In the

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Prometheus Radio Project, Petitioner, v. Federal Communications Commission and United States of America, Respondents, Fox Entertainment Group, *et al.* Intervenors	)))))))))))	No. 03-3388

CITIZEN PETITIONERS' OPPOSITION TO JOINT MOTION TO TRANSFER VENUE

Petitioners Prometheus Radio Project, Media Alliance and The National Council of the Churches of Christ in the United States (hereinafter referred to as "Prometheus") respectfully submit this opposition to the *Network Petitioners' Joint Motion to Transfer Venue* (hereinafter referred to as "Motion") filed on August 22, 2003.[1] Prometheus also addresses the *Response of FCC and United States In Support of Joint Motion to Transfer Venue*, filed on August 25, 2003.[2]

The Network Petitioners' Motion is rooted in the erroneous premise that the District of Columbia Circuit is the proper venue for this proceeding because the matter here under review is "closely related" to two earlier cases which, allegedly, give the D.C. Circuit greater experience as to the issues raised in the instant case. Sadly, the Motion is garnished with innuendo accusing

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[1]Pursuant to the directive of this Court, this pleading is being submitted electronically prior to 12:00 pm, September 8, 2003.

[2]Counsel for Prometheus has also received two additional pleadings supporting the Motion. A memorandum filed by Sinclair Broadcast Group, Inc., dated September 2, 2003, was served electronically. Another, filed by Media General Inc., and dated August 29, 2003, was served by mail. Neither pleading is accompanied by any request for leave to file out of time. As of September 7, 2003, neither of these submissions are listed on PACER. However, inasmuch as neither pleading raises issues which are not addressed herein, Prometheus does not object to their acceptance.

Prometheus of inappropriate forum shopping and questioning the legitimacy of citizens groups' legal right even to participate in this proceeding. Thankfully, the federal Respondents (hereinafter referred to as "the FCC" or "the Commission") do not endorse the Network Petitioners' attacks, but content themselves with offering lukewarm and laconic support for the Network Petitioners' main argument. They also advance another, wholly unsupported, argument which amounts to a claim that the D.C. Circuit is better qualified to hear all petitions for review of FCC decisions.

Prometheus urges this Court to focus upon on the merits of the arguments presented, rather than on the irrelevancies advanced by the Network Petitoners. The citizen petitioners before this Court each lawfully commenced proceedings in venues in which they were entitled to file.[3] That is no more, and no less, than what Fox Television Stations, Inc. and Sinclair Broadcast Group, Inc. did when they chose to pursue causes of action in the D.C. Circuit a few years ago. In seeking to transfer this case to the D.C. Circuit, they could be viewed as seeking to leverage their prior choice of forum. Some might regard that as just one more form of "forum shopping." Indeed, it is often hard to draw a line between the ethical obligation to serve a client's best interests and "forum shopping."[4]

I. "CONVENIENCE OF THE PARTIES"

The Network Petitioners, but not the government, emphasize that almost all counsel in this

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[3]"[T]he interest of justice favors retention of jurisdiction in the forum chosen by an aggrieved party where, as here, Congress has given him a choice." *Newsweek, Inc. v. USPS*, 652 F.2d 239 (2d Cir. 1981). *See also, Tenneco Oil Company v. EPA*, 592 F.2d 897, 900 (5th Cir. 1979) ("[I]n the absence of unusual circumstances compelling transfer, courts have not exercised their inherent power to disturb a party's choice of forum.")

[4]*See, e.g.,* Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 Neb. L.Rev 79 (1999); Note, *Forum Shopping Reconsidered,* 103 Harv. L.Rev. 1677 (1990) ("actions described as 'forum shopping' lie on a continuum of activities, many of which are integral to the legal system and may actually enhance its capacity to provide needed remedies.")

case practice in the District of Columbia, and that this makes the D.C. Circuit "the preferred forum from the perspective of the 'convenience of the parties. 28 U.S.C. §2112(a)(5).'" Motion at 13.[5]

While the Motion correctly describes the residence of counsel, it does not follow that the Third Circuit is inconvenient for counsel, or that there is any practical difference between the D.C. and Third Circuits in this regard. It now takes just over an hour and a half to travel by train between Washington and Philadelphia. That is not much longer than the travel time for many daily commuters. Regardless of which venue is ultimately chosen, if this case proceeds like most agency appeals, there will be one oral argument prior to final disposition of the matter. One trip to Philadelphia is hardly an inconvenience sufficient to defeat Petitioner Prometheus' statutory venue right.

