



filed within ten days of the order’s publication in the Federal Register. *See* 28 U.S.C. §2112.

Venue in this Court is proper under 28 U.S.C. §2343 because the principal offices of Prometheus and MMP are in Pennsylvania.

### **PROCEDURAL HISTORY**

The *Incubator Order* for which review is sought is one of a series of Federal Communications Commission decisions implementing its statutorily-mandated quadrennial review of broadcast media ownership rules and its obligation to address ownership diversity—*i.e.*, ownership by women and people of color—in broadcasting. These FCC decisions have been reviewed multiple times by this Court and a panel of this Court (Judges Ambro, Fuentes and Scirica) has retained jurisdiction over them. *Prometheus Radio Project v. Federal Communications Commission*, 824 F.3d 33 (3d Cir. 2016) (“*Prometheus III*”); see also *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus I*”); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (“*Prometheus II*”).

The *Incubator Order* is the product of a Notice of Proposed Rulemaking issued with the Commission’s recent *Reconsideration Order*. *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802 (2017) (“*Reconsideration Order*”). The *Reconsideration Order* substantially reversed the Commission’s 2016 *Second Report and Order. 2014 Quadrennial Review, Second*

*Report and Order*, 31 FCC Rcd. 9864 (2016) (“*Second Report and Order*”). Both the *Reconsideration Order* and the *Second Report and Order* are pending before this Court in Docket Numbers 18-1092 and 17-1107, respectively. Further, this Court stayed consideration of them pending the outcome of the Notice of Proposed Rulemaking that has just resulted in the *Incubator Order*. Order, Docket Nos. 18-1167, 17-1107, 18-1902 (Feb. 7, 2018); FCC Status Report, Docket Nos. 18-1167, 17-1108 (Aug. 6, 2018).

In these decisions, this Court has repeatedly reversed and remanded the FCC’s decisions because the FCC had insufficiently justified and analyzed policies purportedly designed to address the Commission’s obligation to promote ownership diversity. The Court further found that the Commission had insufficiently considered how various rule changes would impact ownership diversity and remanded to the Commission consideration of the definition of entities eligible to benefit from diversity-enhancing policies, known as “eligible entities.” *Prometheus I*, 373 F.3d at 420-21, 426-27; *Prometheus II*, 652 F.3d at 471; *Prometheus III*, 824 F.3d at 48-49.

The *Incubator Order* also addresses which classification of eligible entities should qualify for Commission programs to promote diversity and insufficiently analyzes that definition or its impact on ownership diversity. Because the *Second Report and Order*, the *Reconsideration Order*, and the *Incubator Order* are closely

connected, Petitioners are separately moving to consolidate this new proceeding with Docket Nos. 18-1092 and 17-1107 and other cases previously consolidated with it.

### **REVIEW REQUESTED**

Despite statutory obligations and the mandates of this court, the *Incubator Order* fails to compile a record sufficient to consider its impact on ownership diversity and adopts a definition of “eligible entities” that will not increase ownership diversity—despite the Commission’s stated intention to do so. The Commission makes further errors in its compilation and analysis of the record, which does not support its decision. As such, the *Incubator Order* violates this Court’s mandate, the Administrative Procedure Act, and the Communications Act. Therefore, Petitioners ask the Court: to hold unlawful and set aside the Commission’s action pursuant to 5 U.S.C. §706(2), 47 U.S.C. §§151, et seq., and 28 U.S.C. §1651 because it is arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law and this court’s mandate; to direct specific and date-certain compliance with this Court’s mandates; and to grant such other relief as this Court deems just and proper.

Respectfully submitted,



---

Cheryl A. Leanza

Cheryl A. Leanza  
Best Best & Krieger LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5300  
Washington, DC 20006  
(202) 785-0600  
cheryl.leanza@bbklaw.com

Andrew Jay Schwartzman  
Angela J. Campbell  
Christopher Laughlin  
James T. Graves  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, DC 20001  
(202) 662-9170  
andyschwartzman@gmail.com

*Counsel for Prometheus Radio  
Project and Media Mobilizing Project*

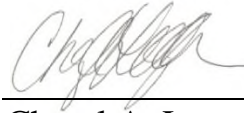
August 31, 2018

ATTACH ORDER

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to the United States Court of Appeals for the Third Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Prometheus Radio Project and Media Mobilizing Project respectfully state that each of them is a non-profit organization with no parent companies, subsidiaries or affiliates and that none of them have issued shares to the public.

Respectfully submitted,



---

Cheryl A. Leanza  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5300  
Washington, DC 20006  
Telephone: (202) 785-0600  
Facsimile: (202) 785-1234  
Cheryl.Leanza@bbklaw.com

## CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, I sent copies of the forgoing Petition for Review via first class mail to the following parties:

Thomas M. Johnson, Jr.  
General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-A741  
Washington, DC 20554

The Honorable Jeff Sessions  
Attorney General of the United States  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

I, Cheryl A. Leanza, hereby certify that on August 31, 2018, I filed the foregoing Motion to Consolidate with the Clerk of the United States Court of Appeals for the Third Circuit through the CM/ECF system. Participants in cases 17-1107 and 18-1092 who are registered CM/ECF users will be served by the CM/ECF system.

Signed:



---

Cheryl A. Leanza  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5300  
Washington, DC 20006  
Telephone: (202) 785-0600  
Facsimile: (202) 785-1234  
Cheryl.Leanza@bbklaw.com