

Third Circuit Sends Newspaper/Broadcast Cross-Ownership Rule Back to FCC; Upholds Other Media Ownership Rules

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On July 7, 2011, the United States Court of Appeals for the Third Circuit issued its opinion in *Prometheus Radio Project v. FCC* (*Prometheus II*), which is the latest in a series of cases challenging decisions of the Federal Communications Commission (FCC) in periodic reviews of its media ownership rules pursuant to Section 202(h) of the Telecommunications Act of 1996. In its decision, the Third Circuit vacated the modestly deregulatory changes that the Commission had made to the newspaper/broadcast cross-ownership (NBCO) rule in its *2008 Media Ownership Order* and upheld the FCC's retention of the remainder of its media ownership rules. In addition, the court vacated and remanded portions of the FCC's related *2008 Diversity Order*, finding that the Commission failed to provide a reasoned analysis supporting its definition of so-called "eligible entities," a definition that is relevant to several rules designed to promote broadcast ownership by women and minorities. The Third Circuit directed the FCC to consider the remanded issues within the context of its 2010 Quadrennial Review and indicated that the *Prometheus II* panel would retain jurisdiction over those issues.

Prometheus II has its origins in the FCC's 2002 media ownership proceeding, in which the Commission adopted a number of deregulatory changes to its media ownership rules. In *Prometheus I*, however, the Third Circuit remanded many of the new rules to the FCC, finding that the Commission had failed to adequately justify its deregulatory decisions. In the *2008 Media Ownership Order* under review in *Prometheus II*, which concluded the agency's 2006 Quadrennial Review, the FCC responded to the Third Circuit's remand,

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in many instances reversing course and reinstating rules as they had existed before the 2002 proceeding.

Prometheus II rejected calls by the media industry to declare the individual restrictions on media ownership insufficiently deregulatory to satisfy Section 202(h) or the Administrative Procedure Act (APA). In addition, the court once again rejected constitutional challenges to the media ownership rules, refusing to revisit the so-called "scarcity rationale" that has historically been relied upon to justify subjecting broadcast regulation to a lower level of First Amendment scrutiny. Indeed, the court stated that the scarcity rationale may have even more force today than it did in 1975, despite the dramatic technological and marketplace changes that have occurred over the several decades since its inception. Relying almost entirely on a 1978 Supreme Court decision that upheld the NBCO rule against constitutional challenge following its initial adoption, the Third Circuit held that all of the media ownership rules today still constitute "reasonable means of promoting" the government's "substantial" interests in competition and viewpoint diversity. The court also rejected arguments that the NBCO rule unfairly singles out newspapers for differential treatment in violation of the Fifth Amendment's equal protection clause, again relying on the same 1978 Supreme Court ruling.

The Commission will now have to determine how to address the Third Circuit's *Prometheus II* decision in the context of its pending 2010 Quadrennial Review, in which we expect a Notice of Proposed Rulemaking (NPRM) to be issued in the near future. In addition, parties to the case may elect to request rehearing or rehearing *en banc* by the Third Circuit, and/or to petition for a *writ of certiorari* before the Supreme Court of the United States.

*District of Columbia Bar pending. Supervised by principals of the firm.