II. "CLOSELY RELATED" CASES

The Network Petitioners place greatest emphasis on the argument that the case now under review is "closely related" to two D.C. Circuit cases remanding prior FCC orders. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002), *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). Respondents agree on this point, although they offer nothing in support of their view, other than to say that the *Biennial Review Order* on appeal before this Court "contains the FCC's response to the D.C. Circuit remands." FCC Response at 3.[6]

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[5]With respect to the parties, as opposed to counsel, this Court can take notice of the fact that each of the Network Petitioners have found the Third Circuit sufficiently convenient so as to incorporate themselves in Delaware.

[6]The Network Petitioners and the FCC also advert to another D.C. Circuit case which has been held in abeyance. *National Newspaper Assn. of America v. FCC*, No. 00-1375. Neither the Network Petitioners, nor the NNA claim that this D.C. Circuit matter affords any additional basis for transfer. The case, which is almost certainly moot in light of the 2002 *Biennial Review Order*, has been held in abeyance since shortly after it was filed. Since no briefs or substantive motions have been filed, it is impossible for the D.C. Circuit to have acquired any special expertise which could be applied to the current case.

As Prometheus will now show, however, the case now before this Court is ***not*** one in which the issues are "closely related" to the *Fox* and *Sinclair* cases. Nor would review by this Court "duplicat[e]...judicial effort." *United Steelworkers of America v. Marshall*, 592 F.2d 693, 696 (3d Cir. 1978).

A. The 2002 Biennial Review Has Little in Common With the *Fox* and *Sinclair* Cases.

The *Fox* and *Sinclair* cases each addressed one FCC rule relevant to this proceeding. The rule which was considered in *Fox* has been very substantially liberalized in the *Order* now under review, an action which is justified largely on the basis of an empirical economic analysis bearing no resemblance to the rationale set forth in the 1998 *Biennial Review Report* reviewed in the *Fox* case. The "8-voices test" at issue in *Sinclair* was abandoned in favor of new provisions which are justified on different grounds bearing no relationship to the 8-voices test presented to the D.C. Circuit.

The *Fox* case arose from the 1998 Biennial Review. Fox challenged the Commission's "decision not to repeal or to modify the national televison station ownership rule...." *Fox*, 280 F.3d at 1033. Comparing the FCC's *1998 Biennial Review Report* to "an agency's denial of a petition for rulemaking," the D.C. Circuit "conclude[d] that the Commission's decision to retain the rules was arbitrary and capricious and contrary to law...," *id.,* and "remanded the FCC's "national television ownership rule to the Commission for further consideration...." *Id.*[7]

The *Sinclair* case arose from an appeal of certain changes in the FCC's local TV ownership rule limiting the number of stations any one licensee could operate in a single community. The rule

[7]Fox also challenged retention of the cable/broadcast cross-ownership rule. The Court "vacate[d] the cable/broadcast cross-ownership rule because we think it unlikely the Commission will be able on remand to justify retaining it." *Id.* This provision is not at issue here.

at issue was adopted in August, 1999, but was subject to agency reconsideration, which was not completed until January, 2001. *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903 (1999), *clarified in Memorandum Opinion & Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001) ("*Local TV Rule Order*"). Finding that the FCC had failed to justify differential treatment of local station "voices" in the local ownership caps and in its local cross-ownership rules (addressing common ownership of TV/ radio combinations in a community), the D.C. Circuit "remand[ed] the [local TV ownership] rule to the Commission for further consideration." *Sinclair*, 284 F.3d at 170.

