

**In the  
UNITED STATES COURT OF APPEALS  
for the Ninth Circuit**

Media Alliance,	)	
	)	
Petitioner	)	
	)	No.
v.	)	
	)	
Federal Communications Commission and	)	
United States of America,	)	
	)	
Respondents.	)	

**URGENT MOTION UNDER CIRCUIT RULE 27-3(b)  
FILED BY MEDIA ALLIANCE  
FOR STAY OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION**

**Action requested by September 4, 2003**

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Media Alliance (Movant), by its attorneys, and pursuant to 28 U.S.C. §2112(a)(4), FRAP 18, and Circuit Rule 27-3(b), moves for a stay pending judicial review of the regulations adopted by the Federal Communications Commission (FCC) in *2002 Biennial Regulatory Review*, 68 Fed. Reg. 46286 (Aug. 5, 2003) (Order). Ex. A1. Movant requests that the stay be issued prior to Sept. 4, 2003, the effective date of the new regulations, or as soon as practical thereafter.<sup>1</sup>

If the Court fails to issue a stay, massive consolidation of the broadcast industry will occur before the court can review the decision, causing irreparable harm to the Movant and the American public. Because parties will undoubtedly seek agency reconsideration, and the FCC customarily asks the court to hold appeals in abeyance pending action on reconsideration, a long time could pass before the appeal is decided. In the absence of a stay, many applications for media mergers involving broadcast licenses will be approved under the new rules. These mergers, and the consequent restructuring of the communications media, will cause

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<sup>1</sup> Movant has not sought a stay from the FCC because “moving first before the agency would be impracticable.” FRAP 18(a)(2)(A)(i)-(ii). Two dissenting Commissioners asked their colleagues for a stay on July 15, 2003. Since the FCC has taken no action on that request, Ex. A2, the Movant cannot expect to obtain relief. Futility of seeking a stay is also shown by the agency’s denial of a request to postpone action until further research could be submitted, Order ¶ 638, and of an emergency motion to postpone voting until the agency’s electronic filing system problems were resolved. *Id.* n. 1323. Moreover, the FCC failed to act on a request to postpone the effective date of the rules until after reconsideration. Ex. A3. In light of these factors, filing a stay request would be an “exercise of futility.” *See Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 67 (7th Cir. 1983).

irreparable harm, and it will not be possible to return to the *status quo*, even though Movant has a strong likelihood of ultimately prevailing on the merits.

### **STATEMENT OF THE CASE**

Over the strong dissents of two of the five FCC Commissioners, the FCC has radically overhauled its longstanding ownership rules for broadcast stations. This action was taken pursuant to §202(h) of the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996 Act), which requires the FCC to review all of its ownership rules biennially to “determine whether any of such rules are necessary in the public interest as the result of competition,” and to “repeal or modify any such regulation it determines to be no longer in the public interest.”

The Notice of Proposed Rulemaking sought comment on four broadcast ownership rules: the local TV multiple ownership rule; the radio-TV cross-ownership rule; the national TV multiple ownership rule; and the dual network rule. *2002 Biennial Regulatory Review*, 17 FCC Rcd 18503 (2002) (NPRM). The FCC also incorporated the pending proceedings on broadcast ownership, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001), *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000), and *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). Although the FCC asked numerous questions about the legal framework, the state of competition in the industry, whether the marketplace

provides sufficient competition to advance the FCC policy goals, and how its rules might be modified, it did not present any new or substitute rules for public comment. The FCC, despite receiving over 500,000 comments, Order n.1323, the vast majority opposed to relaxing the ownerships rules, Adelstein dissent at 4-5, Ex. A4, concluded that most of the existing rules are no longer necessary to achieve its longstanding goals of diversity, localism, and competition, and thus, substantially modified the rules as follows:

*Local TV Rule:* Traditionally, the local TV rule prohibited common ownership or control of two TV stations with overlapping service areas. However, the FCC amended this rule in 1999 to allow ownership of two TV stations in the same Designated Market Area (DMA) provided that at least one is not among the 4 highest-ranked stations, and at least 8 independently owned and operated full power commercial and noncommercial TV stations would remain. 47 C.F.R. § 73.3555(b). The Order further modified this rule to allow common ownership of 3 TV stations in DMAs with 18 or more TV stations (regardless of whether any are commonly owned or operated) and common ownership of 2 TV stations in all other DMAs, while retaining the restriction on common ownership of 2 of the top-4 ranked stations.<sup>2</sup> Order ¶186.

