



**Federal Communications Commission  
Office of General Counsel**

November 25, 2009

Ms. Marcia M. Waldron, Clerk  
U.S. Court of Appeals for the Third Circuit  
21400 United States Courthouse  
601 Market Street  
Philadelphia, PA 19106

Re: Prometheus Radio Project v. FCC, Nos. 08-3078 et al.

The Federal Communications Commission (FCC or Commission) hereby responds to this Court's November 4, 2009 request to state when the agency expects to issue a decision on the pending petition for administrative reconsideration of the 2008 Report and Order (*2008 Order*) that concluded the *2006 Quadrennial Regulatory Review*.

The petition for reconsideration asks the Commission to revisit two decisions it made in connection with the 2006 Quadrennial Regulatory Review proceeding. The first decision at issue in the reconsideration petition involves modification of the newspaper-broadcast cross-ownership rule, 47 C.F.R. § 73.3555(d). The second is a judgment not to change the local television ownership and local radio ownership rules. *See id.* § 73.3555(a), (b). The Commission is already working hard to reexamine both of these questions as part of the statutorily mandated 2010 Quadrennial Review of the media ownership rules, which the Commission commenced in October 2009. (By comparison, the Commission commenced the 2006 Quadrennial Review at the end of July 2006.)

The Commission has determined that resolving the petition for reconsideration outside the context of its ongoing 2010 Quadrennial Review would require unwarranted duplication of effort and fragmented policymaking. In the Commission's view, it would be difficult to justify second-guessing decisions that were made based on the record in the 2006 proceeding, when Commission staff are simultaneously gathering an updated record concerning the same issues (and reflecting lessons learned in the 2006 and prior Quadrennial Review proceedings). The Commission therefore does not intend to issue a decision on reconsideration of the *2008 Order* until that decision can be made harmoniously with the current Quadrennial Regulatory Review.

Furthermore, because the *2008 Order* does not reflect the participation of the current Commission, is currently stayed, and will be superseded by order(s) arising out of the 2010 Quadrennial Review, judicial review of the *2008 Order* would serve little or no practical function. There is no guarantee that any decision by the Court in these cases regarding the reasonableness of the prior Commission's *2008 Order* will bear any relationship to the judgments the current Commission makes in the first instance in the already-commenced 2010 Quadrennial Regulatory Review.

Under the circumstances, the Commission asks this Court to continue to hold these cases in abeyance pending the Commission's 2010 Quadrennial Review. In the alternative, if the Court determines that continued abeyance is not appropriate, the Commission moves to remand the *2008 Order* to the Commission so that it may revisit the determinations made in that order in conjunction with the 2010 Quadrennial Regulatory Review. In either case, the Commission supports continuation of the current stay.

## DISCUSSION

1. Background. The FCC is under a statutory obligation to review its media ownership rules every four years, and to repeal or modify any such rule that the agency finds is no longer in the public interest. 47 U.S.C. § 303 note. The Commission's ownership review proceedings are extremely complex; they require an enormous amount of agency time and effort to resolve and considerable judicial resources to review. *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

In early 2008, the Commission released the *2008 Order*, which concluded the 2006 Quadrennial Regulatory Review. *See* 23 FCC Rcd 2010 (2008). The *2008 Order* loosened the regulatory prohibition against common ownership of a daily newspaper and a broadcast station, while generally retaining the Commission's other broadcast ownership rules. *See id.* at 2011 ¶ 1. Common Cause and several other parties filed a petition for administrative reconsideration of the *2008 Order*. At the same time, Prometheus Radio Project and numerous other parties filed judicial challenges to the *2008 Order* that have been consolidated in this Court.

Prometheus subsequently filed a motion to hold these consolidated cases in abeyance pending the Commission's disposition of the Common Cause petition for

reconsideration. On April 14, 2009, the Court issued an order holding the cases in abeyance. On June 12, the Court asked the parties to file status reports on October 1 addressing whether the stay of an earlier set of ownership rules that had been entered in Nos. 03-3388 *et al.*, and continued in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), should be lifted.

The FCC supported continuance of the stay. The FCC explained that three new Commissioners (including a new Chairman) had joined the five-member agency over the summer, that Common Cause's petition for administrative reconsideration remained under consideration, and that the agency had begun its 2010 Quadrennial Regulatory Review by initiating a series of workshops as a first step in framing the issues.

