

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Promoting Diversification of Ownership In)	MB Docket No. 07-294
The Broadcasting Services)	
)	
2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	MB Docket No. 02-277
Ownership Rules and Other Rules Adopted)	MM Docket No. 01-235
Pursuant to Section 202 of the)	MM Docket No. 01-317
Telecommunications Act of 1996)	MM Docket No. 00-244
)	MB Docket No. 04-228

Opposition to Motion for Stay

Office of Communication of the United Church of Christ, Inc.,
National Organization for Women Foundation,
Media Alliance,
Common Cause,
Benton Foundation,
Free Press,
National Hispanic Media Coalition,
and Professor Carolyn M. Byerly

Of Counsel:

Andrew M. Lewis
Michael J. Scurato
Georgetown University Law Center

Law Students

Guilherme Roschke, Esq.
Adrienne Biddings, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Dated: November 23, 2009

Summary

Public and Academic Commenters oppose the motion for stay filed by Fletcher, Heald & Hildreth (FH&H) seeking to stay the filing date for Ownership Form 323. The Commission should dismiss the motion because FH&H is not a party to this proceeding and has not shown that it would be harmed by the implementation of the filing requirement. Nor has FH&H complied with the FCC rules regarding motions for stay.

Even if the Commission were to reach the merits, it should deny the motion. FH&H fails to make a showing under any of the four factors that could possibly justify any further delay in the collection of this important data. First, the claim that thousands of individuals will endure irreparable harm because the Commission's revised Form 323 will require them to file their Social Security Numbers (SSNs) is premised on a misunderstanding of either the FCC's process or the Privacy Act, or both. In fact, although some individuals will need to provide SSNs to obtain unique identifiers known as FCC Registration Numbers (FRN), their SSNs will at all times be protected from public disclosure. Indeed, the very purpose of requiring a FRN is to ensure the accuracy of Form 323s without requiring filers to publicly disclose their SSNs. Further, the FCC has complied with all Privacy Act requirements by publishing Systems of Record Notices (SORNs) for the systems used to obtain FRNs and to file Form 323. The SORN for Form 323 was published after the filing of the stay motion and renders it moot.

Second, FH&H has failed to show any likelihood of prevailing on the merits of its claim that the FCC failed to give adequate notice under the APA. The FCC published a general notice of its intent to revise Form 323 to, among other things, increase the accuracy of data submitted by licensees and provided ample opportunity for comment. The APA does not require the FCC

to spell out that filers would need an FRN in the NPRM, because it is either a logical outgrowth of the proposal or an internal FCC process exempt from public notice.

Finally, any further delay of the filing date would harm the Commission, other parties and the public. It has been more than a decade since the FCC first required ownership reports to include race and gender of the owners. Unfortunately, it took many years for the flaws in the FCC's recordkeeping to be discovered and fixed. Now that the FCC has a system designed to obtain accurate and complete data on minority and female ownership, it would be unconscionable to countenance any further delay. Moreover, the FCC, researchers, and the public need this information to fulfill the Commission's obligations in the 2010 Quadrennial Review of the ownership rules.

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The Office of Communication of the United Church of Christ, Inc., National Organization for Women Foundation, Media Alliance, Common Cause, Benton Foundation, National Hispanic Media Coalition, Free Press, and Professor Carolyn M. Byerly (“Public and Academic Commenters”), by their counsel, the Institute for Public Representation, oppose the Motion for Stay filed by Fletcher, Heald & Hildreth, P.L.C. (“FH&H”), on November 16, 2009. The motion asks the Commission to stay the December 15, 2009, deadline for broadcast stations to file their biennial ownership reports.¹ Public and Academic Commenters strongly oppose any further delay in the collection of this important data. They urge the FCC to dismiss the motion for lack of standing, or in the alternative, deny it on the merits.

