LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDSDAY, APRIL 14, 2021

PERSPECTIVE

Supreme Court's media ownership ruling has silver linings

By Elizabeth Brannen

In October 2020, when the U.S. Supreme Court granted review of the 3rd U.S. Circuit Court of Appeals' decision in the *FCC v. Prometheus Radio Project* et al. cases, civil rights advocates cringed. For decades the Federal Communications Commission, which regulates broadcast media, has maintained strict ownership rules. These rules limit the number of radio stations, television stations, and newspapers a single entity may own in any given market. The 3rd Circuit vacated as arbitrary and capricious under the Administrative Procedures Act an FCC order entered in 2017 in which the agency concluded that three of its ownership rules no longer served the public interest.

The FCC claimed that its sweeping changes to these rules "will not have a material impact" on ownership by people of color and women. But a divided 3rd Circuit panel rejected the FCC's analysis supporting this conclusion, calling it "so insubstantial that it would receive a failing grade in any introductory statistics class." Prometheus Radio Project v. FCC, 939 F.3d 567, 586 (3d Cir. 2019). Both the FCC and the National Association of Broadcasters, along with other industry participants, then sought Supreme Court review.

As the respondents' lead counsel Ruthanne Deutsch adeptly conveyed, the 3rd Circuit's decision had much to commend it. The FCC has long recognized and adopted ownership diversity as an important public interest consideration. Yet the agency failed to live up to its own policy commitment. With respect to local media ownership by women, the FCC did not consider data — *at all*. As for ownership by people of color, the FCC engaged in a scant, spurious discussion, using the *same data* it had invoked just over a year earlier to reach the *opposite conclusion*. The FCC also predicated its conclusion on a lack of empirical data, but that was a problem of the FCC's own making. In short, the FCC's analysis epitomized arbitrary and capricious agency action. But the high court did not grant review to affirm.

Section 202(h) and the FCC's quadrennial review process. Section 202(h) of the Telecommunications Act of 1996, as amended, provides that the FCC shall review its local broadcast ownership rules quadrennially as part of its regulatory reform review "and shall determine whether any of such rules are necessary in the public interest as the result of competition."

Perhaps most notably, the court correctly recognized that the FCC has adopted ownership diversity as an important and freestanding public interest consideration.

On April 1, Justice Brett Kavanaugh delivered a unanimous opinion holding that the FCC's 2017 decision to repeal or modify three of its media ownership rules was not arbitrary or capricious. *FCC v. Prometheus Radio Project*, 2021 DJDAR 3007. The decision was narrow and deferential to the agency under the APA.

In significant respects, however, those who recognize the importance of diverse broadcast media ownership can find aspects of the decision to celebrate. Perhaps most notably, the court correctly recognized that the FCC has adopted ownership diversity as an important and freestanding public interest consideration. The court expressly recognized that historically during its quadrennial review process, the FCC has considered not just the effect of its rules on competition, localism and viewpoint diversity, but also on ownership diversity: "The FCC has also said that, as part of its public interest analysis under Section 202(h), it would assess the effects of the ownership rules on minority and female ownership."

That section also provides that the FCC "shall repeal or modify any regulation it determines to be no longer in the public interest." Every four years, the FCC engages in notice-and-comment rulemaking pursuant to the APA to determine whether to repeal or modify the ownership rules.

The industry petitioners' arguments and concurring opinion of Justice Clarence Thomas. As some members of industry would have it, two Clinton appointees on the 3rd Circuit, Judges Thomas Ambro and Julio Fuentes, (over a Reagan appointee, Judge Anthony Scirica's, dissent), held the FCC captive to goals imposed from on high for 17 years, thereby improperly thwarting desirable deregulation. And although the language of Section 202(h) charges the FCC with evaluating its local broadcast ownership rules to determine what is in the "public interest," the industry petitioners urged the court to conclude that the FCC must consider competition only. While the concurring opinion did not go so far as to suggest that competition is the only relevant consideration, Justice Thomas did conclude that the 3rd Circuit imposed ownership diversity as an improper nonstatutory mandate and stated that the FCC has "considered ownership diversity a potential means to pursue viewpoint diversity, not a freestanding goal of its ownership rules."

The Supreme Court's opinion. The Supreme Court issued a narrow ruling that correctly recognized the FCC's commitment in the context of its Section 202(h) quadrennial reviews to ownership diversity as an important and freestanding policy consideration. The FCC employs divisions of economists and statisticians. It is an agency that expends significant resources (billions annually) to achieve its strategic goals. Those stated goals and policy commitments expressly entail collecting data about broadcast media ownership, including information about race and gender. Nevertheless, the court forgave the agency for the dearth of empirical data and deferred to its analysis: "The FCC … further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more."

While many hoped the court would require the FCC to do more to keep its word and show its work, there are positive aspects to this decision.

Silver linings. First and foremost, the Supreme Court's opinion makes clear that ownership diversity is a freestanding goal that the FCC has historically considered in the Section 202(h) public interest inquiry. Unlike the concurring opinion, the court understood and correctly described the FCC's historical approach. If, in the future, the

FCC were to depart from considering ownership diversity, that would be a policy shift to be acknowledged and justified.

Second, the decision may prove helpful in the context of broader agency decision-making. It makes clear that agencies are generally entitled to work with the empirical data they have and may use it to make predictive judgments. Provided the analysis is forthcoming, information need not be perfect before policy changes may proceed.

Finally, the decision leaves room for the FCC under the current administration to reiterate its commitment to ownership diversity and to do a better job obtaining the empirical data necessary to carry out that goal. The FCC, for its part, appears poised to do so. On April 2, the day after the court's decision, Commissioner Geoffrey Starks issued a statement reiterating that the FCC would "move forward confidently to address media ownership in future Quadrennial Reviews in a manner that is data-driven and otherwise fully consistent with our duty to promote and ensure competition, localism, and diversity in the public interest." Commissioner Starks concluded "And to be clear, nothing in the Court's holding upsets our long-established ruling that media ownership decisions must take into account how diversity will be affected."

May it be so, and may ownership diversity in broadcast media grow and thrive. ■

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