Plainly, these two cases have little bearing on the case at hand. The FCC considered six different rules, and subjected them to a rigorous (if ill-conceived) empirical analysis. Unlike the *Fox* and *Sinclair* cases, in which two different rules were considered independently, the FCC considered all of the rules in a single omnibus rulemaking docket that it described as

> the most comprehensive look at media ownership regulation ever undertaken by the FCC. The FCC said the objective of this proceeding is to develop ownership rules and policies that are reflective of the current media marketplace, are based on empirical evidence, and are analytically consistent.

FCC Initiates Third Biennial Review of Broadcast Ownership Rules, FCC Document Number 2261988A1 (released September 12, 2003).

B. Section 202(h) of the 1996 Telecommunications Act.

To understand why this case is in no way controlled by, or directly related to, the *Fox* and *Sinclair* cases, it is first necessary to examine the text of the statute upon which the Network Petitioners (but not the FCC) place greatest reliance. Section 202(h) of the 1996 Communications Act provides as follows:

The Commission shall review its rules adopted pursuant to this section and all of its

> ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

This statute has two sentences, which direct two different tasks. The first sentence requires the FCC to conduct review of its rules for the purpose of "determin[ing] whether any of such rules are necessary in the public interest." The second sentence sets forth what the FCC should do in the event it does, indeed, find that one or more of its rules are no longer "necessary in the public interest."

The first task is in the nature of an inquiry. It contemplates a go/no go decision as to whether particular rules should be revised or repealed based on whether they meet a new test, never before in the Communications Act, as to whether they are "necessary in the public interest."

The second sentence becomes operative only when the FCC determines that a particular rule is "no longer in the public interest." In directing the FCC to "repeal or modify" such a rule, the statute clearly, albeit implicitly, contemplates the conduct of a rulemaking proceeding under the Administrative Procedure Act.[8]

B. The 2000 Biennial Review and the *Fox* Case.

Section 202(h) does not specify whether the two tasks it describes should be undertaken one at a time or simultaneously, and the FCC surely has discretion to decide how best to proceed in that regard.

In the 1998 and 2000 Biennial Reviews, the Commission followed a bifurcated approach, in

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[8]There is no basis to conclude, and the FCC has never suggested, that the second sentence of Section 202(h) somehow repealed or amended 5 U.S.C. §553, the basic federal statute governing such proceedings

which it issued *Notices of Inquiry*, and to the extent it determined that particular rules no longer served the public interest, it then initiated rulemaking proceedings. Thus, the 1998 review was initiated by means of a *Notice of Inquiry. Notice of Inquiry,* 13 FCC Rcd 11276 (1998). Upon completion of the inquiry, the Commission issued its *1998 Biennial Review Report*, 15 FCC Rcd 11058 (2000) which identified those rules it considered to be "necessary in the public interest," as well as those which were deemed no longer "necessary in the public interest." Among the latter rules, the most important was the "dual network rule." *Id.*, 15 FCCRcd at 11098. "Accordingly," the Commission said, "we will adopt a *Notice of Proposed Rulemaking* seeking comment on modifying the dual network rule. *Id.; see Amendment of Section 73.658(g) of the Commission's Rules*, 15 FCCRcd 11253 (2000). Ultimately, the Commission adopted its proposed modifications. *Dual Network Order*, 16 FCC 11114 (2001).[9]

C. The 2002 Biennial Review.

Responding to the D.C. Circuit's criticisms, the FCC initiated a much more searching inquiry in its third Biennial Review. It announced that it would undertake a systematic examination of all of its ownership rules. The agency commissioned a series of empirical studies from its own staff and outside consultants and appointed an agency-wide "Media Ownership Working Group" to supervise the review. *See Statement of Chairman Michael K. Powell*, at 3. (Chairman Powell's statement was provided to the Court as Exhibit 1-H to Prometheus' August 13, 2003, *Motion for Stay Pending Judicial Review.*)

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[9]The Commission reviewed the 2001 version of the dual network rule yet again in the order now before the Court. It found that the rule is necessary in the public interest. *2002 Biennial Review Order*, ¶¶592-621. (The *2002 Biennial Review Order* was provided to the Court as Exhibit 1-A to Prometheus' August 13, 2003, *Motion for Stay Pending Judicial Review.*)