Since the filing of its status report, the Commission has moved expeditiously in its review. In the past month, the agency has conducted three media ownership workshops – presenting the views of academics, public interest groups, and media organizations, respectively – to assist in defining the issues the agency should address in conducting the 2010 Quadrennial Regulatory Review. *See Public Notice, Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of the 2010 Media Ownership Review Proceeding*, DA 09-2209 (Oct. 21, 2009) (*Oct. 21 Public Notice*).<sup>1</sup> Pursuant to the agency's invitation, *id.* at 3, interested parties have also filed numerous written comments in the proceeding. This is as early as the Commission has ever begun the periodic review of its ownership rules required by statute. Further media ownership workshops will be held as a prelude to initiating a formal administrative proceeding in early 2010.

2. Response. Common Cause's petition for reconsideration seeks to have the Commission revise three of its ownership rules. First, the petition asks the Commission to modify its newspaper-broadcast cross-ownership rule by (a) limiting the ability of applicants to obtain waivers of the rule, Pet. at 3-4; (b) requiring additional public notice of proposed mergers and waiver requests, *id.* at 5-6, and (c) reversing the Commission's decision to grandfather five newspaper-broadcast combinations, *id.* at 7-11. Second, the petition seeks to have the Commission tighten the local television ownership rule to prohibit ownership of two or more television stations in the same local market. *Id.* at 11-14. Third, the

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<sup>1</sup> The *Oct. 21 Public Notice* is attached for the Court's convenience. Archived video of each workshop is available on the Commission's website at [www.fcc.gov/ownership](http://www.fcc.gov/ownership).

petition asks the Commission to lower the current numerical limits for local radio station ownership. *Id.* 14-22.

Each of the policies as to which Common Cause seeks reconsideration is encompassed in the 2010 Quadrennial Regulatory Review. *See Oct. 21 Public Notice* at 1. The Commission does not believe it would be sound practice to address in isolation a retrospective reconsideration petition that raises issues that can be addressed prospectively, on a more current record, in the ongoing proceeding. Indeed, as the media petitioners have themselves emphasized, there have been a number of significant additional developments in the broadcast and newspaper industries just since these suits were filed. *See Status Report of Belo Corp., et al.*, at 3-4 (filed Oct. 1, 2009). Particularly when confronted with a rapidly changing marketplace, the Commission has “broad discretion to manage its docket as it sees fit,” including “adopting procedures and timetables it considers necessary to effective treatment of complex and difficult problems.” *Telecomm. Resellers Ass’n v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (quoting *GTE Service Corp. v. FCC*, 728 F.2d 263, 273-74 (D.C. Cir. 1986)).

Although the Commission does not intend to dispose of the pending petition for reconsideration outside the context of the 2010 Quadrennial Regulatory Review, this litigation should nevertheless remain in abeyance. Judicial review of the *2008 Order* would serve little purpose when that order has been stayed and will soon be superseded by the 2010 Quadrennial Regulatory Review. This is particularly the case given that three of the five current members of the FCC were not members of the Commission at the time the *2008 Order* was adopted and released, and a fourth member – Commissioner Michael Copps – dissented from the order, *see* 23 FCC Rcd at 2115-21. The Commission has commenced a fresh review of its media ownership rules in the 2010 Quadrennial Regulatory Review, which may not come to any of the same conclusions that are embodied in the *2008 Order*. In addition, it is unlikely that resumption of the litigation would allow the Commission better to frame the 2010 review, when that process already is underway. A decision from this Court would likely come near the end of the current quadrennial review, or after it is complete.

Because the *2008 Order* is subject to this Court’s stay, continued abeyance would not disrupt the status quo. This Court should therefore continue to hold these cases in abeyance pending the Commission’s resolution of the 2010 Quadrennial Regulatory Review.

If, however, this Court is disinclined to continue these cases in abeyance, the Commission requests in the alternative that the Court remand the *2008 Order* to the agency so that the current Commissioners may revisit that order's conclusions in light of the new insights that are likely to be obtained during the 2010 Quadrennial Regulatory Review. Remand is appropriate where the agency seeks "to give further consideration" to its prior orders. *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) (citation omitted). If this case is not continued in abeyance, such a voluntary remand will avoid the need for judicial review of an order that is certain to be overtaken by the agency's decision concluding the already-commenced, congressionally mandated, quadrennial review process.<sup>2</sup>

### CONCLUSION

The FCC intends to address the pending petition for agency reconsideration filed by Common Cause and others in connection with the already-ongoing 2010 Quadrennial Regulatory Review. Under the circumstances, this Court should continue to hold these cases (which have been stayed) in abeyance pending the conclusion of the 2010 Quadrennial Regulatory Review. In the alternative, this Court should remand these cases to the Commission for further proceedings in conjunction with the 2010 Quadrennial Regulatory Review.

Respectfully submitted,

/s/

Austin C. Schlick  
General Counsel

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<sup>2</sup> In the event this Court decides against continuing the case in abeyance, we ask that it treat our alternative request as a formal motion for voluntary remand.

