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**Ex Parte**

Austin Schlick  
General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: In re Leased Commercial Access; Development of Competition and Diversity  
in Video Programming Distribution and Carriage, MB Docket No. 07-42**

Dear Mr. Schlick:

I am writing to draw your attention to the opinion issued yesterday by the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*.<sup>1</sup> In *Prometheus*, the Third Circuit held that the Commission failed to comply with the notice and comment requirements of the Administrative Procedure Act (“APA”) in its 2008 Order revising the newspaper/broadcast cross-ownership rule (“NBCO”). Among other things, the *Prometheus* court made four findings relevant to the APA’s notice and comment standard. As described in bolded language below following each of the court’s findings, these findings would apply with equal or greater force in the instant docket were the Commission to adopt a final “standstill” rule without seeking further comment.<sup>2</sup>

- (1) The Commission’s FNPRM failed to fulfill the agency’s obligation to give notice to the public in a sufficiently concrete and focused form to make criticism or formulation of alternatives possible. Two open-ended sentences were insufficient to have fairly apprised the public of the alternatives under consideration or the approach taken in the Commission’s final rule. Slip op. at 26-27.

<sup>1</sup> *Prometheus Radio Project v. FCC*, Nos. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 08-4459, 08-4461, 08-4462, 08-4463, 08-4464, 08-4465, -08-4467, 08-4468, 08-4470, 08-4471, 08-4472, 08-4475, 08-4477, 08-4478, 08-4652 (3d. Cir. July 7, 2011).

<sup>2</sup> For a more detailed discussion of the relevant facts and issues here, see Letter from Rick Chessen, Senior Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (filed July 6, 2011).

**The facts here are more egregious than the facts before the *Prometheus* court. In *Prometheus*, there was at least some indication – albeit brief and open-ended – that the Commission intended to consider revising the cross-ownership rule at issue. By contrast, the program carriage NPRM in this docket contained no whisper of a potential standstill rule – no mention of the word or even any general reference to the concept.**

- (2) The court’s conclusion that the Commission failed to give adequate notice is buttressed by comparison to the Commission’s 2010 Notice of Inquiry, in which the Commission specifically addressed possible alternative approaches to the newspaper/broadcast cross-ownership issue. Slip op. at 27.

**The conclusion that the Commission failed to give adequate notice of a potential standstill requirement is buttressed by comparison to its NPRM on program access, issued only a few months after release of its program carriage NPRM; in the program access NPRM, the FCC explicitly and at length sought comment on the possibility of adopting a “standstill” requirement pending resolution of a program access dispute.<sup>3</sup> The standstill issue was also raised in the recent retransmission consent NPRM, again highlighting that the FCC is perfectly capable of seeking comment on the issue where that is its intent.**

- (3) Interested parties were prejudiced by the FNPRM’s omissions; some commenters during the official comment period noted that their comments on the NBCO would be limited because the NPRM made no proposals and suggested no options. Slip op. at 28.

**Interested parties were prejudiced by the inadequacy of the program carriage NPRM; there was virtually no discussion of a potential standstill requirement during the official comment period – hardly surprising given the lack of any hint in the NPRM that the Commission was considering such a requirement.<sup>4</sup>**

- (4) After the Commission began to formulate a specific approach to a final rule, the public was entitled to a “new opportunity for comment” in which “commenters would [] have their first occasion to offer new and different criticisms which the agency might find convincing.” Slip op. at 29-30 (citing *BASF Wyandotte Corp. v. Castle*, 598 F.2d 637, 642 (1<sup>st</sup> Cir. 1979)). A newspaper op-ed by the FCC Chairman and FCC press release

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<sup>3</sup> Compare *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 135-37 (Oct. 1, 2007), with *In re Leased Commercial Access and Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222 (June 15, 2007).

<sup>4</sup> Based on our review of the record, no commenter raised the standstill issue in the initial round of comments and only one commenter raised it in reply comments – in a limited context not applicable here. See *Crown Media Holdings Reply Comments*, MB Docket No. 07-42 at 18-19 (Oct. 12, 2007) (proposing a standstill in the context of proposing an arbitration process for resolving program carriage disputes, rather than an FCC complaint process).

late in the rulemaking proceeding did not cure the inadequate notice, although it did give some interested parties the clearest indication of the Chairman's substantive thinking on a final rule. Slip op. at 25-26, 29.

**After the FCC began to formulate a specific approach to a final standstill rule, the public was entitled to a new opportunity to attempt to persuade the Commission. And here, unlike the *Prometheus* case, there has not even been a newspaper op-ed or press release in which a member of the Commission outlined the substantive proposal that is reportedly being contemplated in the order. Although the NPRM has been pending for over four years, the Commission has never sought comment on any standstill rule.**

For these reasons, the Commission should heed the clear guidance of *Prometheus* and its antecedents. Inadequate notice is not a harmless procedural error; it is an integral part of proper decision-making and is ignored at an agency's peril. It not only deprives the public of its right to attempt to persuade the Commission but also deprives the Commission of the evidence it needs to make informed decisions and avoid negative unintended consequences. It has also, in part, fueled calls for FCC process reforms in Congress.

NCTA once again respectfully urges the Commission to seek comment on a proposed standstill requirement before moving to a final rule.

Respectfully submitted,

**/s/ Rick Chessen**

Rick Chessen

cc: Marlene H. Dortch