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<sup>2</sup> This change will allow TV triopolies in 9 markets that collectively account for more than 25% of the population, and one or more duopolies in DMAs which account for over 95% of the population. Adelstein Dissent at 24. Moreover, the

*National TV Rule.* The Supreme Court upheld the FCC’s prohibition on ownership of more than five TV stations in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). As the number of stations increased, the FCC raised the station limit and added an alternative 25% audience reach limitation. Section 202(c) of the 1996 Act directed the FCC to delete the numerical limit and raise the audience reach limit to 35%. The Order further increased the audience reach limitation to 45%. Order ¶499. At the same time, it declined to repeal or modify the “UHF discount.”<sup>3</sup> *Id.* ¶500

*Cross-Ownership Rules:* The newspaper-broadcast cross ownership rule was adopted by the FCC in 1975 and upheld by the Supreme Court in *FCC v. NCCB*, 436 U.S. 775 (1978). It prohibits common control of a broadcast station serving the same area as a daily newspaper. The radio-TV cross ownership rule, which originally prohibited ownership of more than one TV, AM and FM station in a community, was amended in 1999 to permit common control of up to 2 TV stations and 6 radio stations depending on the number or remaining independent voices. 47 C.F.R. § 73.3555(c).

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FCC relaxed the waiver standards, possibly permitting even more consolidation. Order ¶¶224-25.

<sup>3</sup> UHF stations are on channel 14 and above. The UHF discount was adopted in 1985 when the FCC added the audience reach limit to reflect that UHF signals are generally weaker than VHF signals and reached fewer people. *1985 Reconsideration Order*, 100 FCC 2d 71, 93-94. Since most people now view local TV stations over cable or satellite, retaining the UHF discount has allowed a single owner to reach up to 90% of households nationwide. *Adelstein Dissent* at 15.

The Order replaces both of these rules with a Cross Media Limit (CML) that prohibits newspaper broadcast combinations and radio/TV combinations only in DMAs with 3 or fewer TV stations. Order ¶454. The CML is derived from a new “Diversity Index,” which supposedly identifies “at risk” markets using a modified version of the formula used by the DOJ/FTC to analyze mergers. *Id.* ¶429. The CML will allow newspaper TV combinations “in as many as 179 media markets across the country, where 97.7 percent of Americans live.” Adelstein dissent at 15.

*Local Radio Rule:* The 1996 Act directed the FCC to establish four tiers of radio station ownership, with the station caps dependent on the number of commercial radio stations in a market. 1996 Act, §202(b)(1)(A). The Order modified the rule to include *noncommercial* stations, thus effectively increasing the caps across the board. *See* Order ¶239.

Unless the new rules are stayed, the FCC can begin accepting applications for transfers and assignments of licenses starting on Sept. 4, 2003.

## **ARGUMENT**

In determining whether to grant a stay, the movant must show both possibility of irreparable injury and probability of success on merits at one end of continuum and at other end must demonstrate that serious legal questions are raised and that balance of hardship tips sharply in its favor. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The public interest is another factor to be

strongly considered. *Id.*

**I. THE NEW BROADCAST OWNERSHIP REGULATIONS WILL CAUSE IRREPARABLE INJURY.**

The new FCC regulations on their face permit substantially greater common ownership of broadcast properties and newspaper/broadcast cross-ownership.

Mergers and acquisitions will undoubtedly take place and diminish the diversity of viewpoints available to the public, reduce the number of sources of local news and public affairs, vastly increase the power of the national TV networks, further reduce opportunities for small businesses, local entities, minorities and women to own broadcast stations, and reduce competition resulting in higher advertising prices and less innovation. Moreover, this harm is irreversible.

