Prometheus Radio Project v. FCC (Prometheus IV)

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939 F.3D 567 (3D CIR. 2019)

In *Prometheus Radio Project v. FCC*[1], the United States Court of Appeals for the Third Circuit vacated and remanded the FCC's reconsideration order and incubator order relating to media ownership restrictions as arbitrary and capricious under 5 U.S.C. § 706(2)(A) because the FCC failed to address the orders' impact on station ownership by women and minorities.[2]

I. BACKGROUND

The FCC has always held authority to regulate broadcast media ownership under the Communications Act of 1934.[3] Ownership restrictions imposed under this authority intend to promote competition, diversity, and localism.[4] However, after decades of technological change in the communications field, Congress worried the FCC's broadcast ownership rules might harm competitiveness of entities burdened by them.[5] So, with Section 202(h) of the Telecommunications Act of 1996 as amended, Congress required the FCC to review each of its media ownership rules on a quadrennial[6] basis and repeal those that no longer serve the public interest in light of competitive developments.[7] One of the considerations for public interest review under Section 202(h) is impact on diversity, including broadcast station ownership by women and minorities.[8]

These quadrennial reviews have spawned litigation galore and the relevant history is complex.[9] The same Third Circuit panel in this case[10] partially vacated and remanded the FCC's 2002 Biennial Review reforms for loosening ownership restrictions as arbitrary and capricious in *Prometheus*

1. Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019) [hereinafter *Prometheus IV*].
2. *Id.* at 573.
3. *Id.* at 573-74.
4. *Id.* at 573.
5. *Id.* at 574.
6. The Telecommunications Act of 1996 § 202(h) originally required biannual review but Congress later amended this to quadrennial review by a subsequent law passed in 2004. *Id.*
7. *Id.* at 573-74.
8. *Id.* at 574, 591.
9. *Id.* at 572-77 ("Here we are again.").
10. "This case" refers to Prometheus IV.

I.[11] Then, the same panel again in *Prometheus II* partially vacated and remanded the FCC's 2006 Quadrennial Review ownership reforms and its proposal for promoting broadcast ownership by women and minorities as arbitrary and capricious.[12] Next, in *Prometheus III*, the same panel found that the FCC's twelve-year long delay in defining "eligible entit[y]"[13] for purposes of promoting fledgling broadcast stations by women and minorities was unreasonable.[14]

This case, *Prometheus IV*, involves both the FCC's response to *Prometheus III* and its subsequent reversal of this response after the administration change following the 2016 presidential election.[15] In 2016, under then-Chairman Tom Wheeler, the FCC completed its delayed 2014 Quadrennial Review, retaining broadcaster ownership restrictions and declining to create a broadcast incubator program as suggested by commenters.[16] Industry groups petitioned the FCC for rehearing, and the FCC under Wheeler's successor, Chairman Ajit Pai, granted it, which led to the FCC's reconsideration order on ownership restrictions in 2017 and incubator order establishing a broadcast incubator program in 2018.[17]

The reconsideration order repealed bans on cross-ownership of television stations and newspapers, as well as television stations and radio stations.[18] It partially relaxed the FCC's local TV ownership rules by repealing the "eight voices" rule that banned mergers in markets that would have fewer than eight independently-owned TV stations following a proposed transaction.[19] The reconsideration order also preserved a blanket ban on mergers between two of the top four TV stations in a given market, but amended it to permit discretionary waivers.[20] The incubator order incentivized incumbent broadcasters to train, finance, and provide resources for new market entrants by waiving radio ownership rules for incumbents in "comparable markets," which are radio station markets with a similar number of stations as the market of the new entrant.[21] Eligible entities for this assistance must (1) qualify as small businesses under the Small Business Administration's criteria and (2) be "new entrants," defined as businesses that do not currently own any television stations or more than three radio stations.[22] The FCC believed these rules would boost ownership among women and minorities.[23]

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11. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 373 F.3d 372 (3d. Cir. 2004).
12. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 652 F.3d 431 (3d. Cir. 2011).
13. Prometheus Radio Project v. FCC, 939 F.3d 567, 575 (3d Cir. 2019).
14. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 842 F.3d 33 (3d. Cir. 2016).
15. Prometheus IV, 939 F.3d at 575-76.
16. *Id.* at 575.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 576.
22. *Id.*
23. *Id.*

Ten entities sought judicial review for a combination of provisions in the reconsideration order and incubator order.[24] The Independent Television Group argued that the FCC's decision to eliminate the eight voices rule but retain the prohibition on mergers of the top four television stations in a market was arbitrary and capricious under 5 U.S.C. § 706(2)(A).[25] Another group of petitioners, including the National Association of Black-Owned Broadcasters, argued that the FCC's definition of "comparable markets" was arbitrary and capricious under § 706(2)(A) and lacked notice under 5 U.S.C. §§ 553(b)-(c).[26] This group also argued that the FCC unreasonably delayed extending its cable procurement rules to broadcasters under 5 U.S.C. § 601(1).[27] A final group, including the Prometheus Radio Project, argued that the FCC failed to adequately consider the impact of its revisions to its ownership rules on minorities and women, making them arbitrary and capricious under § 706(2)(A).[28] The Third Circuit obtained jurisdiction over each of these challenges and consolidated them in this case.[29]

