Virginia Association of Broadcasters
Legal Review

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

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Legal Memorandum

FCC and NAB Seek U.S. Supreme Court Review of Third Circuit's Ownership Decision

Last week, in separate filings, the FCC and the National Association of Broadcasters asked the United States Supreme Court to review the fall 2019 decision of the Third Circuit Court of Appeals rejecting the Commission's 2017 effort to modernize its local media ownership rules.

You'll recall that, in November 2017, the Commission adopted an Order on Reconsideration that modernized a number of local media ownership rules, finding them no longer justified in light of competitive conditions in the rapidly-changing media marketplace. In particular, the 2017 Order repealed or modified the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, the Local Television Ownership Rule (including the "eight voices" test and the prohibition on top-four combinations), the Local Radio Ownership Rule, and the Television Joint Sales Agreement Attribution Rule.

In September 2019, a divided three-judge panel of the Third Circuit Court of Appeals—the same panel that has overseen challenges to the Commission's efforts to modernize the local media ownership rules for more than 15 years—vacated the Commission's rule changes in their entirety. The panel majority found no fault with the FCC's analysis of competitive marketplace conditions, but it concluded that the Commission had failed to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." Judge Scirica dissented from the panel's decision, reasoning that the Commission is not required "to quantify the future effects of its new rules as a prerequisite to regulatory action."

In November, the appeals court denied a request for *en banc* rehearing of the case before the full Third Circuit.

Since the Third Circuit's decision took effect in November 2019, the pre- 2017 local media ownership rules have been back in effect. The means that the Newspaper/Broadcast Cross-

Ownership Rule is now in play, the Local Television Ownership Rule test for a permissible television duopoly includes both the "Top 4" prohibition and the "8 voices" test, and certain television Joint Sales Agreements are "attributable," subject to specified grandfathering relief.

Industry stakeholders have watched for the last several months as both the Commission and the National Association of Broadcasters filed requests in February and March for additional time within which to ask the U.S. Supreme Court to review the Third Circuit's decision. In a pair of orders granted in March, the Court set an April 18, 2020 deadline for filing cert petitions in the case (meaning, effectively, that petitions were due no later than Monday, April 20th).

The wait has come to an end. On Friday, April 17, both the Commission (via the Office of the Solicitor General) and the NAB (joined by various industry participants) filed separate cert petitions asking the Court to review the Third Circuit panel's September 2019 decision.

Both petitions ask the Supreme Court to intervene in order to correct errors in the Third Circuit's reasoning—errors that, if allowed to stand, could have far-reaching consequences for the broadcast industry.

The petitions preview arguments—which will be made at greater length should the Supreme Court grant review—that the Third Circuit majority's decision is wrong. Both the Commission and NAB petitions emphasize the lack of deference shown by the Third Circuit to the FCC's expertise- and experience-based judgments and the fact that no party—or, indeed, the Third Circuit itself—questioned the Commission's judgments or policy determinations in support of the relaxation or elimination of long-outdated media ownership rules. Both criticize the Third Circuit majority's singular focus on the (non-statutory) effect of the Commission's modified ownership rules on women and minorities.

Both petitions stress the dramatic changes in the media marketplace in recent years, the proliferation of sources of news and information available to consumers, and the critical need for the rules governing local broadcasters to keep pace.

And both petitions acknowledge that a "circuit split"—the most common ground for asking the Supreme Court to agree to review a decision of a federal appellate court—is a practical impossibility, given the Third Circuit's exceptional retention of jurisdiction, since 2004, over all challenges to the FCC local media ownership rules. The Third Circuit has effectively blocked any other federal court from considering the FCC's actions, turning itself into what the NAB petition calls "the national media ownership review board." There can be no circuit split, argue the petitions, when no other federal court of appeals has been given an opportunity to evaluate the Commission's changes to its local ownership rules.

The cert petitions are a first step in what promises to be a long process. It will likely be many weeks if not several months before the Supreme Court even decides whether to review the Third Circuit's decision, and the odds that the Court will grant the petitions are slim: The Court grants review in only approximately one percent of all cases. And even if the petitions are granted, it would be several more months before the parties submit their briefs and the case is argued before the Court (which has already postponed two argument sessions this spring in light of the coronavirus, so the Court's own calendar for the remainder of this Term as well as the fall is

somewhat uncertain). In the meantime, the pre-2017 ownership rules remain in effect, and the media marketplace continues to evolve at a remarkable pace.

We will keep you posted on developments at the Supreme Court in the months ahead.

Tim Nelson, Editor

BROOKS, PIERCE, McLENDON,
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