¹ On November 23, the FCC further extended the filing date to January 11, 2010 on its own motion because it had not finished testing the electronic version of Form 323. Public Notice, *Media Bureau Extends the Biennial Filing Deadline for the Commercial Broadcast Ownership Report (Form 323)*, DA 99-2457 (Nov. 23, 2009).

I. THE FCC SHOULD DISMISS THE MOTION FOR STAY WITHOUT CONSIDERING THE MERITS

The Commission should dismiss FH&H's motion because it lacks standing and fails to comply with FCC rules. Standing requires a showing that (1) one is a party to the Commission proceeding, and (2) that the party is aggrieved by the FCC's action.

FH&H fails both parts of this test. Commission rules define a "party" in a rulemaking proceeding as "any person who participates in a proceeding by the timely filing of a petition for rule making, comments on a notice of proposed rule making, a petition for reconsideration, or responsive pleadings in the manner prescribed by this subpart."² FH&H is a law firm. As a law firm, it has not filed any of the above-referenced documents in this proceeding. Although FH&H claims at one point to be filing "on behalf of various broadcast clients,"³ it never identifies a single client that would be harmed by having to file Form 323.⁴

Even if FH&H were a party, to have standing, it must show that it has suffered or imminently will suffer injury - an invasion of a legally protected interest which is concrete and particularized. It is not enough that the person is merely interested; the injury must be actual or imminent, distinct and palpable, not abstract.⁵ Clearly, FH&H fails this standard as it never states how it has been or would be harmed by the FCC's filing requirements for Form 323.

FH&H claims to file this motion under Section 1.44(e) of the Commission's rules, which states that "any request to stay the effectiveness of any decision or order of the Commissions

² 47 C.F.R. § 1.400 (2006).

³ Motion for Stay of Fletcher, Heald & Hildreth, MB Dkt. No. 07-294, filed Nov. 16, 2009, 1 ("FH&H Motion").

⁴ A search of the ECFS reveals that FH&H did file in Docket 07-294, separately on behalf of two clients: the Community Broadcasters Association and the Chesapeake-Portsmouth Broadcasting Corporation. However, neither of these parties even addressed Form 323.

⁵ *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

shall be filed as a separate pleading.”⁶ This section does not confer authority on non-parties to seek stays of FCC rules. Rather, a reading of the rule as a whole demonstrates that a party may seek a stay only if it has requested substantive relief from the Commission in a separate pleading. Again, since FH&H has not sought reconsideration or other appropriate substantive relief, the Commission cannot entertain its motion for stay.

II. FH&H HAS FAILED TO MEET THE TEST FOR A STAY

If the FCC nonetheless decides to consider FH&H’s motion on the merits, it should deny it because FH&H fails to show that anyone would be irreparably harmed by the filing of the Form 323s, fails to demonstrate any likelihood of succeeding on the merits, and because further delay would be harmful to parties to this proceeding and the public interest.

A. Background

To understand why FH&H’s claims are totally lacking in merit, it is important to consider its arguments in context. Although the FCC has regularly required broadcast licensees to file annual or biennial ownership reports, it was not until 1998, as part of its 1998 Biennial Review of media ownership rules, that Commission modified its Annual Ownership Report, FCC Form 323, to require the provision of information on race and gender.⁷ The Commission reasoned that the action was needed in order to

determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that the Commission may adopt, and to fulfill the Commission’s statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the

⁶ 47 C.F.R. § 1.44(e) (2006).

⁷ See *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23096-99 ¶¶ 100-05 (1998).

Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry.⁸

Unfortunately, the FCC implemented this requirement in such a poor manner that the data was unreliable and difficult to use. During the 2002 Biennial and 2006 Quadrennial reviews of the broadcast ownership rules, it became increasingly clear that the FCC lacked reliable data about minority and female ownership of broadcast stations.