II. Analysis

A. Standing

The court rejected arguments by intervenors that petitioners lacked standing to seek review of the FCC's orders.[30] Standing requires:

> (1) [A]n 'injury in fact,' meaning 'an invasion of a legally protected interest which is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical,' that is (2) 'fairly traceable to the challenged action of the defendant,' and it must (3) be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'[31]

Intervenors argued petitioners lacked standing because (1) they failed to file materials proving standing in their initiating briefs, (2) there was no sufficiently evident harm to the petitioners from repealing the broadcast ownership rules and (3) petitioners' legal arguments addressed diversity issues instead of their stated harm of industry consolidation.[32]

Each argument against standing failed. First, the court held that standing for administrative review may be proven at any time during litigation by supplemental submission.[33] All persuasive authority from federal circuit courts holds that standing for administrative reviews may always be proven

24. *Id.*
25. *Id.* at 576-77.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 576.
30. *Id.* at 578.
31. *Id.* (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 560-61 (1992)).
32. *Id.* at 578-80.
33. *Id.* at 579.

by supplement.[34] Contrary persuasive authority supporting the intervenors came solely from the D.C. Circuit, which has a local rule that requires filing evidence of standing in initiating briefs for administrative reviews.[35] The Third Circuit has no such rule.[36] Second, the court held that petitioners stated a sufficiently evident harm because the type of merger that would damage their market share can only happen but-for the reconsideration order, which has an explicit policy of boosting consolidation.[37] Finally, the court rejected intervenors' contention that petitioners' legal arguments must involve harm to competition to have standing because there is no such requirement for standing under the Administrative Procedure Act or Article III of the United States Constitution.[38]

B. Hard Look Review

Here, the court vacated and remanded the reconsideration order and the incubator order as arbitrary and capricious because both failed to consider their impact on broadcast ownership by women and minorities.[39] But the court affirmed on challenges to the "comparable market" definition, cable procurement extension, and maintenance of the four-station television merger rule.[40] Each of the issues considered in this case, except the cable procurement rule, involved hard look review.[41] To survive hard look review under § 706(2)(A), an agency's regulation must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[42] Congress required the FCC to consider impact on women and minority ownership under Section 202(h) by requiring public interest review of media ownership rules.[43]

First, the court ruled that the FCC provided adequate evidence for maintaining its prohibition on mergers among the largest four television stations in a market.[44] The record included facts such as a large "cushion" of ratings and viewership between the fourth and fifth largest stations in local and national markets.[45] It also showed that the top four stations in most marketplaces are affiliates of the four largest broadcasters—ABC, CBS, NBC, and Fox.[46] Lastly, mergers among the third and fourth most-viewed stations in the top ten markets would produce a new largest station in each market and substantially boost consolidation.[47] Together, these facts in the

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 580-81.
39. *Id.* at 589.
40. *Id.* at 588-89.
41. *See id.* at 577.
42. *Id.* (quoting Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
43. *Id.* at 574, 591.
44. *Id.* at 581.
45. *Id.*
46. *Id.*
47. *Id.*

record justified the FCC's decision to maintain its prohibition against mergers of top four stations.[48] While there may have been more effective or efficient ways to draw pro-competitive lines prohibiting mergers, the FCC's action was within its lawful discretion.[49]

Next, the court found that the FCC provided adequate notice and reasoned decisionmaking for its "comparable markets" definition.[50] Adequate notice under §§ 553(b)-(c) requires that a notice of proposed rulemaking "fairly apprise interested persons of the subjects and issues before the agency."[51] Courts consider relative shock of commenters in response to a publicly released order as a factor for evaluating notice.[52] The FCC defined "comparable markets" as markets that have a similar number of radio stations as the incumbent station providing support to a qualifying entity.[53] Petitioners believed comparable markets would be based on population.[54] However, the text of the relevant Notice of Proposed Rulemaking informed petitioners that the FCC intended to base this definition on the number of stations in a market.[55] The FCC's response to petitioners' concerns that defining "comparable markets" based on the number of stations would decrease diversity by permitting waivers in markets with dissimilar population size satisfied hard look review.[56] The court found that the FCC adequately explained its rejection of petitioners' proposed definition and diversity concerns by reasoning that a station-based definition would not harm diversity, since many sparsely-populated markets with lots of stations are ethnically diverse.[57]

