Stolz v. FCC

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822 F.3D 234 (D.C. CIR. 2018)

In *Stolz v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit dismissed as moot in part and denied in part an appeal of the FCC's decision to deny the assignment of a radio broadcast license,[2] a decision that the court hoped would bring a "long-running dispute . . . closer to [its] conclusion . . . ."[3]

I. BACKGROUND

The transfer of ownership of a broadcast TV or radio station depends upon the FCC's approval of the assignment of that station's broadcast license to the station's new owner.[4] Approval requires that the FCC find that the assignment will serve "the public interest, convenience, and necessity[,]"[5] which includes promoting program and viewpoint diversity and "preventing undue concentration of economic power."[6] As such, FCC regulations provide that one entity may own no more than eight commercial stations in a market with 45 or more stations, with no more than five commercial stations operating in the same AM or FM service, or seven commercial stations in markets with 30-44 stations, with no more than four commercial stations operating in the same AM or FM service.[7]

In 2002, the FCC, while retaining its prior numerical limits on station ownership, updated its rules for defining the applicable ownership limits for a single entity in a given market.[8] This change also applied to broadcast license transfers.[9] While the *2002 Order* did not require existing licensees to divest any of their current station ownership interests, it provided that any assignment applications the FCC had not acted on before the *2002 Order's* adoption date would be subject to the new market definitions.[10]

1. 882 F.3d 234 (D.C. Cir. 2018).
2. *See id.* at 238.
3. *Id.* at 236.
4. *Id.* (quoting 47 U.S.C. § 310(d)).
5. *Id.* (quoting 47 U.S.C. § 310(d)).
6. *Id.* (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978)).
7. *Id.* (citing 47 C.F.R. § 73.3555(a)).
8. *Id.* (citing 2002 Biennial Regulatory Review, *Report and Order*, 18 FCC Rcd 13620 (2003) (*2002 Order*)).
9. *Id.*
10. *Id.* at 236-37.

Edward R. Stolz, II, owner of the Royce International Broadcasting Company, held the broadcast license for a radio station in Sacramento, California.[11] In 1996, Stolz signed a letter of intent to sell the station and transfer its license to Entercom.[12] However, relations between the parties fell apart, and the sale and transfer were never completed.[13] After Entercom successfully sought specific performance of the sale in California state court, Stolz was ordered to sign the license transfer application that Entercom would submit to the FCC in November 2002.[14] However, Stolz refused to sign, and instead petitioned the FCC to deny the application.[15] Stolz contended that the FCC's measurement of the Sacramento market was the result of a flawed methodology and that, had an accurate standard been applied, ownership concentration rules would prevent Entercom from acquiring his station.[16]

The FCC's Media Bureau granted Entercom's application in May 2003.[17] However, less than a month later, the FCC adopted the *2002 Order*, which redefined the Sacramento market along the lines that Stolz had previously argued.[18] At the time of the application, Entercom already held the maximum number of broadcast licenses allowed in Sacramento.[19] Thus, had the *2002 Order* been applied, the transfer of Stolz's station's license to Entercom would have been denied.[20]

After being denied reconsideration by the Media Bureau, Stolz sought review from the full FCC which, ten years later, affirmed the Media Bureau's original decision.[21] Although Stolz attempted to argue that the Entercom transfer was unlawful under the District of Columbia Circuit's intervening decision in *Kidd Communications v. FCC* (*Kidd*), the full FCC denied Stolz's petition for reconsideration, concluding that Stolz should have sought to reopen briefing on his original petition in order to bring this argument sooner.[22]

II. ANALYSIS

Stolz's primary argument before the court was that, because Entercom's license transfer application was hovering in administrative limbo within the FCC when the *2002 Order* went into effect, it should have been assessed under the *2002 Order's* new local-market definition.[23] Had this been the case, the application would have been denied for pushing Entercom over

11. *Id*. at 237.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *See id*.
20. *Id*.
21. *See id*. at 237-38.
22. *See id*.
23. *See id*. at 238.

the station ownership limit for the Sacramento market.[24] Conversely, the pre-2002 regulatory scheme would have allowed Entercom to obtain Stolz's station without violating the local-market ownership rule.[25] However, the court concluded that it did not need to determine whether Entercom's license was, in fact, pending, because Entercom terminated operation of one of its preexisting Sacramento FM stations and returned the station's license to the FCC while the present case was unfolding.[26] With only four FM stations and one AM station in the Sacramento market, Entercom was eligible to acquire Stolz's station even under the *2002 Order's* standard.[27] As such, the court dismissed this portion of Stolz's appeal as moot.[28]

Stolz further argued that the D.C. Circuit's decision in *Kidd* rendered the FCC's approval of Entercom's license transfer invalid.[29] In response, the FCC asserted that, because he elected to bring his *Kidd* argument in a petition for reconsideration, instead of through a supplemental filing before the FCC had rendered its decision, Stolz had forfeited his ability to rely on this intervening precedent.[30] However, the court rejected the FCC's argument, concluding that it knew of no FCC rules that permit supplemental filings after the pleading cycle has closed, and that the FCC's procedural regulations failed to provide fair notice to claimants that failure to make such a supplemental filing will forfeit that claim.[31] The court went on to point out that FCC regulations actually make it clear that claimants should use a petition for reconsideration to raise "events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commissioner."[32]

Although the FCC was able to identify some prior decisions indicating that it has, at times, accepted supplemental filings, the true issue before the court was whether Stolz had been given "fair notice that he had to plead for an exercise of discretion under an *unwritten* rule on pain of forfeiting a claim that the *written* rules expressly say could be presented later in a petition for reconsideration."[33] In order for an agency to have a claim-foreclosing procedural requirement like this, "it needs to be explicit about the rule and upfront about consequences of noncompliance."[34] The court further noted that the only reason that Stolz waited ten years to raise his *Kidd* argument in the first place was that the FCC took ten years to decide on Stolz's initial appeal.[35]

24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.* at 239.
31. *See id.*
32. *See id*. (quoting 47 C.F.R. § 1.106(b)(2)).
33. *Id*. (emphasis in original).
34. *Id.*
35. *See id.*

However, despite this procedural victory, the court proceeded to reject Stolz's interpretation of and reliance on *Kidd*.[36] While both *Kidd* and the present case stemmed from a state court order to file a broadcast license assignment application,[37] the D.C. Circuit in *Kidd* found the FCC's decision to approve the application unlawful because the FCC "woodenly granted the assignment application" by virtue of the application being the result of a state court's decision—without ensuring that it furthered the public interest and "notwithstanding that the transfer would enforce the very type of reversionary interest that FCC regulations expressly prohibit."[38] However, the transfer of Stolz's station would not have enforced any sort of prohibited reversionary interest.[39] Similarly, the California state court did not order the FCC to grant the application, but rather ordered Stolz to sign the application in order to comply with his original agreement with Entercom.[40] Thus, unlike *Kidd*, the FCC based its decision to grant Entercom's application entirely on federal law and established FCC policy.[41]

III. CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit dismissed Stolz's appeal in part and denied it in part because his challenge to the FCC's decision to apply its pre-2002 local-market definition to Entercom's broadcast license assignment application was moot, and because his remaining challenge to the FCC's decision under *Kidd* lacked merit.[42]

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36. *See id.*
37. *See id.* (citing *Kidd Communications v. FCC*, 427 F.3d 1, 3 (D.C. Cir. 2005)).
38. *Id.* at 239-40.
39. *See id.* at 240.
40. *See id.*
41. *See id.*
42. *See id.*