

Oral Arguments in Third Circuit Media Ownership Litigation

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On February 24, 2011, the U.S. Court of Appeals for the Third Circuit heard oral arguments in *Prometheus Radio Project v. FCC*, the case challenging the legality of the Federal Communications Commission's (FCC's) 2008 revision of its media ownership rules.

Arguing on behalf of Anti-Deregulatory Petitioners, Andrew J. Schwartzman asserted, in addition to addressing notice issues, that the four factors adopted with respect to waivers of the newspaper/broadcast cross-ownership rule are vague and unenforceable and, thus, must be defined with greater specificity and subject to an enforcement mechanism, such as a complaint process or license revocation proceeding. Specifically, Mr. Schwartzman noted that the FCC has no effective enforcement mechanism to determine whether combined media outlets maintain independent news judgment, and has no recordkeeping or reporting requirement to evaluate whether cross-ownership will increase the amount of local news in affected markets. Corie Wright further argued for Anti-Deregulatory Petitioners that the FCC failed to consider the competitive impacts of the digital television transition in retaining the local television ownership limits, while the court questioned whether it would have been premature for the FCC to address the impact of digital multicasting before the 2010 Quadrennial Review proceeding. Ms. Wright also argued that the FCC failed to consider the impact of its media ownership limits with regard to female and minority ownership.

Arguing first for Deregulatory Petitioners, Virginia Seitz addressed the newspaper/broadcast cross-ownership rule, asserting that the FCC dramatically retreated from the *2002 Order* by imposing a strong negative presumption against cross-ownership in 190 of 210 markets, and that this significant retrenchment without reasonable explanation

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or support in the record, as well as various internal inconsistencies, violates the Administrative Procedure Act (APA). The court asked about the significance of the FCC-commissioned Milyo study, noting that the study found little difference in the partisan slant of cross-owned stations and other major network-affiliated stations in the same market, and also inquired whether elimination of the rule would have an impact on viewpoint diversity and whether a case-by-case approach would be onerous for potential cross-owners.

Elaine Goldenberg addressed the local television rule and the radio/television cross-ownership rule, emphasizing that the FCC returned to the 1999 version of both rules with very minimal record evidence supporting its change in position and without fully considering the competitive impact of changes in the media marketplace. Wiley Rein partner Helgi Walker argued that the court in *Prometheus I* had expressly instructed the FCC on remand to produce additional justification for its decision to retain the specific numerical limits and AM/FM subcaps of the local radio ownership rule or to modify its approach, but the FCC failed to do either in the 2008 Order. Addressing the dual network rule, Wiley Rein partner John Fiorini argued that the Commission failed to sufficiently justify retention of this rule, noting that the agency ignored record evidence of increased competition between 2003 and 2008, and instead retained the rule for the same reasons given in 2003. Mr. Fiorini further asserted that the Commission erred in its consideration of the local television rule as it relates to large markets because it did not discuss whether combinations of more than two stations should be allowed in larger markets, though it had previously allowed triopolies in the 2003 Order.

Finally, Jacob Lewis presented arguments on behalf of the FCC. Mr. Lewis first addressed notice issues, indicating that the notice of proposed changes to the newspaper/broadcast cross-ownership rule was sufficient under the APA to apprise interested parties of the general issues that the agency would be considering with respect to the rule, even though the specific rule proposals were not set forth in the notice. With regard to the newspaper/broadcast cross-ownership rule, Mr. Lewis argued that the Commission proceeded cautiously in loosening the absolute prohibition because the logic underlying the rule—that the owner has the power to "call the shots" and thus can in theory influence the viewpoint even of co-owned properties that operate independently—has not changed since 1975, and the conflicting record evidence did not conclusively prove that ownership can never influence viewpoint. He conceded that the Commission ignored the Milyo study, but argued that it was cumulative of other evidence. Mr. Lewis further contended that it was within the FCC's discretion to implement a case-by-case approach to newspaper/broadcast cross-ownership waivers while providing some presumption-based guidance as to which transactions will be approved, though the court questioned whether the approval process would be onerous for parties and whether the enforcement mechanism would be adequate. The court also questioned whether the FCC sufficiently evaluated the effect of the Internet on viewpoint diversity and spent a considerable portion of the questioning addressing whether the FCC adequately analyzed the effect of the ownership rules on minority and female ownership and whether the court should remand the Diversity Order.

Before arguments commenced, counsel for the FCC updated the court on the status of the 2010 Quadrennial Review of the media ownership rules. Mr. Lewis noted that the FCC had issued a Notice of Inquiry and contracted for 10 or 12 studies on the media marketplace, which are scheduled to be submitted to the Commission during April or early May 2011. The Commission will await taking further steps on a Notice of

Proposed Rulemaking until after the studies have been submitted.