

# Federal Appeals Court Sends FCC Back to the Drawing Board on Media Ownership

September 24, 2019

On Monday, September 23, 2019, a panel of the U.S. Court of Appeals for the Third Circuit issued an order vacating the Federal Communications Commission's (FCC or Commission) 2017 Media Ownership Order on Reconsideration and 2018 Incubator Order in their entirety and vacating the revenue-based definition of an "eligible entity" in the FCC's 2016 Media Ownership Order. The 2-1 decision was authored by Judge Thomas Ambro, who was joined by Judge Julio Fuentes. Judge Anthony Scirica issued a separate opinion concurring in part and dissenting in part.

Today's decision is just the latest in a long history of litigation before the same panel of the same Circuit concerning the FCC's media ownership rules. Section 202(h) of the 1996 Telecom Act directs the FCC to conduct a periodic review of its broadcast ownership rules to determine "whether any of such rules are necessary in the public interest as a result of competition" and to repeal or modify any regulations it determines do not meet this standard. Although the U.S. Court of Appeals for the D.C. Circuit heard the challenge to the FCC's first periodic review, the same panel of the U.S. Court of Appeals for the Third Circuit has heard every challenge since, beginning with a challenge to the FCC's 2003 Order (which concluded the 2002 biennial review).

The panel decision generally did not address the justifications provided by the FCC for its deregulatory actions in the 2017 Media Ownership Reconsideration Order. Rather, the panel took the Commission to task for what it deemed a failure to "adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities." Although the Commission argued that it based its decision on a comparison of

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National Telecommunications and Information Administration (NTIA) data on minority ownership from the late 1990's with more recent data collected by the FCC, the panel found that the Commission's analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class." The panel determined that because the data sets were created using different methodologies, the FCC's efforts amounted to "an exercise in comparing apples to oranges." The panel also criticized the FCC for failing to cite any evidence at all regarding the effect of its rule changes on female ownership.

Although the panel concluded that the Commission's failure to properly analyze the effect of its rule changes on minority and female ownership undermined the rule changes themselves, the panel nevertheless recognized that "promoting ownership diversity is but one of the policy goals the FCC must consider." Accordingly, the panel noted 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 diversity) if it gave a meaningful evaluation of that effect and then explained why it believed the trade-off was justified for other policy reasons. But it has not done so."

The panel did reject three other challenges to the FCC orders under review. First, the panel found that the Commission's decision to retain the "top four" restriction, which prohibits mergers among two or more of the four largest television stations in the market, was a reasonable act of line drawing. Second, the panel found that the FCC's definition of "comparable markets" for its radio incubator program was a reasonable exercise of discretion. Finally, the panel concluded that the Commission has not unreasonably delayed action to extend its cable procurement rules, which encourage cable companies to do business with minority- and female-owned businesses, to broadcast media.

Nevertheless, because the Third Circuit decision overturned the 2017 Media Ownership Reconsideration Order in its entirety, absent a successful further legal challenge it will result in a reinstatement of the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the eight-voices test for local television ownership. The decision also does away with the presumptive waiver standard for certain so-called "embedded markets" under the local radio ownership rule and reinstates the FCC's rule requiring attribution for television joint sales agreements (JSAs) (subject to a Congressional waiver for existing JSAs through 2025). The Third Circuit decision also eliminates the FCC's incubator program to facilitate the entry of new and diverse voices in the broadcast industry.

Not surprisingly, the panel, recognizing that "further litigation is, at this point, sadly foreseeable," retained jurisdiction over the remanded issues.

In a statement, FCC Chairman Ajit Pai announced his intention to seek further review of the panel decision, a sentiment that Commissioners O'Rielly and Carr echoed in separate statements. Commissioners Rosenworcel and Starks, on the other hand, issued statements applauding the Third Circuit's decision. Meanwhile, the Commission is in the process of conducting its 2018 Quadrennial Review.

We will continue to monitor further developments in this proceeding.

If you have questions about the panel's decision or the FCC's media ownership rules, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.