It is of critical importance here that the FCC chose to carry out ***both*** of its Section 202(h) tasks in a single proceeding by issuing a *Notice of Proposed Rulemaking* pursuant to 5 U.S.C. §553, rather than a *Notice of Inquiry*. This meant that the Commission was in a position to determine whether particular measures were "necessary in the public interest" and simultaneously "repeal or modify" such regulations. This approach also had the benefit of enabling the Commission to fulfill the *Fox* and *Sinclair* remand directives in the same proceeding.[10]

In the decision now before this Court, the FCC set out an entirely new framework for justifying such rules as it has retained. It modified the national ownership rule by raising national audience reach cap from 35% to 45%, and the agency retained the so-called "UHF discount" which has been subjected to criticism by proponents of stronger regulation. With respect to local ownership rules, the Commission harmonized its local TV ownership rule, its TV/radio cross-ownership rule (and its local newspaper/broadcast cross-ownership rule as well) by the use of a single local market-based appraisal that, according to the Commission, asssured consistency in review of different media. As the Chairman explained at great length at pages 6-9 of his individual statement, the agency modified all three of its local cross-ownership rules by substituting a single "Cross Media Limit" determined "by developing and applying a Diversity Index (DI) to its broadcast ownership rules." *Statement of Michael K. Powell* at 6.[11]

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[10]The FCC explicitly consolidated the Fox and Sinclair remands into the new proceeding. See *Notice of Proposed Rulemaking*, 15 FCC Rcd 18503, 18506, ¶6 (2002).

[11]"The DI is modeled on the Herfindahl-Hirschman Index (HHI) used by antitrust authorities to measure the degree of concentration in a given economic market. The DI seeks to measure concentration in local media markets using many of the same principles as the HHI – identifying market participants, assigning market shares, and squaring those market shares to arrive at a measure of concentration."

Id.

E. The Current Review Is Not "Closely Related" to Issues Considered by the D.C. Circuit.

This case involves review under the APA of an ordinary, if very important, agency rule-making. It does ***not*** involve consideration or application of the first sentence of Section 202(h).[12] It is based on an entirely new, and extremely comprehensive record, and upon justifications never before advanced to the D.C. Circuit or any court.

Accordingly, the legal and factual issues considered in the *Fox* case are entirely unrelated to the matters now before this Court. The *Fox* case was entirely devoted to application of the threshold question set forth in the first sentence of Section 202(h), and there is little, if any insight, to be gained from prior FCC statements based on different records. Having determined that the old 35% ownership cap is no longer "necessary in the public interest," this Commission comes before this Court with a new rule based on an entirely new record. While Petitioner Prometheus and several of the other citizen and broadcaster Petitioners believe that the record justifies retention of the 35% rule, their arguments in this regard are now presented under the new rulemaking record developed in response to the agency's *Notice of Proposed Rulemaking*. Their arguments, as well as those of the

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[12]The Network Petitioners note that, on rehearing, the Fox court vacated language construing the statutory term "necessary in the public interest." If this is intended to suggest that this is a legal issue as to which the D.C. Circuit has special expertise, the implication is based on a faulty premise. The fact that the FCC conducted a rulemaking means that its decisions under the first sentence of Section 202(h) have already been acted upon, and decisions to retain, modify and/or repeal rules will now be conducted under ordinary APA standards. Moreover, the *Verizon* case to which the Network Petitioners refer at page 11 of their Motion, is a blatantly premature effort to obtain review of the FCC's construction of the term "necessary in the public interest" which appears in ***another*** section of the 1996 Telecommunications Act. The FCC has filed a brief challenging Verizon's standing, and asserting that the D.C. Circuit otherwise lacks jurisdiction because there is no final agency action, and that the matter is not otherwise ripe for review. *See* Brief for Respondents in No. 03-1080, available at *http://www.fcc.gov/ogc/briefs/03-1080.pdf* (accessed September 5, 2003).