Thus, in December 2007, at the same meeting at which the FCC adopted the 2006 Quadrennial Review Order, the FCC issued a *Report and Order and Third Further Notice of Proposed Rulemaking* (“*Diversity Order*”) seeking comment on, among other things, modifications to Form 323.⁹ The *Diversity Order* observed that both commenters and FCC study authors had expressed concern about the FCC’s data collection process. It specifically noted that some commenters found fault with

the process the Commission uses to automate and cull the data from the forms. Areas of concern include the filing of multiple forms for a single station, the practice of some filers to attach racial/gender information in a separate attachment to the form, the lack of questions regarding gender/racial classifications on the Form 323-E used by noncommercial educational stations, and filers who write “no change – info on file” as opposed to electronically validating completing the information previously submitted, including race, gender, and ethnicity data.¹⁰

The *Diversity Order* tentatively concluded that the FCC should make changes to Form 323 to increase the accuracy of the data collected. It specifically solicited public comment on whether to expand the scope of parties required to file, to establish a uniform filing date, and to require entities with attributable interests to file a separate Form 323. The Commission noted its particular concern

⁸ *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922, 5954 ¶93 (2008) (“*Diversity Order*”).

⁹ *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922 (2008). (“*Diversity Order*”).

¹⁰ *Id.* at 5954-55 ¶ 94.

about the accuracy of data submitted by licensees, as this information may form the basis for Commission policy and rulemaking. Should the Commission adopt a new form to more accurately collect information from licensees on race, gender, and ethnicity, and delete these questions from the Form 323? Moreover, we are concerned about the accuracy of data submitted from licensees as this information may form the basis for Commission policy and rulemaking. We ask commenters to address whether the Commission should conduct audits to assess the accuracy of the information filed in the annual ownership report.¹¹

It also asked, “What other changes to Form 323 would make use of the data more reliable?”¹²

In the *Report and Order and Fourth Further Notice of Proposed Rulemaking* (“323 Order”), the FCC adopted a number of improvements to the Form 323 data collection process and set November 1, 2009 as the uniform filing date.¹³ It also directed the staff to revise Form 323 consistent with the 323 Order, revise the electronic interface so that the ownership data would be searchable, and could be aggregated and cross-referenced, and to “build additional checks into Form 323 to perform verification and review functions and to preclude the filing of incomplete or incorrect data.”¹⁴

On August 11, 2009, the Commission submitted the revised Form 323 to the OMB and invited the public to comment on the information collection.¹⁵ Eight parties filed comments with the OMB responsive to the request, with some making similar privacy arguments to those raised

¹¹ *Id.* at 5955 ¶ 96.

¹² *Id.* at 5955 ¶ 95.

¹³ *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896, 5903 ¶ 12 (2009) (“323 Order”).

¹⁴ *Id.* See also *id.* at 5909 ¶ 23. The National Association of Broadcasters filed a petition for reconsideration. In the Memorandum Opinion & Order and Fifth Further Notice of Proposed Rulemaking, the Commission granted NAB’s request to reconsider whether to require reporting of certain nonattributable ownership interests, but denied the request that it reconsider its decision to require filing by sole proprietors.

¹⁵ Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested, 74 Fed. Reg. 40188 (Aug. 11, 2009).

in the current motion.¹⁶ In a letter to OMB dated October 6, 2009, the Commission responded to the privacy arguments made in the comments and further clarified the purpose and implementation of the data collection.¹⁷

On October 2, 2009, the Commission, on its own motion, extended the November 1 biennial filing date to no sooner than 30 days after the FCC received approval from the OMB for the revised Form 323. After the FCC modified the form to relieve the requirement that certain nonattributable owners have to file, it received approval from OMB.¹⁸ The FCC established a new filing date of December 15, 2009. On November 23, the FCC further extended the filing date to January 11, 2010 on its own motion because it had not finished testing the electronic version of Form 323.

