Third Circuit Once Again Sends Broadcast Ownership Rules Back to the FCC

By Emmy Parsons

As Yogi Berra once said, "it's déjà vu all over again." For the fourth time in 15 years, the U.S. Court of Appeals for the Third Circuit has remanded the broadcast ownership rules back to the Federal Communications Commission ("FCC" or "Commission"), finding that the FCC failed in its latest review of the rules to adequately address the impact of rule changes on minority and female ownership of broadcast stations. Prometheus Radio Project v. Federal Communications Commission. So how did we get here and what comes next?

Section § 202(h) of the Telecommunications Act of 1996 requires the FCC to regularly review its broadcast ownership rules. *See* Telecommunications Act, Pub L. No. 104-104, 110 Stat. 56, § 202(h) (1996). During these reviews the Commission is to "determine whether any of such rules are necessary in the public interest as the result of competition" and "repeal or modify any regulation it determines to be no longer in the public interest." Since Congress enacted the law, the FCC has reviewed the ownership rules in a series of rulemaking proceedings known as the "Quadrennial Regulatory Reviews." Each time the FCC has modified its ownership rules during these reviews, however, the same panel of Third Circuit judges has largely rejected the actions and remanded the rules back to the FCC for further consideration.

The Court's new ruling, rendered on September 23, 2019, which will be known as "*Prometheus IV*," throws out changes adopted by the FCC in November 2017 and August 2018. Under the leadership of FCC Chairman Ajit Pai, the *2017 Order on Reconsideration and Notice of Proposed Rulemaking* (2017 Order) eliminated the 1975 ban on newspaper/broadcast and television/radio common ownership in the same market, rescinded the "eight voices" test for television ownership, retained the prohibition on mergers between two of the top four stations in a given market (the "top-four" rule) but adopted a discretionary waiver provision, adopted a presumptive waiver for radio transactions in embedded markets, eliminated the attribution rule for television joint sales agreements, retained the disclosure requirement for shared service agreements involving commercial television stations, and announced plans to adopt an incubator program. In August 2018, the FCC then adopted a Report and Order establishing a radio incubator program.

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Broadly speaking, the FCC, in its now-rejected 2017 Order, said that it was "tak[ing] concrete steps to update its broadcast ownership rules to reflect reality" to give broadcasters and local

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newspapers "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." And, in an attempt to address previous concerns from the Third Circuit about diverse ownership, the FCC said that available evidence suggested the rule changes were unlikely to harm minority and female ownership of broadcast stations.

In its decision, the Third Circuit ignored the FCC's detailed analysis of the tremendous competitive changes in the media marketplace, which the FCC had used to justify relaxing the broadcast-specific ownership rules. Instead, the court said that the goal of § 202(h) is not limited to promoting competition, but rather, requires the FCC to review the ownership rules under a broad "public interest" standard "in light of ongoing competitive developments within the industry." And while it acknowledged that "[t]he Commission might be well within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity," the court said that the FCC must first engage in "a meaningful evaluation of that effect and then explain[] why it believed the trade-off was justified for other policy reasons." On this front, the Third Circuit found the FCC's Order wholly inadequate.

While the court did agree with a few of the FCC's determinations, including its decision to retain the top-four rule and its definition of "comparable markets" for purposes of compliance with the 2018 Incubator Order, the court remanded both orders in their entirety for failure to properly consider ownership diversity. The court scolded the Commission for failing to cite evidence regarding gender diversity, for comparing data regarding minority ownership from two data sets based on different methodology in what it said was "plainly an exercise in comparing apples to oranges," for failing to study whether the percentage of broadcast stations owned by minorities increased or decreased across the years, and for failing to analyze how many minority-owned stations would have existed but for the FCC's deregulatory decisions in the 1990s.

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The court said that the FCC's decision "rested on faulty and insubstantial data" and failed to "adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities." Where the Commission analyzed ownership diversity, the court said was "so insubstantial that we cannot say it provides a reliable foundation for the Commission's conclusions."

As a result, the court vacated the entire 2017 Order and the 2018 Incubator Order, as well as a definition for "eligible entities" meant to encourage ownership diversity adopted by the FCC in 2016. The court then directed the FCC to "ascertain on record evidence the likely effect of any rule changes it proposes ... whether through new empirical research or an in-depth theoretical analysis." While the Court said it would not "prejudge" the outcome of any future review, it

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cautioned that the FCC "must provide a substantial basis and justification for its actions whatever it ultimately decides."

So where do we go from here? The Third Circuit, anticipating future litigation on these issues, again retained jurisdiction. Shortly after the decision was released, however, Chairman Pai issued a statement signaling that the FCC "intend[s] to seek further review of [the] decision" and that he is "optimistic" the FCC will succeed on appeal. The FCC has not yet indicated whether it intends to seek an *en banc* review of the panel's decision or whether it will appeal the decision directly to the Supreme Court. In the meantime, it remains to be seen what will happen to transactions pending before the FCC and what will happen to the ownership rules currently under review as part of the 2018 Quadrennial Review.

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