

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

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

Nos. 03-3388 *et al.*

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES
OF AMERICA,

Respondents.

**PARTIAL OPPOSITION OF CITIZEN PETITIONERS TO THE
FEDERAL COMMUNICATIONS COMMISSION’S AND UNITED STATES’
PETITION FOR PANEL REHEARING**

Pursuant to the August 10, 2004 letter of the Clerk, Petitioners and Intervenors Prometheus Radio Project, *et al.* (collectively the “Citizen Petitioners”) file their response to the Federal Communications Commission’s and United States’ August 6, 2004 *Petition for Panel Rehearing* (“Petition”).

Citizen Petitioners do not oppose the request for rehearing, except in one respect as described below.

I. Modification of the Stay As Requested will be More Likely to Maintain the *Status Quo*.

Citizen Petitioners do not generally oppose the government’s request because the Commission’s revision will be more likely to maintain the *status quo* than the present stay. Petition at 2-3. Although Citizen Petitioners do not agree with all aspects of the

new local radio ownership rule affirmed by this Court,¹ Citizen Petitioners support a stay that will be more likely to preserve the *status quo* while the Commission acts pursuant to this Court’s remand. Under the current stay, there are proposed radio transactions that could receive Commission approval even though they would be impermissible under the new local radio ownership rules as upheld by this Court. It is preferable for all parties to maintain the *status quo* rather than to permit new business combinations that would likely have to be “unwound” at a later date.

Moreover, it is an indisputable historical fact that the FCC has often faced powerful political and legal pressure to extend “temporary” waivers and to grandfather ownership interests rather than order divestiture. Therefore, Citizen Petitioners strongly oppose any Commission approval of transactions that will require divestiture at a later date.²

II. The Commission’s Request to “Conform” the Court’s Radio Ruling with the Television Ruling Must Be Rejected as Inconsistent with the APA.

In the penultimate paragraph of its Petition, the government makes a somewhat opaque reference to this Court’s discussion of the Commission’s inconsistent justifications supporting its local television and local radio rules. Petition at 12. Citizen Petitioners understand the government to be saying that the Court should revise its

¹ Specifically, while Citizen Petitioners did not challenge the local radio market definition and supported the attribution of Joint Sales Agreements, Citizen Petitioners continue to believe that the Commission’s inclusion of noncommercial stations in determining the size of a local market to be incorrect.

² For example, when the FCC adopted the newspaper-broadcast cross-ownership rules in 1975, it decided not to require divestiture except in the most egregious cases due to a concern about “disruption for the industry and hardship for individual owners,” *FCC v. NCCB*, 436 U.S. 775, 787 (1978). *See also, e.g., Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12961 ¶133 (1999), on recon., 16 FCC Rcd 1067 (2001) (grandfathering TV duopolies in violation of rules until at least the 2003 Biennial Review); *Gaylord Entertainment Company*, 14 FCC Rcd 12209 (1999) (temporary waiver conditioned on the outcome of pending rulemaking); *Milton S. Maltz*, 13 FCC Rcd 15527 (1998) (granting waiver to “interim policy” intended to govern transactions during pendency of rulemaking). Indeed in the proceeding below the FCC grandfathered existing combinations that violate the new rules. *Media Ownership Biennial Review Order*, 18 FCC Rcd 13620, 13808, ¶484 (2003).

decision to remand for further justification the FCC's decision to use an economic theory to justify its local radio rules that conflicts with the economic theory used to justify its local television rules.³ *Id.* Specifically, the Petition cites the Court's analysis regarding the local radio rules:

The Commission's decision to rely on theory that conflicts with the Merger Guidelines is suspect because, in the same Order, the Commission relied on the Merger Guidelines to derive its new limits for local television stations ownership. The Commission did not address this discrepancy in its Respondent's Brief, and should do so on remand.

373 F.3d at 433 (citations and footnote omitted).

The government seems to be arguing that it should not have to explain why it chose to rely upon the traditional Herfindahl-Hirshman Index ("HHI") to adopt a six-competitor benchmark for its local television rules, but relied instead upon several game theory articles that conflict with the HHI to adopt a five-competitor benchmark for radio. In support of this claim, the government points to the Court's conclusion that there is no reason that the Commission's local television ownership limits must "mirror precisely" its local radio ownership limits, "particularly given that there are generally more radio stations than television stations in a given market." 373 F.3d at 418, n.52 (responding to Citizen Petitioners' argument that adoption of a six-competitor benchmark in television was inconsistent with adoption of a five-competitor benchmark in radio); Petition at 12.

The government's request here demonstrates the Commission's on-going refusal to address complex decision-making with appropriate care or subtlety. Whether or not the Commission's radio and television rules must rest upon the same economic theory,

³ Although the Commission styles its request as asking the Court to "conform" its radio ownership decision with its television ownership decision, Petition at 3, 12, as Citizen Petitioners explain, the Commission's request appears to be a substantive one.

the Commission remains subject to a bedrock APA obligation to make relevant distinctions between its decisions to apply conflicting economic analyses to various industries and markets. *See, e.g., Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Commission, as the Court properly found, did not address this differential treatment. The only distinction offered by the Commission (as noted by the Court) was that there are usually more radio stations than television stations in any given community. Petition at 12, FCC Br. at 39, 373 F.3d at 418 n.52.

The proffered “reason” explains nothing, and verges on a *non-sequitur*. Market share (as well as the number of competitors in a market) is measured regardless of how many stations are present in that market.⁴ The Commission’s answer certainly does not begin to address the question presented to it by the court: why it believes the HHI is appropriate to analyze the television broadcast industry at the same time it relies on economic theory that conflicts with the HHI to analyze the radio broadcast industry. The Commission cannot shirk its obligation to provide reasoned analysis explaining its reliance on conflicting economic theories to analyze very similar markets in pursuit of similar goals.

Rather than a request to “conform” an inadvertent conflict between two portions of its decision, the government appears to ask this Court to relieve it of a substantive APA obligation. For this reason, Citizen Petitioners oppose this portion of the Petition.

⁴ To illustrate the obvious, in a given market with four television stations and twenty radio stations, the four television stations could be owned by four independent corporations while the twenty radio stations could be owned by only two corporations with ten radio stations each. The competitive state of the television industry in such a market would be much healthier than the competitive state of the radio industry, regardless of whether there are more radio stations than television stations.

Conclusion

Citizen Petitioners therefore do not oppose the Commission's request to modify the stay with respect to the local radio ownership rules, but respectfully suggest the Court reject the Commission's request that this Court revise the Commission's obligation to address the discrepancies between the justifications for its local radio ownership rules and the justifications for its local television ownership rules. Citizen Petitioners also request that this Court grant all such other relief that it deems just and proper.

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CERTIFICATE OF SERVICE

I, Paula Galloway, certify that, on this 19th day of August 2004, I caused to be served upon the parties listed below by electronic mail, and also by either overnight express mail or by hand, prepaid, copies of the foregoing *Partial Opposition of the Citizen Petitioners to Federal Communications Commission's and United State's Petition for Panel Rehearing* to the following:

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