B. FH&H Has Failed to Show that Filing Form 323 Will Cause Irreparable Harm to Anyone

“To justify a stay, the alleged harm must be great, imminent, and certain to occur *unless* the stay is granted.”¹⁹ Since FH&H has failed to articulate sufficient harm to demonstrate standing, it has certainly failed to show irreparable harm.

¹⁶ Parties submitting comments were: Anthony T. Lepore, Esq.; United Church of Christ, *et al.*; the Law Office of Dan J. Alpert; Saga Communications, Inc.; forty-seven Named State Broadcasters Associations; the National Association of Broadcasters; Wiley Rein LLP; and Joint Comments filed by a number of broadcasters.

¹⁷ Letter from Walter Boswell, Acting Associate Managing Director, PERM, Federal Communications Commission to Nicholas A. Fraser, Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 6, 2009) (“FCC Letter to OMB”).

¹⁸ Notice of Office of Management and Budget Action, OMB Control No. 3060-0010 (Oct. 19, 2009) *available at* <http://www.reginfo.gov/public/do/DownloadNOA?requestID=222569>.

¹⁹ *Liberty Productions*, 16 FCC Rcd 18966, 18971 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (“[T]he injury must be both certain and great; it must be actual and not theoretical ... the party seeking injunctive relief must show that ‘[t]he injury complained of [is] of such imminence that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm”) (internal citations omitted).

FH&H claims that individuals will endure irreparable harm because the Commission’s revised Form 323 will require the “electronic submission of personally identifiable information from thousands of individuals,” and that “[o]nce disclosed, that information cannot be taken back.”²⁰ It further argues that “unless and until the Commission releases a SORN for this system, parties will have no way to know how long this information will be retained, how long it will be used, and how it will ultimately be disposed of.”²¹ These claims of speculative harm are based on a misunderstanding of either the FCC’s process or the Privacy Act requirements, or both. In fact, the FCC’s process for collecting Form 323 ownership data fully complies with the Privacy Act requirements.

Under the Privacy Act, a federal agency is permitted to maintain systems of records provided that upon establishment or revision of a system of records, the agency publishes a System of Records Notice (SORN) in the Federal Register.²² The SORN lists information about the system, including: the name and location of the system; the categories of individuals covered; the categories of records maintained; the routine uses of the system; and the policies and practice regarding storage, retrievability, access, retention, and disposal.²³ Under the Privacy Act, “[n]o agency shall disclose any record which is contained in a system of records...unless disclosure of the record would be...for a routine use as defined.”²⁴

Under the procedures established by the FCC, individual investors who are required to file or be listed on the Form 323 Ownership report must provide their FCC Registration Number (FRN). They can obtain a FRN online using the Commission Registration System (CORES).

²⁰ FH&H Motion at 8 ¶ 16.

²¹ *Id.* at 9.

²² 5 U.S.C. § 552a(e)(4)(A)-(I) (2009).

²³ 5 U.S.C. § 552a(e)(4)(A)-(I) (2009).

²⁴ 5 U.S.C. § 552a(b)(3) (2009).

CORES is a system of record as defined by the Privacy Act.²⁵ The FCC published a revised SORN for CORES in April 2006.²⁶ The CORES SORN provides all of the information required by the Privacy Act, including individuals covered, routine uses, and policies for storing, retrieving, accessing, retaining, and disposing of records in the system.²⁷

To obtain an FRN, a user must submit a Taxpayer Identification or Social Security Number (SSN). The purpose of requiring filers to obtain a FRN is to allow the FCC to verify the accuracy of its data. CORES assigns each filer a unique identifier and requires the filer to select a password. The purpose of requiring persons to obtain a FRN is, as the FCC already explained, to permit electronic filing with the FCC “*without the need to collect sensitive personal information to verify each filing.*”²⁸

After an individual obtains a FRN from CORES, he or she uses it, rather than a SSN to fill out Form 323. The Commission published a SORN detailing for the system of records that it will use for the Form 323 reports on November 19, 2009,²⁹ a few days after the Motion for Stay was filed. The publication of the SORN renders FH&H’s arguments for a stay moot.