Network Petitioners, then, arise under "garden variety" APA standards.[13]

The *Sinclair* case has slightly greater procedural, but far less substantive, relationship to this case. While it involved a more traditional APA review, albeit informed by the first sentence of Section 202(h), the FCC so radically revised its rules regarding local ownership of TV, radio and newspaper properties that the D.C. Circuit's consideration of the prior Local TV Ownership Rule has little, if any, bearing on the current case. Specifically, in *Sinclair,* the Court found that the "Commission included a voice-count provision in both the radio-television cross ownership rule and the local television rule," 284 F.3d at 162, yet had failed to adequately explain why for purposes of the radio-television cross-ownership rules it counted as voices television stations, radio stations, daily newspapers and cable systems, while for purposes of the local television rule it counted only television stations. *Id.* at 162-63. In the *2002 Biennial Review Order,* the FCC completely abandons a voice-count approach. The new local television rule turns on the number of stations in a DMA, not the number of voices, *2002 Biennial Review Order,* ¶186[14] and the radio-television cross-ownership

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[13]The FCC has recently submitted a brief to the D.C. Circuit which takes the same position as that advanced in the text. In the government's brief in the *Verizon* case discussed at footnote 12, *supra*, the Commission argues (at page 38) as follows:

> *Fox* and *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), do not establish that a "presumption in favor of deregulation" "distinguishes the standard that applies in the biennial review from that which applies in the agency's exercise of its general rulemaking authority." Verizon Brief at 17. Although Fox and Sinclair allude to a statutory presumption, the Court did not endorse a strict construction of the "necessary in the public interest" standard in either case. The Court in *Fox*, 293 F.3d at 540, expressly declined to rule on the meaning of the statutory standard. And the Court in *Sinclair* upheld the bulk of the challenged rule as "necessary in the public interest" without articulating a new or higher public interest yardstick. Although the *Court* in Sinclair remanded certain aspects of the rule, it did so because it found the Commission's explanation to be "deficien[t]," rather than because it failed to satisfy a stringent public interest test. 284 F.3d at 164.

[14]Previously, under the FCC's voice test, the Commission required that "eight independently owned, full-power and operational television stations" remain after a merger. *Local TV Rule Order,*

rule has been replaced altogether with the Cross Media Limit, which again turns on the number of television stations in a DMA. *2002 Biennial Review Order,* ¶¶454, 456. Nor is there any remaining issue as to whether the Commission has complied with the D.C. Circuit's remand instructions. Having determined that the old rule was not "necessary in the public interest," and adopting substitute provisions which address local ownership of television, radio and newspaper properties, the FCC clearly mooted any remaining aspects of the *Sinclair* remand.

III. THE D.C. CIRCUIT HAS NO SPECIAL GENERIC EXPERTISE WITH RESPECT TO CASES ARISING UNDER 47 U.S.C. §402(a).

The governmental Respondents offer what appears to be an unprecedented argument that the expertise that the D.C. Circuit has acquired in exercising its exclusive jurisdiction over FCC ***licensing*** decisions somehow expands the D.C. Circuit's jurisdiction over FCC ***rulemaking*** actions.

The dispositive answer is also a simple one: if Congress wished to give the D.C. Circuit additional jurisdiction over FCC policy decisions, it would have done so. "Congress has implicitly determined that...litigation should not be concentrated in a single 'expert' court." *United Steelworkers of America v. Marshall*, 592 F.2d at 697 (3d Cir. 1978). 47 U.S.C. §402(b) not only gives the D.C. Circuit exclusive jurisdiction over licensing cases, but it also delimits that authority to those cases. (The text of 47 U.S.C. §402 is set out in the *Appendix* attached hereto.) This Court is fully empowered to hear this case, *see New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1121 (3d Cir. 1978), and there is nothing in the statutory scheme to suggest that it could or

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14 FCC Rcd at 12907. The FCC now counts each station separately, regardless of ownership. *2002 Biennial Review Order,* ¶186.

should defeat the Congressional scheme by ceding jurisdiction to the D.C. Circuit.[15] As this Court has said, "it would be improper to speculate that any circuit court of appeals is more expert...than another." *United Steelworkers of America v. Marshall*, 592 F.2d at 697.

