is help us understand more clearly, A, what broadcasters are doing or not doing, and other more thoughtful and fundamental ways we can answer in the affirmative that question when we are considering a license.

Q Have you talked to -- following up on Frank's question, did you talk to members of Congress and do you consult with them? And have you talked to Senator McCain about this? And what is his -- what are the response (sic) that you're getting from members of Congress to this initiative?

MR. POWELL: Yes. We haven't talked to every member of Congress, but we certainly have had an ongoing dialogue with members of Congress throughout the summer. And indeed I had had some conversations with Senator McCain preceding his hearing on localism. It's one of -- and one of the places that started me thinking about constructive ways that the commission could be in partnership with Congress about those things.

So we have, yes, talked to a number of members, but we're going to talk to a lot more in the coming days, to try to see how we can constructively gear our efforts to their concerns and what they would like to see done. And so -- so yes.

The beauty of a task force is it puts up a standing organization that dedicates itself on a continual basis to these issues.

Q A follow-up on that. Is there any sign that they are going to back off from their efforts, their legislative efforts to overturn the rules?

MR. POWELL: I have no idea. You know, I'm not in the leadership of the Congress. Again, it is not my job to guess or second-guess what they will do or not do. I actually think it's their prerogative to create the media landscape they want.

But it is our obligation to try to make sure that whatever action they take will actually do something that benefits consumers and makes TV better and not worse. I don't know that I think every proposal that I've heard considered in the Congress is necessarily going to do that. I don't personalize policy, but I think we should make sure that whatever policy choices are made are ones that are really going to enhance the public welfare, and that's what this is part of.

Q Dimitri -- (last name inaudible) -- Financial Times. In light of what you just said, if you need to have more of a discussion with Congress to advise them better, wouldn't it be smart to put a stay on the rules until

you've had more discussion with them?

MR. POWELL: I disagree, because I think the rules, for what they are targeted for, are well balanced and correctly done. And it's far from clear exactly what all 535 members of Congress, the United States president, will prefer or not prefer. And I don't think that it's appropriate to stay the rules. The marketplace is destabilized by rules that have been overturned by the court. I don't have any regret about the specific rules that we constructed.

What I think is important is that this initiative is a different kind of rules, different set of rules to be looked at, and I think it is actually a much more constructive place to consider some of the concerns that we've heard.

Yeah?

Q What power does the FCC have to change procedures currently, without an additional rulemaking or laws from Congress?

MR. POWELL: Well, it may still require rulemaking, but the commission has extraordinarily broad discretion on the public interest standard to consider and entertain affirmative public interest obligations and localism rules, as it has done consistently for many, many decades. So I think the commission does have the jurisdiction and authority to give meaning to the public interest standard.

All public licensees are obligated to operate consistent with that standard in receiving their licenses and having their licenses renewed, and the commission enjoys a fair amount of discretion in deciding how to interpret that, up to the limits of the law which the court will permit. At times it has overreached and had those public -- certain kinds of public interest obligations overturned. We have to always be careful that the First Amendment still stands there as an important filter, not to regulate content too directly. And so, we will have to be guided by that caution as well.

But I don't think that there is a significant problem with commission jurisdiction. But that said, anything in the media would benefit from more specific and clear legislative guidance.

Q I think what I was asking, is there anything the FCC can do immediately versus through a lengthy formal rulemaking or waiting on Congress?

MR. POWELL: Well, I think it is immediately going to accelerate the pace of low-power FM radio. That's one of the things it's going to do immediately. I think it's about as immediate as a federal bureaucracy gets to have an NOI in motion within a month of an announcement. So, we're going to put significant emphasis on this and move it as quickly as we can.

But we are an agency that's required to have a record. It's an agency required to develop a record and make decisions that are consistent with that record. It is not an agency permitted to shoot from the hip and just impose obligations without a substantive basis for doing so.

Yes, ma'am?

Q Do you think there is a problem with localism in the media? I'm sorry, Monica Conrad, ABC News. Is there a problem with localism in the media? Do you think there is? I mean clearly, the public thinks there is. Do you agree with them, or are you doing this and is the task force doing this to find out if there is an issue with localism in the media?

MR. POWELL: I think the answer to that -- the answer is yes to both of that (sic). That is, I think we do suspect that there are problems and aspects of the media marketplace, but it's also meant to find out exactly in what form and how that manifests itself and whether that's accurate. I'm sure the broadcasting community would insist that there isn't. But that's one of the things we're going to really examine critically. But I do think we've heard lots of anecdotal concerns about local programming, and I also think that there's a lot of sort of misdirection associated with some of the ownership rules in talking about ownership and that the public doesn't appreciate, like the fact that the national ownership cap doesn't prevent local broadcasters -- purportedly local broadcasters from owning station groups as large or larger than network-owned stations. And so, those rules for 30 years haven't ensured that you would have a local owner of your community property; whether it's 35 or 45, at either line, it's not going to have that effect. So, if that's

not the case, how do we -- you know, how do we better and more directly deal with those concerns? And that's what this is intended to find out.

Q What do you then -- what problems do you see in localism currently? What are the ones that you do see currently?

MR. POWELL: Well, I think that, for example, at Senator McCain's hearing, there was some discussion about whether people were purporting to represent themselves as reporting locally on things, when in fact, they were in other markets. That's just one example. I think that we need a -- you know, I think that our record in the ownership proceeding did a really good job of cataloging the presence of local news in local communities, but I think you could look harder about how many hours were dedicated to local news, what was the nature and the quality of that local news. There are a lot of studies that we already have, but I think there's more that we can learn. But the beauty of this is it's wide open. I don't want to foreclose anything and I don't want to promise anything until we really take a sober and rigorous look at it, and we need this task force to do it.