The 323 SORN identifies the information collected from individuals including FRN, name, address, race, and gender.³⁰ It does not list SSNs as one of the categories of information

²⁵ 5 U.S.C. § 552a (a)(5) (2009).

²⁶ 71 Fed. Reg. 17234, 17253 (Apr. 5, 2006) (“CORES SORN”). In fact, SSNs have been collected by CORES for many years and they are never disclosed to the public. *CORES SORN*, 71 Fed. Reg. at 17253.

²⁷ To the extent that FH&H may be suggesting that the CORES SORN is inadequate because it only applies to individuals who are doing business and who incur applications fees, Motion at 8, ¶14, the Commission has already explained that attributed owners are doing business with the Commission. FCC Letter to OMB at 6. Moreover, the FCC does charge a filing fee for filing ownership reports. 47 CFR §1.1104.

²⁸ FCC Letter to OMB at 5 (emphasis in original).

²⁹ 74 Fed. Reg. 59978, 59980 (Nov. 19, 2009) (“323 SORN”).

³⁰ *Id.*

collected. It also identifies routine uses including “public access.”³¹ The 323 SORN describes security measures that will be implemented to ensure that no sensitive data is released. The SORN states that “the proposed new system of records will become effective on December 21, 2009, unless the FCC receives comments that require a contrary determination.”³² Since the FCC has extended the filing date for Form 323 to January 11, 2010, the FCC should be in full compliance with the Privacy Act by that date.³³

In sum, FH&H cannot show any harm, much less irreparable harm, because the FCC has complied with the Privacy Act. Confidential information, such as SSNs, have been and will continue to be kept secure, and will not be disclosed to the public.

C. FH&H Have Failed to Show Likelihood of Prevailing on the Merits

Not only has FH&H failed to show irreparable harm, but it has also failed to show any likelihood of success upon the merits. Indeed, it is not clear how FH&H can claim a likelihood of success on the merits, as it has not filed a petition for reconsideration or other action upon which it could prevail on the merits. But in any event, the legal argument presented in the motion for stay lacks any merit.

FH&H claims that “the enormous expansion of FRN-collection which the revised Form 323 entails flatly contravenes the APA.”³⁴ Specifically, it asserts that the Commission failed to “give any indication that a substantial number of individuals would be having to submit their

³¹ 323 SORN 74 Fed. Reg. at 59979.

³² 74 Fed. Reg. 59978. To the extent that FH&H may have additional concerns regarding the FCC’s compliance with the Privacy Act, the appropriate remedy is to file comments in response to the 323 SORN.

³³ Public Notice, Media Bureau Extends the Biennial Filing Deadline for the Commercial Broadcast Ownership Report (Form 323), DA 99-2457 (Nov. 23, 2009).

³⁴ FH&H Motion at 10 ¶ 20.

social security number to the Commission in order to obtain their own FRNs because they would be having to include those FRNs in the revised Form 323.”³⁵

This argument should be rejected. Section 553(b) of the APA only requires that “general notice be published in the federal register” and that the agency afford “interested persons an opportunity to participate.”³⁶ Notice is sufficient if it includes “a description of the subjects and issues involved.”³⁷ Moreover, no notice for comment is required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”³⁸

Here, the FCC published a general notice of its intent to revise Form 323 to, among other things, increase the accuracy of data submitted by licensees. It provided ample opportunity for comment (and reply comment), even though FH&H failed to take advantage of this opportunity. So, the only conceivable basis for FH&H’s claim the FCC violated the APA’s notice and comment requirement is that the FCC never spelled out in the *Diversity Order* that filers would need an FRN and would need to submit their social security number to obtain an FRN. But nothing in the APA requires this level of detail in a notice of proposed rulemaking.

