

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3388

#E-59

PROMETHEUS RADIO PROJECT,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

*Fox Entertainment Group, Inc., Fox Television Stations, Inc.,
National Broadcasting Company, Inc., Telemundo Communications Group, Inc.
and Viacom, Inc.,
Intervenors

*(Pursuant to Clerk's Order dated 8/22/03)

(FCC No. 03-127)

Present: SCIRICA, *Chief Judge*, AMBRO and FUENTES, *Circuit Judges*

ORDER

Per Curiam.

Before the Court is Petitioner's motion to stay the effective date of Respondent Federal Communication Commission's new ownership rules, 2002 Biennial Regulatory Review, 68 Fed. Reg. 46,286 (Aug. 5, 2003), pending judicial review.¹ Extensive oral

¹Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation has designated this Court to hear this and related petitions for review.

argument was heard on September 3, 2003.²

We consider four factors in determining whether to grant the motion to stay: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the request is denied; (3) whether third parties will be harmed by the stay; and (4) whether granting the stay will serve the public interest. *E.g., Susquenita Sch. Dist. v. Raelee*, 96 F.3d 78, 80 (3d Cir. 1996); *In re Penn Cent. Transp. Co.*, 457 F.2d 381, 384-85 (3d Cir. 1972).

At issue in this litigation are changes adopted by the FCC that would significantly alter the agency's ownership rules for multiple media properties, including national television networks, local broadcast affiliates, radio stations, and newspapers. Petitioner has alleged harms from industry consolidation contending they would be widespread and irreversible if they occurred. The harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part. In contrast to this irreparable harm, there is little indication that a stay pending appeal will result in substantial harm to the Commission or to other interested parties. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Granting the stay pending judicial review would maintain the status quo in

²Ordinarily, we would require strict adherence to Federal Rule of Appellate Procedure 18 that petitioner "move first before the agency for a stay of its decision or order." Fed. R. App. P. 18(a)(1). Nonetheless, under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.

order to permit appellate review after briefing on the merits. While it is difficult to predict the likelihood of success on the merits at this stage of the proceedings,³ these harms could outweigh the effect of a stay on Respondent and relevant third parties. Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review.

For the foregoing reasons, we will grant Petitioner's motion to stay the effective date of the FCC's new ownership rules and order that the prior ownership rules remain in effect pending resolution of these proceedings.

Subject to the Court's decision on the motion to transfer venue, the Clerk shall issue a briefing schedule.

DATED: **SEP - 3 2003**

add/cc: counsel of record

³ An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Holiday Tours, 559 F.2d at 844.