Nor does the Commission assert, much less prove, that an informal policy rulemaking is in any way ancillary to the Commission's licensing authority. *See Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959). In fact, evidently without FCC objection, other Circuits have considered petitions for review of ownership rules not unlike those here under review. *See, e.g., Marsh Media, Ltd. v. FCC*, 798 F.2d 772 (5th Cir. 1986); *National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987); *National Black Media Coalition v. FCC*, 791 F.2d 1017 (2d Cir. 1986).

IV. PR0METHEUS HAS STANDING TO VINDICATE THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION.

The Network Petitioners' parting shot is the assertion that Prometheus' *Petition for Review* "may be procedurally infirm." Motion at 14. It says that the "narrow focus of Prometheus' purpose on 'low power FM issues'" somehow "makes it unclear how Prometheus has standing to present the wideranging claims reflected in its stay motion." *Id.* at 14-15.

Prometheus Radio Project has multiple bases for standing sufficient to appear before this Court, as do the other two citizen/petitioners, the National Council of the Churches of Christ in the

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[15] "[I]t is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories. *Federal Communications Commission v. Columbia Broadcasting System*, [311 U.S. 132 (1940)]. Plainly, had Congress intended that all licensing decisions be reviewable pursuant to Section 402(b), there would have been no point in listing the eight specific categories provided for in that Section. The order is not one described in Section 402(b) and is therefore reviewable in this Court pursuant to Section 402(a). *See also Ilowite v. United States*, 390 F.2d 589 (3d Cir. 1968); *Blumenthal v. Federal Communications Commission*, 318 F.2d 276 (D.C. Cir. 1963), *certiorari denied*, 373 U.S. 951."
Campos v. FCC, 650 F.2d 890, 893 (7th Cir. 1981) (footnote omitted).

United States[16] and the Media Alliance.[17] As shown in its *Petition for Review,* and the accompanying declaration of Pete Tridish provided as Exhibit A thereto, Prometheus has been involved in numerous activities relating to media ownership. Its members are listeners and viewers, *see Office of Communication of the United Church of Christ*, *supra*,[18] and they are also affected by changes in the job market caused by media consolidation.

The Network Petitioners appear to believe that Prometheus' interest in promoting low power FM radio somehow means its members are unaffected by the ownership of other classes of broadcast media. To understand the relationship between low power FM radio and commercial media ownership, one need look no further than the recent press conference of FCC Chairman Powell, which has been provided to this Court as Exhibit B to Prometheus' August 29, 2003 *Joint Reply* to oppositions to its stay motion. The low power FM service was conceived and implemented as a means of advancing localism precisely because of deficiencies caused by consolidation.[19]

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[16]As is clear from its *Petition for Review*, the National Council of Churches standing claim is essentially the same as that recognized by the D.C. Circuit in the landmark *United Church of Christ* case. *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1965) (Burger, J.).

[17]The Media Alliance explains in its *Petition for Review* that it has served its dues paying members (currently numbering 1,900 individuals and 50 organizations) for more than 25 years. It publishes a Bay Area media review and a guide to media outlets and journalists and trains hundreds of community organizations and activists annually. The Alliance co-sponsored a hearing in San Francisco to educate its members and the public on the then-proposed media ownership rules.

[18]It is well worth noting that the Supreme Court of the United States heard argument from a viewers' group in support of the very newspaper/broadcast cross-ownership rule which has been abandoned in this proceeding by the FCC. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[19]"The new low power radio service we are adopting is a partial antidote to the negative effects of consolidation. It promotes localism and diversity not by limiting the rights of existing voices, but by adding new voices to the mix. Under the First Amendment, this is the best kind of

CONCLUSION

WHEREFORE, Prometheus asks that this Court deny the *Network Petitioners' Joint Motion to Transfer Venue*, and that it grant all such other relief as may be just and proper.

Respectfully submitted,

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September 8, 2003

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response -- the answer is more speech, not less." *Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2327 (2000) (Separate Statement of Commissioner Tristani).

APPENDIX

47 U.S.C. §402

Section 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission
(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
(8) By any radio operator whose license has been suspended by the Commission.
(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, certify that, on this 8th day of September, 2003, I caused to have the foregoing *Citizen Petitioners' Opposition to Joint Motion to Transfer Venue* served electronically and by First Class Mail upon the following:

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