But the court delivered a blow to the FCC's reconsideration order by ruling it did not adequately address the impact of removing broadcast ownership rules on station ownership by women and minorities.[58] The court lambasted the FCC for comparing its own data to an incomplete and methodologically faulty dataset.[59] Even if the FCC had used accurate comparison data, it engaged in poor statistical analysis by comparing *absolute* numbers of minority-owned stations before and after relaxing ownership rules.[60] Confounding variables such as the total number of broadcast stations in existence may mean that repealing ownership rules decreased *the proportion* of minority owned stations in the dataset despite an *absolute* rise.[61] Also, the FCC provided no data on station-ownership by women.[62] The FCC responded to the court's concerns in litigation by claiming diversity is one of

48. *Id.*
49. *Id.* at 582.
50. *Id.* at 583.
51. *Id.*
52. *Id.*
53. *Id.* at 583.
54. *Id.* at 582-83.
55. *Id.* at 583.
56. *Id.* at 584.
57. *Id.*
58. *Id.*
59. *See id.* at 584-87.
60. *Id.* at 586.
61. *Id.* at 586.
62. *Id.* at 585-86.

many considerations under its public interest review, that it received support from many minority-owned entities, and that no commenters submitted better data.[63] While the FCC is not required to produce empirical data under the Administrative Procedure Act, it must use adequate analysis to justify its conclusion that repealing broadcast ownership caps would have no impact on ownership by women and minorities.[64] The court agreed with the FCC that diversity is only one part of public interest analysis that might be usurped by other considerations, but it must first show reasoned analysis for potential diversity impact before offering countervailing reasons to prioritize other goals.[65]

Lastly, the court found no unreasonable delay by the FCC with respect to declining to extend its cable procurement rules to broadcasters.[66] The challenge to the delay of the cable procurement rules involved 5 U.S.C. § 706(1) review for reasonableness of agency delay, which balances (1) the length of time elapsed since the duty to act, (2) the context of the statute authorizing action, (3) the consequence of agency delay, and (4) error, inconvenience, practical difficulties, or limited agency resources.[67] The court agreed with the FCC that delay was not unreasonable because it received no support from commenters on the issue when originally considered as part of the order extending from the 2014 Quadrennial Review and because it sought comment on the issues again in its 2018 Quadrennial Review.[68]

III. CONCURRENCE IN PART

Judge Scirica partly dissented from the panel majority's finding because he believed the reconsideration order and incubator order were not arbitrary and capricious.[69] Instead of vacating the orders, Judge Scirica would have allowed them to go into effect and order the FCC to report findings on women and minority broadcaster ownership in its upcoming 2018 Quadrennial Review.[70]

In general, Judge Scirica believed the majority constrained the FCC's lawful discretion and should have deferred to its public interest findings that ownership restrictions hurt competition.[71] He based his decision in part on massive technological and competitive media industry upheaval wrought by the Internet.[72] Judge Scirica also found it relevant to the FCC's public interest analysis and hard look review under § 706(2)(A) that public commenters didn't rebut the FCC's statistical findings on competition or diversity.[73] The

63. *Id.* at 586-87.
64. *Id.* at 587.
65. *Id.* at 587-88.
66. *Id.* at 588.
67. *Id.* at 578.
68. *Id.* at 588.
69. *Id.* at 589-90.
70. *Id.* at 590.
71. *Id.* at 594.
72. *Id.* at 589 ("Studies in the record reinforce what most people old enough to recall the days before WiFi and iPads understand instinctively: the explosion of Internet sources has accompanied the decline of reliance on traditional media.").
73. *Id.* at 593.

FCC sought comment on the reconsideration order's impact on minorities and women and competition but received no empirical evidence contrary to its own statistical conclusions on both subjects.[74] He also noted that receiving accurate data for the impact of the reconsideration order on women and minorities is impossible because it involves hypothetical and subjective predictions about the future.[75] Thus, the record will probably never demonstrate clear impact to satisfy the majority's demands, and such a showing likewise isn't required by the Administrative Procedure Act.[76]

Scirica would have also deferred to the FCC's interpretation of Section 202(h) of the Telecommunications Act as to its statutory requirements to consider diversity under the *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, doctrine, since the statute's meaning is disputed.[77] Lastly, Scirica believed the FCC adequately explained its definition of "eligible entity" in its Incubator Order by choosing a definition that would allow minorities and women to benefit from it while avoiding Equal Protection Clause violations.[78]

IV. CONCLUSION

In sum, the court vacated and remanded the FCC's reconsideration order and incubator order for failure to consider the orders' impact on women and minorities.[79] *Prometheus Episode V*, "the FCC Strikes Back" could soon be around the corner if the FCC responds to its remand.[80]

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74. *Id.*
75. *Id.* at 592.
76. *Id.*
77. *Id.* at 593.
78. *Id.* at 596-97.
79. *Id.* at 589.
80. *See id.* at 589 ("Because yet further litigation is, at this point, sadly foreseeable, this panel again retains jurisdiction over the remanded issues.").