**ATTACHMENT**



# PUBLIC NOTICE

Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, D.C. 20554

News Media Information 202 / 418-0500  
Internet: <http://www.fcc.gov>  
TTY: 1-888-835-5322

DA 09-2209

Released: October 21, 2009

## MEDIA BUREAU ANNOUNCES AGENDA AND PARTICIPANTS FOR INITIAL MEDIA OWNERSHIP WORKSHOPS AND SEEKS COMMENT ON STRUCTURING OF THE 2010 MEDIA OWNERSHIP REVIEW PROCEEDING

MB Docket No. 09-182

**Comment Deadline: November 20, 2009**

Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its ownership rules every four years and “determine whether any of such rules are necessary in the public interest as the result of competition.” Under Section 202(h), the Commission “shall repeal or modify any regulation it determines to be no longer in the public interest.” Our statutorily required periodic review encompasses five ownership rules: (1) the newspaper/broadcast cross-ownership rule, (2) the radio/television cross-ownership rule, (3) the local television ownership rule, (4) the local radio ownership rule, and (5) the dual network rule.<sup>1</sup>

To assist in structuring the 2010 quadrennial review process, the Media Bureau will hold workshops on November 2, 3, and 4 to discuss the scope and methodology of the proceeding and the analytical framework the Commission should use for conducting its review. We will explore these issues during three half-day sessions with: (1) a panel of policy scholars, (2) a panel of public interest groups, and (3) a panel of broadcasters and media trade associations.

The moderator of each workshop will invite the panelists to present their views on questions relating to the scope and analytical framework of the media ownership review process. These questions will include:

### General Scope and Framework:

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<sup>1</sup> The Commission’s broadcast ownership rules are contained in 47 C.F.R. § 73.3555. For the local television ownership rule, the radio/television cross-ownership rule, and the newspaper/broadcast cross-ownership rule that are currently in effect, see 47 C.F.R. § 73.3555(b)-(d) (2002); for the local radio ownership rule, see 47 C.F.R. § 73.3555(a). The dual network rule is contained in 47 C.F.R. § 73.658(g).

- In addition to the five rules that the Commission is statutorily required to consider in its quadrennial review, are there other rules or issues that the Commission should address in this proceeding?
- The existing rules limit concentration within a single industry and bilateral cross-ownership between two industries. Should the Commission continue to enforce limits of these types, or should it develop an alternative structure, such as determining an ownership limit for all media within a relevant market?
- Should the Commission have bright line rules or a more case-by-case approach guided by a policy statement?

Competition, Diversity, and Localism Goals:

- What is the relationship between the Commission's longstanding policy goals of competition, diversity, and localism and the media ownership rules in the current media marketplace? How should we define them in that context?
- Are there other goals the Commission should consider in its media ownership proceeding? If so, what are they, and why are they important in this context?
- Competition:
  - Is the competition goal best conceptualized as economic competition?
  - If so, what approach should the FCC take to determine the relevant product and geographic markets? Are the relevant geographic markets local, national, both, or something else? Should the rules be analyzed within separate relevant product markets for delivered programming, advertising, and content production and/or something else?
  - What analytical approaches should the Commission employ to determine whether common ownership of multiple media outlets increases or decreases competition in a relevant product market?
  - How should the FCC assess competition in the market for delivered programming, given that there are no direct user fees for broadcast programming? Is the concept of innovation in programming relevant here?
  - How should the FCC's analysis take into account recent changes in the media industry, such as the increased number of channels carried by cable and satellite operators, the transition to digital TV broadcasting, the decline of newspapers, and the increased use of the Internet for news and entertainment?
  - What metric(s) should the Commission use to measure competition?
  - How should the Commission connect those metrics to the structure of media ownership?
- Diversity:
  - How should the FCC define the diversity goal in the modern media marketplace in a manner that is addressable by the media ownership rules?
  - How should the Commission evaluate diversity across media? In particular, in deciding which media should be considered together for purposes of evaluating diversity, should the Commission apply the same substitutability criteria that are used in defining product markets for competition analysis?
  - What metric(s) should the Commission use to measure the extent of diversity and/or its components?
  - How should the Commission connect those metrics to the structure of media ownership?



- Localism:
  - How should the Commission define and measure the localism goal in the modern media marketplace in a manner that is addressable by the media ownership rules?
  - What metric(s) should the Commission use to measure localism? Are traditional measures of localism (the extent of local news and public affairs and other local programming, such as local school sports) still relevant and useful? If so, how do we define local in this context (locally produced, locally oriented, or some other way)?
  - How should the Commission connect those metrics to the structure of media ownership?

Data and Study Questions:

- What specific study questions/topics should the FCC pursue to inform its decisionmaking?
- What types of data should the FCC collect to support its analysis?
- Are there particularly useful existing, public or proprietary datasets that the FCC should obtain?
- Are there particularly useful ongoing studies or projects?

