

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580,
03-3581, 03-3582, 03-3651, 03-3665, 03-3675,
03-3708, 03-3894, 03-3950, 03-3951 & 03-4073**

PROMETHEUS RADIO PROJECT, *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

RESPONDENTS

PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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PETITION OF THE FCC AND THE UNITED STATES FOR PANEL REHEARING

The Federal Communications Commission (FCC or Commission) and the United States respectfully request that the Court reconsider its June 24, 2004, Partial Judgment extending the stay of the FCC's revised local radio ownership rules. The stay prevents the Commission from implementing regulatory changes that this Court has upheld as a reasonable exercise of the Commission's public interest authority.

As applied to the particular rules that are the subject of this petition for rehearing, the stay is inconsistent with this Court’s merits decision.¹ With the stay in effect, the Commission must continue to define all radio markets using the flawed contour-overlap methodology, which this Court agreed the Commission may replace. The Commission also must exclude noncommercial radio stations when assessing the radio market, even though this Court upheld the Commission’s determination that such stations are active competitors that should be counted. And although this Court held that the Commission acted reasonably in attributing radio stations brokered through certain Joint Sales Agreements (JSAs) to the broker, the stay prevents the Commission from taking radio JSA interests into account in determining compliance with the ownership rules.

There are no sound reasons for maintaining the stay of the local radio ownership rules. The Court required the FCC on remand to modify or further justify its numerical limits on local radio ownership and its “subcap” on ownership of AM radio stations. But the numerical limits and the AM subcap in the stayed rules that have been remanded *are the same* as the numerical limits and AM

¹ The currently stayed rules at issue in this petition are: 47 C.F.R. § 73.3555 Subsection (a) (the local radio ownership rule), Note 1 (defining the scope of a “cognizable interest,” as used in the revised local radio ownership rule), Note 2(j)(1) (reflecting the revised radio market definition), Note 2(k) (codifying the attribution of radio JSAs), Note 4 & Report and Order ¶¶ 482-495 (setting forth the Commission’s rules concerning grandfathering and transfer of media holdings that do not comply with the ownership rules); 47 C.F.R. § 73.3613 (conforming the Commission’s rule regarding the filing of certain contracts to changes concerning the radio market definition and the attribution of JSAs); and 47 C.F.R. § 73.5007 (reflecting the revised radio market definition).

subcap in the Commission's prior rules, which the stay keeps in effect. The only effect of the stay, as it applies to the local radio rules, is to prevent the Commission from implementing other rule changes that this Court upheld. To avoid that illogical and undesirable result, the Court should grant this petition for rehearing and partially vacate its stay.

We also seek rehearing to conform one aspect of the Court's decision concerning local radio ownership limits to the Court's decision concerning local television ownership limits.

STATEMENT

1. In June 2003, the Commission issued a Report and Order comprehensively examining its media ownership rules and making various revisions that the Commission determined to be necessary to promote the public interest. *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*, 18 FCC Rcd 13620 (2003). The Report and Order also resolved two open rulemaking proceedings that the Commission had initiated specifically to consider revisions to the local radio ownership rules. See *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).

The numerical limitations in the local radio ownership rules cap the number of radio stations that may be commonly owned in a local market. In accordance

with Section 202(b)(1) of the Telecommunications Act, 110 Stat. at 110, the Commission modified the limitations in 1996 to provide:

- (i) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
- (ii) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
- (iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
- (iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

47 C.F.R. § 73.3555(a)(1) (2002). The 1996 rule further provided that the relevant “radio market” would be determined using the signal contours of the commonly owned radio stations whose contours mutually overlap. *See id.* § 73.3555(a)(3)(ii); Report and Order, App. F, 18 FCC Rcd at 13907-08.

In the 2003 Report and Order, the Commission revised its methodology for defining local radio markets. The Commission explained that the contour-overlap methodology created an unavoidable inconsistency between the Commission’s calculation of stations under the same ownership in a market and its calculation of the total number of stations in the market, and thus enabled parties “to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.” 18 FCC Rcd at 13718

¶ 254. The Commission also observed that the contour-overlap methodology produced results that were “not in line” with traditional methods for delineating markets for competition analysis and undermined the Commission’s ability to “guard against undue concentration in local radio markets.” *Id.* at 13719 ¶ 256-257. Indeed, the Commission explained, the contour-overlap methodology artificially encouraged consolidated ownership of high-powered radio stations and made it difficult to evaluate accurately the level of competition that is present in local radio markets. *Id.* at 13719-20 ¶¶ 257-260. The Commission concluded that the contour-overlap methodology was “ineffective,” and that a geographically based market definition (specifically, the county-based market definitions used by Arbitron in providing its ratings service) is “the most rational basis for defining radio markets.” *Id.* at 13721 ¶ 263, 13724 ¶ 273.