**A. The New Rules Will Result in Substantial Consolidation**

The Order “allows the giant media companies to buy up the remaining local newspapers and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper.” Copps dissent at 3. Ex. A5. TV networks will be able to control “up to an unbelievable 80 or 90 percent of the national television audience.”<sup>4</sup> *Id.* Past

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<sup>4</sup> In requesting a stay, the dissenters note that “[i]n California, one company could own 22 TV stations, major papers in Los Angeles, San Francisco, Sacramento, and Fresno, and numerous radio stations in every California DMA, as well as potentially, cable channels, local cable operators, and the dominant Internet service provider.” Ex. A2.

experience demonstrates that when rules are changed to permit greater concentration, such concentration is inevitable. The 1996 revisions to the local radio ownership rule resulted in “thousands of assignment and transfer or control applications” *Definition of Radio Markets*, 16 FCC Rcd 19,861, 19,869 (2001). Similarly, a FCC staff study found that while the number of commercial radio stations increased between the date the relaxed limits took effect and March 2002, the number of radio owners declined 34%. Ex. C1. There has been similar consolidation in TV.

After the FCC relaxed the restriction on TV duopolies in 1999, it soon approved numerous applications for mergers creating duopolies. *See, e.g., Shareholder of CBS Corp.*, 15 FCC Rcd 8230, 8237 (2000) (approving Viacom’s duopolies in six markets and temporarily waiving national ownership limit); *UTV of San Francisco*, 16 FCC Rcd 14975, 14982 (2001) (approving Fox’s duopolies in New York, Los Angeles, and Phoenix and temporarily waiving national TV limit as well as cross-ownership rule for New York); *Telemundo Communications Group*, 17 FCC Rcd 6958 (2002) (approving NBC’s TV duopolies in New York, Chicago, Dallas and Miami, and granting a temporary waiver to acquire a third station in Los Angeles). In these and many other cases, temporary waivers allowing excessive ownership will become moot under the new rules.

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There is every reason to believe that companies will quickly begin making acquisitions permitted under the new rules. Even before the rules were adopted, Merrill Lynch predicted that the new regulations would spur a “gold rush.” and identified many potential buyers and sellers. Ex. B1. Within a week after the FCC decision was announced, Broadcasting and Cable (B&C), the leading trade magazine of the broadcast industry, reported that several companies had already announced intended acquisitions, while many others were seeking to buy, sell or swap stations.<sup>5</sup> Ex. B2.

**B. Substantial Consolidation will Substantially Harm the Movant**

These acquisitions will substantially harm the Movant, an organization whose members are citizens as well as consumers and producers of public information. *See* Decl., Ex. D1. As citizens, viewers and listeners, their First Amendment interest in “the widest possible dissemination of information from diverse and antagonistic sources” will be harmed by consolidation. *See FCC v.*

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<sup>5</sup> For example, Sinclair Broadcasting announced it would move immediately to acquire stations it was already operating under management contracts, and CBS was said to be talking to Raycom about buying its Cleveland duopoly, while Raycom has reportedly talked to LIN TV about the possibilities of a merger. CBS is also interested in buying TV stations owned by Meredith in Atlanta and Phoenix. The CEO of Paxson Communications, which could be purchased outright by investor NBC now that the 35% limit has been increased, claims to have had “inquiries about every one of his 60 owned TV stations.” Fox is looking to “create duopolies where it doesn’t have them,” and Gannett Co. is expected to “take the lead among newspaper companies in seeking out and buying TV stations in markets where it owns papers.” *See* Ex. B2.

*NCCB*, 436 U.S. 775, 785 (1978), citing *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). The combination of previously separate TV stations and of TV stations and newspapers will reduce the number of local news sources, and consequently the breadth of the stories covered and the number of different perspectives presented. Moreover, as large corporations buy local stations, the stations will become less responsive to the needs and interest of local citizens and communities. Movant will have fewer opportunities to hear the views of minorities and women, as it will be even more difficult for minorities and women to acquire and retain stations. Finally, the reduction in competition will result in lower quality programming for adults, less innovation, and increased advertising cost (which are passed on to consumers).

In addition, Movant members who are journalists and media workers will be harmed by the loss of jobs. The “efficiencies” of joint operations will make it more difficult to find positions and limit opportunities to exercise their First Amendment rights as speakers. Organizational members of the Media Alliance, whose mission is to disseminate important information to the public or to influence public policy, will also find it more difficult to get their messages to the public. Increased concentration will result in reduced coverage of issues and provide fewer opportunities to present their views to the public.

