

ALERT

Third Circuit Vacates Joint Sales Agreement Attribution Rule, Expresses Displeasure Regarding FCC Delay in Concluding Quadrennial Reviews, and Orders Mediation Regarding an Eligible Entity Definition

May 26, 2016

In what will no doubt become quickly known as *Prometheus III*, the U.S. Court of Appeals for the Third Circuit has issued its opinion reviewing the latest of the Federal Communications Commission's (FCC) decisions (or lack of decisions) in the Quadrennial Review of its media ownership rules pursuant to Section 202(h) of the Telecommunications Act of 1996. At issue was the FCC's 2014 determination that, although it lacked sufficient information to conclude the 2010 review, it had a sufficient record on which to effectively expand the local television ownership rule by treating certain television joint sales agreements (JSAs) as "attributable interests" akin to ownership.

Section 202(h) imposes an obligation upon the FCC to review its media ownership rules every four years, to determine whether those rules remain necessary in the public interest, and to repeal or modify any rule that does not meet that standard. Since 1998 (the first review following adoption of the media ownership review mandate in 1996), the FCC's periodic review decisions have been the subject of requests for judicial review and remands. As it now stands, the FCC has yet to complete any such review to a reviewing court's full satisfaction. In the most recent litigation, media company petitioners challenged the FCC's decision to attribute television JSAs and its failure to complete the 2010 quadrennial review in a timely fashion, while citizens' groups faulted the FCC for its refusal to adopt an appropriate definition of

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“eligible entity” for purposes of rules designed to increase minority and female ownership. In essence, the FCC was faced with challenges from both sides, and the Third Circuit, at least in part, sided with the challengers on each issue.

JSA Attribution

In its 2014 order, the FCC had determined that television JSAs should be treated as attributable interests under the local television ownership rule and other media ownership rules, reasoning that they confer the brokering station with sufficient control over the brokered station to justify such treatment. The FCC “dismissed as irrelevant” the evidence of the public interest benefits of television JSAs, but inconsistently determined that it lacked a sufficient record upon which to conclude that the local television ownership rule remained necessary in the public interest. The Third Circuit rejected this approach, finding that the Commission “put the cart before the horse” by impermissibly “expand[ing] its attribution policies for an ownership rule to which § 202(h) applies” without, “within the previous four years, fulfill[ing] its obligation to review that rule and determine whether it is in the public interest.” As a result, the Third Circuit found the FCC’s approach to be “procedurally invalid,” vacated the JSA attribution rule, and remanded it to the FCC.

At the same time, the Court noted that the FCC might be able to justify the existing ownership rules to which the JSA attribution rule applies (including the local television ownership rule), stating that “nothing in [its] opinion would prevent [the FCC] from readopting the JSA rule” as part of a proper quadrennial review. Of course, as the Court recognized, the JSA rule, if readopted, would be subject to judicial review and challenge, particularly because the Court declined to reach the media company petitioners’ arguments that the rule itself was arbitrary and capricious in violation of the Administrative Procedure Act. Whether the FCC will seek to readopt a JSA attribution rule, and whether any such rule will be upheld by a reviewing court, remains to be seen.

Failure to Complete the 2010 Quadrennial Review

The Third Circuit similarly faulted the FCC for its failure to timely complete the 2010 (and, by implication, now the 2014) quadrennial review. Indeed, the Court recognized the “unmistakably mandatory language” of the quadrennial review statute, which “provides that the Commission ‘shall’ review its rules on broadcast ownership every four years, ‘shall determine whether any of such rules are necessary in the public interest as the result of competition,’ and ‘shall repeal or modify any regulation that it determines to be no longer in the public interest.’” As the Court noted, “[t]his repeated use of ‘shall’ creates ‘an obligation impervious . . . to discretion.’”

The Court determined that, despite this unambiguous and mandatory congressional command, the FCC had yet to complete a quadrennial review since the 2006 cycle, and noted that even that review was untimely because an order was not adopted until December 2007 and not released until February 2008. Since then, the last review decision was issued “more than eight years” ago, “enough for two review cycles” to “have passed without any final action.” And the consequences of this delay, as the Court acknowledged, are real. To provide but one example, the Third Circuit pointed to the newspaper/broadcast cross-ownership rule, which

remains on the books even though the FCC determined in its 2002 review—more than *a decade ago*—that it was no longer in the public interest and the Third Circuit upheld that finding.

Although the Court expressed dissatisfaction with the FCC's delay in concluding its quadrennial reviews, it was unwilling to vacate the media ownership rules or order resolution on a specific timetable as a consequence of the agency's tardiness. Regardless, the Third Circuit made clear that its decision not to order specific relief "should not be confused with a green light for further agency delay." Instead, the Court noted FCC counsel's assurance at oral argument that an order resolving both the 2010 and 2014 quadrennial reviews would be circulated to the Commissioners by June 30, with the expectation that it would be finalized and adopted by the end of the year. The Third Circuit expressed its anticipation that the FCC would meet this deadline, and cautioned that a failure to do so would be at the agency's "own risk," with "[n]ew litigation," in which "the outcome may well be different" likely to ensue. Judge Scirica dissented from this portion of the Court's opinion, and would have compelled the FCC to take action to resolve the outstanding 2010 quadrennial review.

Eligible Entity Definition for Minority and Female Ownership

The citizen petitioners challenged the FCC's failure, despite two Third Circuit remands, to adopt a definition of "eligible entities" entitled to preferences as a means to increase minority and female ownership of broadcast stations. The Court found unpersuasive the agency's explanations for its failure to adopt an appropriate standard—primarily the need to amass additional data—and found that the FCC had unreasonably delayed resolution of this issue. Further, although recognizing the commitment to circulate an order by June 30, 2016 and the expectation that a full vote of the Commissioners would occur by the end of the year, the Third Circuit found this insufficient to guarantee timely agency action. Accordingly, the Court remanded the eligible entity definition to the FCC and ordered the agency "to act promptly" to adopt a new definition. Recognizing the complexity of what "prompt" resolution should mean in this context, the Third Circuit further ordered mediation between the citizen petitioners and the FCC regarding an appropriate timetable for resolution, and cautioned that if mediation is not successful within 60 days, the Court will dictate a schedule.

What Happens Next

A few things are clear. First, the JSA attribution rule has been vacated, which means that, as of May 25, 2016, the FCC should no longer consider television JSAs to be attributable. But how the FCC will interpret this ruling and its interplay with the Congressional grandfathering of JSAs through 2025 remain to be seen. Second, the FCC is free to re-adopt the JSA attribution rule as part of its next quadrennial review, on the condition that the reasoning behind the rule will be subject to judicial review again assuming that any party seeks to challenge it. And finally, the Third Circuit is clearly troubled by the FCC's continued failure to resolve quadrennial review proceedings. Even though this upset may stem largely from frustration regarding the agency's failure to resolve issues related to improving minority and female ownership, its impact should be felt beyond those specific issues, which may encourage more timely FCC resolution in the future.