The Commission also modified the local radio ownership rules to provide for the counting of noncommercial radio stations in determining the size of local radio markets. The Commission observed that noncommercial radio stations compete with commercial radio stations for listeners and therefore exert “competitive pressure” in the market. *Id.* at 13734 ¶ 295. The Commission accordingly concluded that noncommercial stations should be considered in applying the ownership caps.

The Commission retained other portions of its local radio ownership rules without modification. In particular, the FCC declined to change its numerical limits on radio station ownership, *see id.* at 13731-33 ¶¶ 289-292, and kept the existing subcaps on AM and FM stations, *see id.* at 13733-34 ¶ 294. However, the

FCC adopted two new media ownership rules that affect its application of the numerical limits on local radio ownership. First, the Commission provided in its attribution rules that a broker that has entered into a JSA to sell a station's advertising time will, under certain conditions, be deemed to have a cognizable interest in that station. *Id.* at 13743 ¶ 317. Second, the Commission adopted new restrictions on transferring consolidated media holdings that exceed the Commission's ownership limits, but need not be divested due to a grandfather provision in the rules. *Id.* at 13807-813 ¶¶ 482-495. The Commission stated its expectation that the new transfer rules would predominantly affect radio group owners. *Id.* at 13809 ¶ 486.

2. Pursuant to 28 U.S.C. § 2112(a), petitions for review of the Report and Order were consolidated in this Court. On September 3, 2003 (one day before the new rules were to become effective, *see* 68 Fed. Reg. 46286 (2003)), the Court issued a stay "pending judicial review" of the "effective date of the FCC's new ownership rules" and "order[ed] that the prior ownership rules remain in effect pending resolution of these proceedings." *Prometheus Radio Project v. FCC*, No. 03-3388 (Sept. 3, 2003) (order granting stay), slip op. 1, 3. The Court explained that it was granting the stay to "maintain the status quo in order to permit appellate review after briefing on the merits." *Id.* at 2-3.

On June 24, 2004, after full briefing and oral argument, the Court issued its decision affirming the Report and Order in part and remanding in part. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). As is relevant here, the Court held that the Commission had provided "ample justification" for its

decision to replace the contour-overlap methodology for defining radio markets with Arbitron's county-based methodology. *Id.* at 425. The Court stated that "it was reasonable for the Commission to conclude that fixed, geographically based market definitions more readily enable accurate measurement and comparison of competition than a transaction-specific, contour-based definition." *Ibid.* The Court also rejected a challenge to the Commission's decision to count noncommercial radio stations within local radio markets, concluding that this rule change "was not arbitrary and capricious." *Id.* at 425-426. The Court likewise upheld the Commission's decision to attribute stations brokered under certain JSAs to the broker. Such attribution, the Court noted, prevents the "undermin[ing]" of limits on station ownership and "more accurately reflects the conditions of local markets." *Id.* at 429, 430. The Court likewise concluded that the Commission's rule governing the transfer of impermissible ownership holdings "satisfies the public interest requirement under § 202(h)." *Id.* at 427.

Although the Court upheld each of the foregoing rule changes, the Court remanded back to the Commission the decisions *not* to change the tiered numerical limits or the AM subcaps. *Id.* at 432-435. The Court directed the Commission, on remand, "to justify or modify its approach to setting numerical limits." *Id.* at 435. The Court further provided that the "stay currently in effect will continue pending [the Court's] review of the Commission's action on remand, over which [the Court] retains jurisdiction." *Ibid*; *see also* Partial Judgment (dated June 24, 2004).

ARGUMENT

This petition for rehearing is extremely narrow. The Commission seeks to implement—solely in the context of local radio ownership—revised rules that this Court upheld in its decision of June 24, 2004, or that precisely mirror the rules that are in effect today pursuant to the Court’s stay. There is no sound reason to prevent the Commission from implementing those rules during the pendency of any proceedings on remand.

1. The factors that caused this Court to enter a stay pending its consideration of the petitions for review do not support its decision to continue the stay with respect to the local radio ownership rules. When the Court entered its initial stay on September 3, 2003, it noted that the stay’s proponents had alleged that “harms from industry consolidation” under the revised rules would be “widespread and irreversible” and, absent a stay, could not be adequately remedied if the new ownership rules were later invalidated. Order granting stay at 2. Concluding that a stay pending appeal would not cause substantial harm to the Commission or other parties, the Court issued the stay to “maintain the status quo” pending full consideration on the merits. *Ibid.*