### **C. The Injury from Increased Consolidation is Irreparable**

The injury from the new rules will be irreparable. As Commissioner Copps points out: “Given that [reconsideration] petitions are unlikely to be resolved for months, the impact of this decision by then will likely be irreversible.” Copps dissent at 8. Similarly, Commissioner Adelstein observes that the relaxed rules are “likely to damage the media landscape for generations to come, as all of our experience tells us that the relentless waves of consolidation are virtually impossible to rollback once they advance.” Adelstein dissent at 1.

Although the FCC has authority to condition grants on the outcome of the appeal, once a transaction has been consummated, it is effectively impossible to “undo” it. The original seller may have gone out of business or be unwilling or unable to reacquire the station. Functions may have been consolidated so that separation is impossible, even if another buyer can be found. Moreover, the FCC has a long history of declining to require divestitures or enforce conditions. 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 because of concern about “disruption for the industry and hardship for individual owners,” *NCCB*, 436 U.S. at 787. *See also 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). Indeed, in this very proceeding, the FCC grandfathered existing combinations that violate the new rules. Order ¶484. Because the serious injuries from the media consolidation resulting from the new rules cannot be reversed, the court should stay the rules if it finds that Movant has some likelihood of success on the merits.

**II. THE MOVANT IS LIKELY TO PREVAIL ON THE MERITS.**

**A. Congress may overturn all or part of the new rules.**

It is quite possible that Congress will overturn some or all of the new FCC rules before this case can be heard. On July 23, 2003, the House of Representatives voted 400-21 to stop the FCC from expanding funds to raise the national TV audience limit. H.R. 2799, 108<sup>th</sup> Cong. (2003). On June 19, 2003, the Senate Commerce Committee voted to approve a bill that would overturn the 45% national limit and the grandfathering of radio station combinations that violate the new rules, and restore the newspaper-broadcast rule. S. 1046, 108<sup>th</sup> Cong. (2003). A similar bill, H.R. 2052, 108<sup>th</sup> Cong. (2003), has been introduced in the House. In addition, Sen. Dorgan introduced a joint resolution of disapproval on July 15, 2003, pursuant to the Congressional Review Act (CRA). S.J. Res. 17, 108<sup>th</sup> Cong. (2003). If enacted, the resolution would overturn the decision under review in its entirety. 5 U.S.C. §802. S.J. Res. 17 already has enough signatures

to bring the resolution directly to the Senate floor for a vote, and Commerce Committee Chairman McCain has predicted that the resolution will pass in September. Ex. B3. This Congressional activity suggest that the FCC's decision is inconsistent with the law and may be overturned before the Court is able to hear the case.

### **B. The Order is Arbitrary and Capricious**

If and when the court considers the merits, Movant is likely to prevail. Under 5 U.S.C. § 706(2)(A), a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Among other things, the court assesses whether the FCC has examined the relevant data and articulated a rational connection between the facts found and the choices made, has failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, and whether the agency findings are supported by substantial evidence on the record. *Motor Vehicle Mgrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43-44 (1980). See also *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Com'n*, 92 F.3d 940, 942 (9th Cir.1996).

Both dissents pointed out many ways in which the Order is arbitrary and capricious. Copps dissent at 8-18; Adelstein dissent at 18-33. Below are just a few

examples of the FCC's failure to consider the relevant factor or provide a reasoned explanation consistent with the evidence before it.

**1. The FCC fails to analyze how its new Cross Media Limit will affect competition in the market for local news**

The FCC finds that the record supports its traditional assumption of a link between ownership diversity and viewpoint diversity. *Id.* ¶27. It also finds that, in analyzing viewpoint diversity, it is appropriate to focus on diversity in local news, and that TV stations and daily newspapers are the sources used most often for local news. *Id.* ¶¶34-35, 342. Despite these findings, the FCC arbitrarily and capriciously fails to analyze the impact of newspaper-broadcast combinations on the delivery of local news, and instead, looks only at competition in the sale of advertising. *Id.* ¶¶331-41.