Q Sir, what do you think about the affiliate argument that the national ownership cap is relevant, because if you raise the cap, basically, the networks will squeeze out more affiliates, and more of the decision-making for programming in the country will be made in New York.

MR. POWELL: I believe that when a Sinclair Broadcasting or a Cox Broadcasting or a Washington Post company, who are strong advocates for changing -- for the argument you just made, also own 50 and 60 stations nationwide, that the idea that they are only uniquely positioned to make decisions affecting the local community, I think, is false, just simply false, at least if the argument is you have to be locally based in order to serve localism.

By the way, I don't believe that you have to necessarily have an owner that lives down the street in order to be responsive to local concerns. I do think that, you know, if you're a large conglomerate, you know, there's a chance those concerns can get lost. But I'm not prepared to say that the only way you can serve a local community is by having a small station in a local community owned by a local owner.

Indeed, you know, we often talk in terms of things like the digital divide. You know, part of what that means is consumers want to be able to have access to the same kind of programming you have in New York. They want to be able to see the top blockbuster shows, they want to be able to see HBO and "The Sopranos," they want to have "Six Feet Under" in their community; they want to see those shows as well. So, you know, there's a balance between trying to make sure that an economic model and policy brings them the best of the best, as well as those things that are really localized to the community.

So, to say sort of absolutely that a group that's focused -- that has a national presence and the resources to produce and carry blockbuster quality sports and entertainment program isn't also serving local interests is probably in error.

Q And then -- and why not just stay the rules, pending resolution of all this, if there's --

MR. POWELL: Let's be really clear. The only way a regulatory agency or a court can accept the will of the Congress is when the Congress acts as an institution. And controversy is nothing new to the FCC on any rules it promulgates. The policy precedent of staying the rules just because they might or might not change, and leave the media structure in limbo, I think is a bad precedent that I'm not prepared to follow.

Yes, ma'am?

Q (Name off mike) -- with Reuters Television. Can you just clarify; are the ownership caps on the table? Is that what you're saying today?

MR. POWELL: The ownership caps are not on the table, unless we get a change in direction from Congress on them.

My argument really is that ownership caps are a relatively clumsy and indirect way to promote some of the concerns expressed by the public. I really will argue quite forcefully, you draw the line at 35, 25 or 45, if you think you're going to see a meaningful and qualitative change in localism as a consequence of those technical line-drawings, I, personally, am of the view that that's not accurate and that's not what will

happen.

STAFF: Just a couple of more.

Q Todd Shields with Media Week magazine. What put you over the top? In May, you had a half a million e-mails, many of which addressed issues of localism. You had fellow commissioners urging you to slow down on the rule set, saying we need to look at localism, among other things.

What is it in recent weeks that put you over the top? And why not do this at a regular FCC meeting? Why are we here with you all by yourself on a Wednesday morning, as opposed to at a meeting? Is there some tremendous special urgency?

MR. POWELL: Gosh, you don't want to be with me this morning? (Laughter.) Man!

Q I'm real happy to be here, but what put you over —

MR. POWELL: I got all dressed up in my best suit for you.

Q Yeah. I guess it's another way to say: Why now? But what happened? What changed your mind?

MR. POWELL: You know, why not now? Why now? Why now? Because we are constantly working to try to find the best and most constructive way to serve our public.

I don't know why now or tomorrow or yesterday is any bell (sic) suited. It's still focused on doing something right and doing something right for the public.

By the way, I do continue to make a distinction that I think that what we're going to pursue here is qualitatively and legally distinct from the structural ownership rules, which are largely about concentration, market power, anti-competitive behavior, very technical and economic sets of rules. They are meant to promote localism; I don't want to suggest that they aren't. But they are very, very blunt and poor instruments for the kinds of concerns that I've spent the summer coming to comprehend and understand, and this is an effort to try to take those

concerns in a more constructive direction.

I feel quite strongly, as an antitrust lawyer, and probably as much as anyone else in this country understands intimately the way the ownership structure rules work, that one of the disconnects is that the generalized anxiety about the media marketplace is not particularly well-addressed by the structural ownership rules. Now reasonable minds can disagree about to what extent. But why not do directly what you care about, rather than indirectly? Why three cushion shots on the pool table, rather than a shot right at the hole? And what this is, is trying to take a shot right at the hole and not have sort of esoteric, complicated arguments, like the one expressed over here, about how to promote localism.

If we mean it, if the broadcasters who fight aggressively to roll back the national cap really mean localism, there should be nothing afraid of — no one should be afraid of looking at it more directly. And that's not what we were doing in June, and that's not what those ownership rules were about.

But I think that's a proper articulation of what the public's actually concerned about.

One last question and then I'm going to have to go.

Q Can you talk briefly about the final order for the triennial review, when you expect that out, and what's holding it up --

MR. POWELL: (Chuckles.)

Q -- if you can talk about that?

MR. POWELL: I really think it's this week. (Laughter.) I've said that before. I really do. So stay tuned, and hopefully we'll get it out of here in the next couple of days. So I would be looking for it toward the end of the week. Hope -- that wasn't too hard.

STAFF: Thank you.

MR. POWELL: All right. Thank you very much. Appreciate you coming.

END.

CERTIFICATE OF SERVICE

I, Cheryl A. Leanza, hereby certify that, on this 28th day of August, 2003, I caused to be served upon the parties marked with an asterisk below via electronic mail, and to all parties listed below a physical copy via first class mail, postage prepaid, 1 copy of the attached *Joint Reply in Support of Motion for Stay*.

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