In any event, the decision to employ FRNs in filing Form 323s is a logical outgrowth of the proposal contained in the *Diversity Order*. An agency “need not renote changes that follow logically from or that reasonably develop the rules it proposed originally.”³⁹ The Commission ordered staff to change Form 323 in the *323 Order*, giving staff instructions as to how to change

³⁵ *Id.*

³⁶ 5 U.S.C. § 553(b) (1966).

³⁷ *Id.* at § 553(b)(3).

³⁸ *Id.* at § 553(b)(A).

³⁹ *Conn. Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982).

FRN collection and why.⁴⁰ Shortly thereafter the Commission published a notice stating that it was revising Form 323 in accordance with the *323 Order* and requesting comments.⁴¹

The final Form 323 follows logically from the instructions granted to staff in the *323 Order* and referenced in the request for comments. The *323 Order* states that "each filing entity must identify by FRN the entity below it in the chain" and instructs staff to change Form 323 to implement this.⁴² Currently, individuals are identified when an entity files and the individual is below that entity in the chain.⁴³ Part of the purpose of this collection is to collect gender and race data, which can only logically apply to individuals, not non-person entities.⁴⁴ The logical – and only – result of this order is that individuals will be identified by FRN in the final form.

Moreover, the details of how broadcasters submit their Form 323 are exempt from notice and comment under the exemption for rules of agency procedure or practice. The purpose of this exemption is to "ensure that agencies retain latitude in organizing their internal operations. A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency."⁴⁵ The D.C. Circuit has "gradually shifted focus from asking whether a given procedure has a substantial impact on parties to inquiring more broadly whether the agency action encodes a substantive value judgment."⁴⁶

⁴⁰ *323 Order*, 24 FCC Rcd at 5907-09, ¶¶ 20, 21 & 23.

⁴¹ Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested, 74 Fed. Reg. 27549 (June 10, 2009).

⁴² *323 Order*, 24 FCC Rcd at 5908 ¶ 21.

⁴³ Old Form 323, available at <http://www.fcc.gov/Forms/Form323/323.pdf> (last visited, Nov. 23, 2009).

⁴⁴ See *Diversity Order*, 23 FCC Rcd at 5954 ¶ 93.

⁴⁵ *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (internal citations omitted).

⁴⁶ *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002) (internal citations omitted).

Requiring FRNs is clearly a rule of agency procedure or practice. It alters no rights of the parties that have to file, and does not affect their substantive position before the agency. The change merely alters the "manner in which parties present themselves" to the agency. According to the *Diversity Order*, the purpose of the data collection is to "further improve the ability of researchers and other users of the data to cross-reference information and construct complete ownership structures."⁴⁷ This is merely a record-keeping procedure, one aimed at facilitating the task of the agency, researchers and the public using the CDBS system. There is no value judgment imposed on or change in the substantive position of parties who file because they now have to file FRNs. These parties merely are now providing information which improves the integrity and data quality of public databases.

D. Staying the Filing Date would Harm Other Parties, the Commission and the Public Interest

FH&H's claim that the issuance of a stay "is unlikely to cause harm to any party," fails to take account of the harm to the Commission, academic researchers, and the public.⁴⁸

The FCC needs the Form 323 data to meet its statutory responsibilities to regulate broadcast stations in the public interest. For example, §202(h) of the Telecommunications Act of 1996 requires periodic review of the FCC's ownership rules.⁴⁹ In remanding the FCC's 2002 Biennial Review, the Court directed the FCC to analyze the effect that proposed rule would have on minority and female station ownership.⁵⁰ As the Commission is starting its 2010 Quadrennial Review, it is particularly important that the FCC get this data on a timely basis.

⁴⁷ *323 Order*, 24 FCC Rcd at 5908 ¶ 21.

⁴⁸ FH&H Motion at 9 ¶17.

⁴⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996).

⁵⁰ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-21 (3rd Cir. 2004).