To the extent that the FCC addresses the impact of the new rules on news, it makes contradictory assertions. To justify common ownership of local TV stations, the FCC cites the high cost of producing local news. *Id.* ¶¶166-69. Yet, in developing the CML, it counts many media outlets that do not provide news because they “can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost.” *Id.* ¶423. Again, this inconsistency renders the decision arbitrary and capricious.

**2. The rules prohibit mergers among the top-4 ranked TV stations and top-4 networks yet allow mergers between the top ranked TV station and the only daily newspaper**

Another glaring inconsistency is the FCC's treatment of market power and audience shares. In keeping the top-4 restriction on local TV ownership as well as the dual network rule, the FCC concludes that dominant firms should not be allowed to merge with each other. The FCC identifies a host of dangers in such mergers including increase in economic market power, the creation of dominant firms that are much larger than their nearest rivals, the ability of such firms to distort the market for inputs available to other distributors of content, and reduced incentives to compete. *Id.* ¶¶195-200, 602-608. Furthermore, the FCC finds little public interest benefit from dominant firm mergers because the merging parties are likely to be healthy and already engaged in the production of news and information products. *Id.* ¶¶197-98, 611.

Every reason for prohibiting mergers between dominant entities in local TV markets also applies to mergers between dominant TV stations and daily newspapers. Yet, the FCC refused to consider actual market shares in developing the CML, *id.* ¶420, and the new rule permits mergers between a dominant TV station and the dominant newspaper in the majority of DMAs. The FCC's different treatment of market power in similar contexts is arbitrary and capricious.

**3. The FCC counts UHF stations differently for purposes of the national TV limits and the local TV limits.**

Another example of the FCC's use of contradictory assumptions in different parts of the Order concerns its treatment of UHF stations. The UHF discount, which allows TV station owners to exceed the 45% limit, attributes only 50% of the audience reached by VHF station to UHF stations. Although the FCC acknowledges that 86% of households receive both UHF and VHF TV by means of cable or satellite, it nevertheless retains the UHF discount because it finds that UHF stations have a smaller service area than VHF stations and it is harder for them to qualify for cable carriage and thus may be unavailable to homes that subscribe to cable. *Id.* ¶¶586-87.

However, the FCC does not discount UHF stations for purposes of the local TV limits or CML. Instead, regardless of actual signal reach or audience rating, UHF stations are counted the same as VHF stations, because the FCC finds that “[g]enerally, cable systems carry all broadcast stations assigned to the DMA in which they are located.” ¶146. See also ¶187. Whether UHF stations are carried throughout a DMA is a factual question, but the FCC arbitrarily and capriciously assumes the facts to be whatever serves its purpose, even if those assumptions are

diametrically opposed in different parts of the Order.<sup>6</sup>

**4. Although the FCC purports to be maintaining existing limits, modifying the local radio rule to count noncommercial stations effectively raises the limits**

The FCC also acts arbitrarily and capriciously in claiming to keep the local radio limits the same, while actually raising them. The current limits for local radio ownership reflect the tiered approach set for in the 1996 Act, where the number of radio stations that may be commonly owned depends upon the number of *commercial* radio stations in the markets. See Order ¶236. The FCC concludes that “[a]lthough we reaffirm the ownership tiers in the local radio ownership rule, ...it is not necessary in the public interest to exclude *noncommercial* radio stations in determining the size of the radio market.” *Id.* ¶295 (emphasis added). Because of the relatively large number of noncommercial radio stations, counting these stations for purposes of determining the cap has the effect of allowing additional common ownership in many markets.<sup>7</sup> The FCC’s failure to recognize that including noncommercial stations effectively raises the cap or to examine the impact given record evidence that local radio is already excessively concentrated,

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<sup>6</sup> Even one Commissioner voting with the majority recognized the irrationality of retaining the UHF discount, noting that the text of the Order was changed after its adoption to add “discussions further justifying ... the disparate treatment of UHF stations in our local and national ownership rules.” Ex. A6.

<sup>7</sup> For example, because San Diego has 42 commercial radio stations, one company can control up to 7 radio stations. However, by counting the 12 noncommercial stations, the radio station cap increases to 8.

