



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

FCC and DOJ File Petition Requesting that Full Third Circuit Consider and Reverse Court's Quadrennial Review Decision

As expected, the FCC and the United States Department of Justice this morning filed a formal [petition](#) (the “Petition”) with the Third Circuit Court of Appeals requesting that the Court’s full complement of judges consider and reverse the [opinion](#) released in September (the “September Opinion”), in which a three-judge panel—by a 2-to-1 vote—vacated and remanded back to the FCC certain of the Commission’s Orders that sought to deregulate local media ownership, including the agency’s 2017 [Order on Reconsideration](#).

Broadcasters will recall that, among other things, the September Opinion vacated the Commission’s 2017 Recon Order, which had eliminated (1) the newspaper/broadcast cross-ownership rule; (2) the radio/television cross-ownership rule; and (3) the “Eight-Voices” component of the local television ownership rule. In the September Opinion, two judges on the three-judge panel found that the FCC failed to adequately consider the effect that the agency’s actions and resulting rules would have on ownership of broadcast media by women and racial minorities—without ruling definitively on the merits of the Commission’s deregulatory action on those rules. Specifically, the September Opinion criticized the FCC’s analysis of the effect its rule changes would have on ownership of broadcast media by women and racial minorities, calling the agency’s analysis “so insubstantial that [the Court] cannot say it provides a reliable foundation for the Commission’s conclusions.” In light of that failure, the September Opinion found the FCC’s actions “arbitrary and capricious”—which is the legal standard by which agency action is measured—and therefore impermissible.

Today’s Petition’s asks that all judges on the Third Circuit rehear the case (called an “*en banc*” hearing) and argues that the September Opinion’s holdings were in error and have prevented the Commission from fulfilling its responsibilities under the Telecommunications Act of 1996; the Act requires the Commission to review its media ownership rules every four years and to repeal

those rules that it determines are no longer necessary in the public interest. (The Third Circuit has overseen legal challenges to the FCC’s Quadrennial Review actions since the early 2000s.)

According to the Petition, among other things, the September Opinion (1) imposes obligations on the FCC’s decision-making process that go beyond those required by the terms of the relevant federal statutes, and (2) provides insufficient guidance as to how the FCC can satisfy those obligations. In particular, the Petition faults the September Opinion for requiring the FCC to generate its own data or theoretical analysis to justify its actions, rather than permitting the Commission to rely on the data presented in the record in the Quadrennial Review proceeding to make predictive rulemaking judgments. Ultimately, the Petition implores the full Third Circuit Court of Appeals to recognize that “[a]fter fifteen years, it is time for th[e] Court, sitting *en banc*, to take a fresh look at the legal and factual predicates underlying this series of cases, accord the FCC the deference it is due . . . , and restore the agency to its proper role as the congressionally-empowered overseer of media ownership regulation.”

As of this writing, it’s unclear when the Third Circuit will act. The Court may request a response to the Petition from the parties that challenged the FCC Orders at issue. Or, it could deny the Petition outright. Ultimately, the active, qualified Third Circuit judges will have to decide whether to grant the Petition and to rehear the case.

Soon after the Petition was filed, the National Association of Broadcasters and other industry members weighed in, filing their own petition with the Court (the “Industry Petition”). Aside from advancing variations on several of the arguments presented in the FCC’s Petition, the Industry Petition further emphasized the importance of allowing the Commission to modernize many of the decades-old rules at issue in the case. According to the Industry Petition, the September Opinion “has frozen in place an obsolete regulatory regime, and the Court should grant rehearing to enable crucial reform.”

We will keep you apprised as the case continues to develop.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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