Now that this Court has issued its decision on the merits, a stay of the local radio rules serves no useful purpose in maintaining the status quo pending judicial review, or limiting industry consolidation that might be inconsistent with lawful FCC requirements. The Commission’s new Arbitron-based market definition has been approved by this Court, which observed in approving the new definition that

it may make the numerical limitations *more* restrictive. 373 F.3d at 426 nn.65, 67. This Court also has upheld the Commission’s decision to count noncommercial radio stations, which, when considered in light of the other changes to the local radio ownership rules, is expected to have a generally indeterminate effect on consolidation of radio ownership. *See id.* at 426. The JSA attribution rule likewise has been upheld. It was not even challenged by the “Anti-Deregulatory Petitioners,” who were the proponents of the initial stay. *See id.* at 429. The JSA attribution rule, moreover, tends to make the Commission’s ownership rules more restrictive, because, without JSA attribution, the ownership rules would fail to take into account a broker’s economic interest in a radio station. Likewise, the transfer rule that this Court upheld *restricts* the transfer of grandfathered station groups that are not in compliance with the current local radio ownership rules.

When the Court entered the initial stay in September 2003, it concluded that the stay would not cause substantial harm to the Commission. Order granting stay at 2. The Court’s intervening decision on the merits now compels a different conclusion. The Court has upheld all of the rule changes that this petition seeks authority to implement. Yet the stay requires the Commission to apply, for

example, the contour-overlap market definition with all of its recognized flaws.² Similarly, this Court’s decision on the merits leaves no explanation why the Commission should be precluded from considering the competitive impact of noncommercial radio stations and radio JSAs. *See, e.g.*, 373 F.3d at 430 (attribution of JSAs “more accurately reflects the conditions of local markets”). The Commission, upheld by this Court, determined that those rules are in the public interest, and their continued suspension constitutes significant harm to both the Commission and the public. *Cf. Coastal States Gas Co. v. Dep’t of Energy*, 609 F.2d 736, 738 (6th Cir. 1979) (entering a stay would be contrary to the public interest if it delayed agency from undertaking its regulatory responsibilities).

Nor would permitting the identified rules to take effect be inconsistent with the Court’s remand of the numerical-limit and AM subcap provisions of the local radio ownership rules. Whether or not there is a stay, and however the Commission responds to the Court’s remand order, the numerical limits and the AM subcap will be in effect during the Commission’s proceedings, because they

² The Commission retains “discretion to review particular cases,” which includes the power to look beyond the contour-overlap market definition when justified in particular cases. Report and Order, 18 FCC Rcd at 13647 ¶ 85. There are, however, over 11,000 commercial radio stations in the United States, and in an average month approximately 150 of them are at issue in new transfer applications that must be processed by the Commission. In these circumstances, case-specific review—with the accompanying loss of certainty and greater burdens on the Commission, applicants, and third parties—is an inadequate substitute for implementation of the Commission’s new rule that establishes a clear, uniform, and court-approved market definition for proposed radio station combinations. *See* 373 F.3d at 425.

are the same in the preexisting rule (which is in effect due to the stay) and the revised rule. The Court's stay does not prevent implementation of those aspects of the local radio rules that the Court found inadequately justified; it only precludes implementation of other aspects that this Court upheld.

2. It is commonplace in administrative review proceedings for the court to allow a successfully challenged rule to remain in effect pending remand proceedings. That is how the D.C. Circuit proceeded in the two precursor cases to this litigation. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002), the D.C. Circuit concluded that the Commission had not adequately justified a national television ownership rule, but, rather than vacate the rule, the court permitted the rule to remain in effect during the remand. *Id.* at 1047-49. Similarly, in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the court remanded without vacating the Commission's local television ownership rule (the same version of the rule that this Court's stay keeps in effect), after concluding that the Commission had not adequately explained its decision to count only television station owners as "voices." *Id.* at 169; *see also id.* (Sentelle, J., dissenting from the decision not to vacate). Granting this rehearing petition would have the same effect, with respect to the local radio ownership rules, as the decisions in *Fox* and *Sinclair* to remand without vacatur. Indeed, allowing the Commission to enforce its revised local radio ownership rules is even more warranted, because this Court has upheld, rather than overturned, the local radio rules insofar as they differ from the former rules that the stay otherwise would keep in effect.

3. The Court also suggested in Part IV.E.2.a of its opinion that the Commission was to provide further justification for not following the same methodology in deriving the local radio ownership limits as in deriving the local television limits. The Court stated that the Commission “did not address this discrepancy in its Respondent’s Brief and should do so on remand.” 373 F.3d at 433 (footnote omitted). The Commission explained in its brief (at 39) that “there is no reason for the Commission’s local television ownership limits to mirror precisely its local radio ownership limits, particularly given that there are substantially more radio stations than television stations in any given community.” This Court expressly agreed. 373 F.3d at 418 n.52. On reconsideration, the Court should conform this aspect of its local radio ownership decision to its resolution of the issue in connection with the local television rules.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for rehearing, partially vacate the stay, and permit the rules identified herein to take effect.

Respectfully submitted,

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