

ALERT

U.S. Supreme Court Rules for FCC and Broadcasters in Media Ownership Case

April 2, 2021

On Thursday, April 1, 2021, the U.S. Supreme Court unanimously reversed a decision of the U.S. Court of Appeals for the Third Circuit that vacated deregulatory changes to the Federal Communications Commission's (FCC) media ownership rules made in 2017. In a decision authored by Justice Kavanaugh, the Court held that the FCC reasonably determined to eliminate the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule and to relax the local television ownership rule. Accordingly, the Court reversed the Third Circuit's decision.

What Does the Supreme Court's Decision Do?

The practical impact of the Court's decision will be to cause the reinstatement of the FCC's 2017 decision to eliminate the cross-ownership rules and the local television ownership rule's "eight voices" test and to replace a flat ban on owning two top-4 television stations with a case-by-case review. In addition, the television joint sales agreement attribution rule will be eliminated. When the Third Circuit ruled against the FCC in 2019, the FCC issued an order amending its rules to implement the court's decision, and we would expect the FCC to do the same here.

We note that the Court's decision does not directly impact the 39% national television ownership cap or the local radio subcaps for AM and FM ownership.

Background

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the Court's decision is the latest in a long litigation saga concerning the FCC's media ownership rules. Those rules, which the Court recognized were "adopted . . . in an early-cable and pre-Internet age when media sources were more limited," are subject to review by the FCC every four years under Section 202(h) of the 1996 Telecom Act. As the Court explained, in order "[t]o ensure that the FCC's ownership rules do not remain in place simply through inertia, Section 202(h) . . . directs the FCC to review its ownership rules every four years to determine whether those rules remain "necessary in the public interest as the result of competition." The FCC "shall repeal or modify" any rules that it determines are "no longer in the public interest." Section 202(h) thus "establishes an iterative process that requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace."

Notwithstanding "technological advances [that] challenged the traditional dominance of daily print newspapers, local radio stations, and local television stations," the FCC's media ownership rules remained largely intact due to successive decisions of the Third Circuit. Beginning in 2003, the same divided panel of the Third Circuit repeatedly struck down FCC attempts to provide regulatory relief to broadcasters and newspaper publishers, with the most recent decisions based on a view that the FCC needed to do more to establish that deregulatory rule changes would not harm minority and female ownership diversity. That same panel purported to retain jurisdiction over FCC remands and any follow-on appellate challenges.

The parties thus found themselves again before the Third Circuit after the FCC decided in 2017 to eliminate the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule and to relax the local television ownership rule. In reaching that result, the FCC found that the rules at issue no longer serve the FCC's public interest goals of competition, localism, and viewpoint diversity, and that altering those rules was not likely to harm minority and female ownership diversity based on available data and a lack of countervailing evidence. However, the Third Circuit wanted more from the FCC and directed the agency to "ascertain on record evidence" the impact that any rule changes would have on minority and female ownership, "whether through new empirical research or an in-depth theoretical analysis."

The Supreme Court's Decision

The FCC, along with broadcast and newspaper industry parties, sought Supreme Court review of the Third Circuit's decision. In its April 1 decision, the Court held that "[i]n analyzing whether to repeal or modify its existing ownership rules, the FCC considered the record evidence and reasonably concluded that the three ownership rules at issue were no longer necessary to serve the agency's public interest goals of competition, localism, and viewpoint diversity, and that the rule changes were not likely to harm minority and female ownership." the Court soundly rejected arguments that the agency needed to go to greater lengths to support its determination regarding minority and female ownership diversity, confirming that there is nothing in the APA, Section 202(h), or any other statute that "requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h)" to repeal or modify rules found to be no longer in the public interest. Accordingly, the Court upheld the FCC's determination that "the historical justifications," for the rules at issue, "no longer apply in today's media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers," and was not likely to harm minority and female ownership.

The Third Circuit also vacated the FCC's separate 2018 order that established an incubator program under the local radio ownership rule, as well as the definition of "eligible entity" that related to other initiatives that the FCC adopted in order to increase broadcast ownership opportunities for minorities and women. Because the Third Circuit vacated those FCC actions based solely on the same grounds it relied on to vacate the changes to the other ownership rules, the Court reversed the Third Circuit's judgment as to those aspects of the media ownership rules as well. Although not expressly mentioned in the Court's decision, the same reasoning applies to the television joint sales agreement attribution rule and the changes the FCC made to the local radio ownership rule's embedded markets policy.

Justice Thomas concurred in the judgment and, in a separate opinion, noted "another, independent reason why reversal is warranted: The Third Circuit improperly imposed nonstatutory procedural requirements on the FCC by forcing it to consider ownership diversity in the first place." As Justice Thomas recognized, "[n]othing in [Section] 202(h) . . . directs the FCC to consider rates of minority and female ownership," and it was improper for the Third Circuit to impose a "'judge-made procedur[e]" on the agency. In Justice Thomas' view, "once the FCC determined that none of its policy objectives for ownership rules—viewpoint diversity, competition, and localism—justified retaining its rules, the FCC was free to modify or repeal them without considering ownership diversity."

What's Next at the FCC?

Meanwhile, the FCC, now under the leadership of Acting Chairwoman Jessica Rosenworcel, and as yet without a 3-2 Democratic majority, is still considering the fate of the media ownership rules in the 2018 Section 202(h) quadrennial review. The full impact of the Court's decision on that review remains to be seen.

Although the 2018 review may well give rise to litigation, such challenges will not automatically go to the same Third Circuit panel that has decided Section 202(h) cases for the last 17 years. The Court did not remand any issues to the Third Circuit (or direct a remand of any issues to the FCC), so there is nothing over which the Third Circuit panel can have retained jurisdiction.

Wiley attorneys Eve Reed and Jeremy Broggi represented Nexstar in the Third Circuit and Supreme Court litigation. Should you have any questions, please contact one of the authors listed on this alert.