

Court Tells FCC to Give More Consideration to Newspaper-Broadcast Cross Ownership Rules and to Policies to Promote Broadcast Ownership By Minorities

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The **Third Circuit Court of Appeals** has once again questioned the FCC's determinations on broadcast ownership issues. In a decision just published, ***Prometheus Radio Project v FCC***, the Court reviewed the FCC's 2007 actions **relaxing the newspaper-broadcast cross-ownership rules** and adopting policies to **increase diversity in broadcast ownership**. These FCC decisions had followed a prior decision of the Third Circuit determining that the **FCC's 2003 Ownership Order**, relaxing many FCC ownership rules, was not adequately justified. The FCC's subsequent actions on cross ownership were set out in its 2007 order, relaxed the newspaper broadcast cross ownership rules in larger markets through a policy based on certain presumptions that, when met, justified the common ownership of newspapers and radio and television stations in larger markets (and, in some cases, in smaller markets too)(see our summary of this order [here](#) and [here](#)). The diversity order, released in 2008 (summarized [here](#) and [here](#)), adopted a number of rules and policies meant to encourage diversity in media ownership. In this new decision, the Court found that both the decision as to the newspaper cross ownership rules and the one dealing with diversity policies were wanting, and sent these matters back to the FCC for further consideration. At the same time, the Court upheld the FCC's decisions not to change the local television ownership rules (allowing common ownership of 2 TV stations only when there are at least 8 independently owned stations in a market, and where the combined stations are not both among the Top 4 in their markets) and to retain the sub-caps for radio ownership (the rules that allow one entity to own up to 8 stations in a single market, as long as there are no more than 5 in any single service, i.e. AM or FM).

The discussion of the newspaper-broadcast cross-ownership rules was entirely procedural. While certain public interest groups had argued that the 2007 revision to the cross ownership rules allowed too many broadcast-newspaper combinations, a number of media companies argued that it allowed too few. The Court didn't address either contention, instead focusing on the process by which the FCC adopted the rules. When the Court addressed the 2003 rule changes, it sent that decision back to the Commission questioning the basis for the "diversity index" that the FCC had adopted to measure when transactions resulted in too much concentration in a market, and specifically instructed the FCC to give the public notice and an opportunity to comment on the specifics of any new proposal that was adopted. The Court felt that there were too many obvious flaws in the diversity index which could have been discovered if the public had been given a chance to review its details before it was adopted. In asking for comments following the Court's remand, the recent decision concluded that the FCC had given the public only a cursory description of the issues that it would consider on remand with respect to the cross-ownership issue when the FCC issued its request for public comment. The substance of the Commission's policies which were adopted, setting out presumptions in favor of cross-ownership in larger markets and against it in smaller markets, was not suggested in the request for public comment, but instead was first floated in a newspaper Op-Ed by then FCC Chair Kevin Martin. While the FCC asked for comment on that proposal, parties were given less than a month to file comments, and a draft decision embodying the proposal was already circulating at the FCC before the comment period had even ended. This process prompted much outcry at the contentious FCC meeting at which these rules were adopted (see our summary [here](#)). The

Court looked at this process, and determined that the public had not been given an adequate opportunity to address the specifics of the FCC proposal, and had given the appearance of having pre-judged the outcome of the case. Thus, this week's decision sent the FCC's 2007 order back to the FCC to seek more public comment, and to develop rules based on those comments.

In the interim, the FCC rules that were in effect prior to the decision will govern newspaper-broadcast cross ownership issues. Those rules effectively forbid most combinations. The FCC has been extending existing combinations that sought waivers while this proceeding ran its course, and has not been flooded with new requests for combinations given the economics of the newspaper (and broadcast) business in recent years. So effectively little will change while the FCC further considers this matter. As some have observed before, the cross ownership rule may well outlive the newspaper.

On the diversity issue, the Court focused on substance - specifically the FCC's decision to base qualifications for a number of diversity preferences on an applicant being a **Qualified Small Business** under the rules of the Small Business Administration. The Court felt that the FCC's objectives should have focused more on increasing diversity by adding women and minorities to the ownership of broadcast stations, not on small businesses. The evidence presented to the Court indicated that minority ownership of small businesses was not significantly higher than current minority ownership of broadcast stations, so relying on the small business definition would not appreciably increase minority ownership. The FCC had not used racial and gender classifications, or those dealing with "**socially and economically disadvantaged businesses**" ("**SDBs**"), as the Commission felt that there were no constitutionally acceptable basis for determining who would qualify for such preferences. One of the problems, as the Court stated several times, was that the FCC did not have data on the race and gender of broadcast owners to determine if there was a basis for adopting a preference based on those factors. To pass constitutional muster, a racial preference has to remedy some past discrimination, and the FCC has to know if there is in fact evidence of discrimination in broadcast ownership to even attempt to meet that test. The new Ownership Reports, as we reported when they were first adopted, are designed to remedy that lack of information. Because the rules adopted did not result in the goals that the FCC announced - the increase in the diversity of ownership of the broadcast media - the Court determined that the FCC had to further consider these policies.

Both of these issues are headed back to the FCC for further consideration. How will this consideration take place? It will be consolidated into the FCC's current quadrennial review of the ownership rules. We wrote about the questions that the FCC asked in initiating the proceeding here, and we are waiting for the Commission to come out with some more specific proposals for new rules in a Notice of Proposed Rulemaking. With the guidance from the Court as to the specificity that it deems necessary in any such NPRM, and with the recent announcement that certain academic studies on ownership issues are available for review, that NPRM will no doubt begin to take shape over the next few months. So, maybe one day (our guess would be late in 2012), the Commission will reach a decision in its 2010 quadrennial review which answers these questions left over from the 2003 Order (though even then, any order will likely not be final). Ownership arguments are ones that never seem to be completely resolved, so look for us to be writing about these issues far into the future.

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