These initial workshops will be open to the public but will not provide an opportunity for audience participation. Subsequent workshops or hearings will feature audience participation. To afford the general public an opportunity to comment on the topics discussed at this workshop, all interested parties are hereby invited to submit written comments on those topics on or before November 20, 2009. The written comments, as well as the transcripts of these workshops, will be included in the public record of this 2010 Quadrennial Review Proceeding.

We request that panelists and those submitting written comments at this stage in the proceeding focus primarily on the issues described above, and that written comments be brief. Subsequent stages of the proceeding will provide opportunities to submit views on all relevant issues, including the appropriate outcome of the proceeding.

For those who cannot attend the workshops in person, audio/video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC Live web page at [www.fcc.gov/live](http://www.fcc.gov/live). A recording of each workshop will be included in the public record of the media ownership proceeding.

**AGENDA**

The workshops will be held from 9:00 a.m. – 12:00 p.m. each day in the Commission Meeting Room, 445 12<sup>th</sup> Street, SW, Washington, D.C. 20554.

**Monday, November 2, 2009**

*Moderator:* **Paul de Sa**, Chief, Office of Strategic Planning and Policy Analysis, FCC

**Policy Scholars' Panel**

**C. Edwin Baker**, Nicholas F. Gallicchio Professor of Law and Professor of Communication, University of Pennsylvania School of Law

**Harold Furchtgott-Roth**, President, Furchtgott-Roth Economic Enterprises, former FCC Commissioner

**Catherine Sandoval**, Professor, Santa Clara University, School of Law.

**Joel Waldfogel**, Ehrenkranz Family Professor in the Department of Business and Public Policy, at the Wharton School of the University of Pennsylvania

**Steven Wildman**, James H. Quello Endowed Chair of Telecommunication Studies and Director of the James H. and Mary B. Quello Center for Telecommunication Management and Law, Michigan State University

**Simon Wilkie**, Professor of Economics, University of Southern California, former Chief Economist, FCC

**Tuesday, November 3, 2009**

*Moderator:* **Colin Crowell**, Senior Counsel, Office of Chairman Genachowski

**Public Interest Group Panel**

**Ken Ferree**, Senior Fellow, The Progress and Freedom Foundation

**Cheryl Leanza**, Policy Director, The Office of Communication of the United Church of Christ, Inc.

**Andy Schwartzman**, President and CEO, Media Access Project, on behalf of Prometheus Radio Project

**Kristin Thomson**, Education Director, Future of Music Coalition

**S. Derek Turner**, Research Director, Free Press

**Wednesday, November 4, 2009**

*Moderator:* **William T. Lake**, Chief, Media Bureau, FCC

**Broadcasters and Industry Panel**

**Jane Mago**, Executive Vice President and General Counsel, National Association of Broadcasters

**George Mahoney**, Vice President, General Counsel, and Secretary, Media General

**James L. Winston**, Executive Director and General Counsel, National Association of Black Owned Broadcasters

[Others not yet confirmed]

All written comments should refer to MB Docket No. 09-182. Comments may be filed using (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) paper copies.<sup>2</sup> The Commission's ECFS filing interface is located at the following Internet address: <http://www.fcc.gov/cgb/ecfs/>. The Federal Government's eRulemaking Portal is at <http://www.regulations.gov>.<sup>3</sup> Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties who choose to file by paper must file an original and four copies of each filing.

Paper filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

In order to facilitate free communication during this phase of the proceeding, we will treat it as exempt for purposes of the ex parte rules. *See* 47 C.F.R. §§ 1.1200(a) (staff discretion to classify

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<sup>2</sup> *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

<sup>3</sup> The Federal Government eRulemaking Portal website contains instructions for submitting comments on that site.

proceedings). Thus, presentations during this phase of the proceeding may be freely made and need not be disclosed.

Open captioning will be provided for the workshops. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need. Also include a way we can contact you if we need more information. Last-minute requests will be accepted, but may not be possible to fill. Send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

For further information about this Public Notice, please contact Mania Baghdadi or Amy Brett, Industry Analysis Division, (202) 418-2330. Press inquiries should be directed to Janice Wise, (202) 418-8165.

-FCC-

08-3078, et al.

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**Prometheus Radio Project, et al., Petitioner**

**v.**

**Federal Communications Commission and United States of America,  
Respondents.**

**CERTIFICATE OF SERVICE**

I, Jacob M. Lewis, hereby certify that on November 25, 2009, I electronically filed the foregoing Letter with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the non-CM/ECF participants. Non CM/ECF Users are denoted with an asterisk below.

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/s/ Jacob M. Lewis