*see, e.g.*, Copps dissent at 9, is another example of arbitrary and capricious decision making.

**C. The FCC’s decision to utilize bright line rules while refusing to consider challenges to transfers in compliance with the rules, violates the Communications Act**

The Order is not only arbitrary and capricious, but as Commissioner Adelstein points out in his dissent at 18:

In its rigid insistence on fixed rules based on arbitrary methodologies, the Order subordinates our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the exclusive right to use public airwaves. And it favors the Commission’s administrative “convenience” ahead of the public interest.

Specifically, the new rules violate Sections 309 and 310 of the Communications Act of 1934, which direct the FCC to approve applications to transfer or assign broadcast licenses only where it makes an affirmative finding that the grant will serve the public interest, convenience and necessity. 47 U.S.C. §§ 309(a) & (e), 310(d).

The FCC admits that “bright line rules” “may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed.” Order ¶84. Because the FCC recognizes that some transactions in violation of the rules may nonetheless serve the public interest, it

commits to consider requests for waiver of its rules from applicants. See, e.g., *Id.* ¶227. However, the FCC fails to ensure that the public interest is served where the rule is underinclusive by refusing to subject applications proposing transactions not barred by the CML to anything more than “routine Commission review,” and refusing to consider how the Diversity Index applies to particular transactions. *Id.* ¶¶453, 481. Because the new rules will allow transactions contrary to the public interest, they contravene the Communications Act.

**D. The FCC failed to provide adequate public notice as required by the APA**

The FCC’s actions also violate the APA’s requirement that an agency give public notice including “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. §553(b). In considering adequacy of notice, courts ask whether the final rule represents a logical outgrowth of the proposed rule. See Richard J. Pierce, Jr., *Admin. Law Treatise*, (4th ed. 2002). Courts have invalidated rules when an agency failed “to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.” *Home Box Office Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

The FCC failed to provide adequate notice in a number of key respects. For example, as described above, *see supra* at 16, it amended the local radio limits to count noncommercial radio stations, yet none of the NPRMs indicated that the

FCC was considering this significant rule change. In addition, “without more specific notice of the interrelated proposals ... at no point was the public able to evaluate and comment on how these rule changes might work in concert.”

Adelstein dissent at 35. *See Complex Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994) (providing “notice of individual parts of a proposed rule is not necessarily notice of the whole”).

### **III. OTHER INTERESTED PARTIES WOULD NOT BE SUBSTANTIALLY HARMED IF THE STAY IS GRANTED**

Granting a stay would not substantially harm any interested parties.<sup>8</sup> Even industry commenters who support the new rules or seek even greater deregulation will be harmed because without a stay, they will expend huge amounts of money on acquisitions, negotiating deals and prosecuting their applications. The FCC will need to expend significant resources to handle these applications. Competitors and public interest groups will be forced to review applications and prepare Petitions to Deny, even though these challenges are unlikely to succeed.

Companies such as Viacom, NBC and Fox, which have temporary waivers to exceed the old rules, *see supra* at 7, should be able to have their waivers extended pending the outcome of the appeal, and any broadcast station that would likely fail if not acquired can obtain a waiver under the prior rules. *Id.* at 225.

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<sup>8</sup> B&C, quoting a congressional aide, warned potential buyers that it may be better to await action in Congress. Ex. B4.

#### IV. GRANTING A STAY IS IN THE PUBLIC'S INTEREST

As Commissioner Capps points out, “every American has a stake in this decision... not just the companies that have temporary license to use the public’s spectrum.” Dissent at 2. He notes that

this proceeding has generated three quarters of a million comments now – more than any other proceeding that I am aware of in the history of the FCC. Of those comments, all but a few hundred are from individual citizens. And of those comments, nearly everyone opposes increased media consolidation – over 99.9 percent.

*Id.* at 7. Given this unprecedented public opposition and the far-reaching consequences of allowing the new rules to go into effect, a stay would clearly be in the public interest. A stay would also allow Congress time to respond to the FCC’s decision.

#### CONCLUSION

For the foregoing reasons, the Court should stay the effective date of the FCC’s new ownership rules and order that the prior ownership rules should remain in effect to preserve the *status quo* pending final resolution of this proceeding.

Respectfully submitted,

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