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Legal Memorandum

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# Supreme Court Will Review Third Circuit Decision Rejecting FCC’s Latest Attempt to Relax Media Ownership Rules

The Supreme Court has [granted](https://www.supremecourt.gov/orders/courtorders/100220zr_7l48.pdf) parallel requests by the FCC and the National Association of Broadcasters to review the Third Circuit’s most recent reversal of the FCC’s repeated attempts to modernize its local media ownership rules. Many industry members supported the request for Supreme Court review, including the Four Network Affiliates Associations, who together filed a joint brief with the Court requesting that it take up the FCC and NAB petitions for review.

*Background*. As you likely recall, in November 2017, the Commission adopted an [Order on Reconsideration](https://docs.fcc.gov/public/attachments/FCC-17-156A1.pdf) 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 In particular, the 2017 Order repealed or modified the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, the Local Television Ownership Rule (including the “eight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.

However, 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.” One of the three judges on the panel dissented from that decision, reasoning that the Commission is not required “to quantify the future effects of its new rules as a prerequisite to regulatory action.”

Earlier this year, both the FCC and NAB filed petitions for certiorari (or “cert petitions,” in legal shorthand) asking the Supreme Court to intervene and 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 now be made at greater length and in greater depth given the Supreme Court’s decision to grant the petitions—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 also highlight 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 petitions criticize the Third Circuit majority’s singular focus on the (non-statutory) effect of the Commission’s modified ownership rules on women and minorities. And 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.

*What the Supreme Court Grant Means Going Forward*. The fact that the Supreme Court granted review is, in and of itself, no small matter: The Court grants review in only approximately one percent of all cases. Now, it will likely be several more months before the parties submit their briefs addressing the merits of the case (rather than merely addressing reasons why the Supreme Court should, or should not, agree to review the Third Circuit decision). The case will then be argued before the Court, most likely early in 2021, and a decision will almost certainly be issued before the end of the Court’s current Term in June of next year. Complicating matters, though, is the uncertain composition of the Court at the time the case will be argued, given Justice Ruth Bader Ginsburg’s recent passing, and the uncertain composition of the FCC’s Commissioners after the November election.

In the meantime, the pre-2017 ownership rules remain in effect; i.e., the Newspaper/Broadcast Cross-Ownership Rule is 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. And changes to those rules in the still-pending 2018 Quadrennial Review proceeding are unlikely; the Commission probably won’t take action on the local ownership rules until the Supreme Court issues its decision.

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# FCC Declines to Terminate Proceeding Seeking to Classify OVDs as MVPDs for Retransmission Consent Purposes

In an important about-face, the Commission’s Consumer and Governmental Affairs Bureau recently issued an [Order](https://docs.fcc.gov/public/attachments/DA-20-1138A1.pdf) declining to terminate an ongoing proceeding in which the Commission is considering whether to treat online video distributors (“OVDs,” also referred to as OTT services or “virtual” multichannel video programming distributors (“MVPDs”)) as MVPDs for purposes of retransmission consent (*In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution* Services, MB Docket No. 14-261). The Order walked back an initial Bureau determination that the docket was a potential candidate for termination as a so-called “dormant” proceeding. The Bureau’s Order based its decision to keep the proceeding alive on comments submitted by the Four Network Affiliates Associations, which identified recent filings in the docket that indicated “ongoing communications with the Commission on the issues raised in the proceeding.”

By way of context, in late 2019, the Commission issued a *Notice of Proposed Rulemaking* raising the question whether OVDs should be considered MVPDs, at least for purposes of retransmission consent. The Four Affiliates Associations filed opening and reply comments in that docket back in 2015, urging the Commission to classify OVDs as MVPDs for retrans purposes, in order to ensure that local broadcasters retained the rights to negotiate the terms and conditions governing distribution of their signals with programming distributors, regardless of the technology a distribution service uses. Taking the contrary position, Google, Netflix, Amazon, and other tech companies have staunchly opposed classifying OTT distributors as MVPDs. The Networks also have voiced opposition to treating OVDs as MVPDs for retrans purposes.

Although the Commission has taken no action in the docket to date, broadcasters have not let the issue lie. Indeed, the arguments for treating OVDs as MVPDs for purposes of retransmission consent have even greater force and urgency today than they did in 2015, as viewers increasingly turn to Internet-based services—and away from traditional MVPD platforms—for access to linear program streams. To underscore the ongoing importance of the issue, the ABC and NBC Affiliates Associations filed comments (in both the 2018 Quadrennial Review docket and the 2014 MVPD/OVD proceeding docket) in May 2019 And in 2020, broadcasters have continued to stress to the Commission the urgency of the issue, particularly as the global coronavirus pandemic has led to significant reductions in advertising revenues. With those declines, the importance of receiving retransmission consent revenues to support the production of valuable local news, weather, information, emergency, and other programming is greater than ever. And, in the absence of Commission action to classify OVDs as MVPDs subject to the retrans regime, the national broadcast networks have asserted authority to negotiate “opt-in” agreements with OTT services that are presented to local affiliates, leaving local stations—both those affiliated with the national networks and independent stations alike—largely unable to negotiate directly with OVD platforms for the retransmission of their signals.

Now that the Bureau’s Order has assured that the OVD docket will remain open, broadcasters can continue their efforts to persuade the Commission to take action on the critical question whether OVD platforms should be subject to the retransmission consent regime. We will continue to monitor the OVD proceeding and notify you of any important developments.

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*Tim Nelson, Editor*

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