Updates

Introduction and Summary

The U.S. Supreme Court's decision in *FCC v. Prometheus Radio Project et al.* is significant for both the decision's effect on the regulation of the broadcast television industry and its clarifications of administrative law.

In *Prometheus*, the Court restored the Federal Communications Commission's (FCC) 2017 order on reconsideration to repeal or modify three core broadcast television ownership rules (2017 Reconsideration Order). Depending on how President Biden's FCC treats the decision, the ruling could result in renewed interest in certain mergers and acquisitions in the television industry.

The decision also clarified the deferential standard of judicial review of federal agency decisions required by the Administrative Procedures Act (APA). Under the Court's analysis, the APA does not require a federal agency to conduct or commission its own empirical or statistical studies even where the record lacks significant data, provided that the agency solicits data from the public and considers the limited record data available.

After expanding on the background for the Court's decision, we discuss both of these issues further below. We also provide some key takeaways on the ruling's implications for mergers, acquisitions, and other transactions in the broadcast industry.

Background

The three media ownership rules at issue in *Prometheus* reach back decades and span an astonishing degree of change in media. When the rules were adopted in the 1960s and 1970s, the media market was quite different. Broadcast television was dominated by three national networks. Cable networks and the internet did not yet exist. ESPN was launched in 1979, CNN in 1980, and MTV in 1981. More news and entertainment channels followed. Tim Berners-Lee invented the World Wide Web in 1989. Online communications channels have since proliferated even as cable channels continued to expand and traditional media persisted.

With respect to the three rules at issue in *Prometheus*, the Local Television Rule (LTO Rule) was adopted in 1964, the Radio/Television Cross-Ownership Rule (RTCO Rule) in 1970, and the Newspaper/Broadcast Cross-Ownership Rule (NBCO Rule) in 1975. The NBCO rule remained unchanged until the 2017 Reconsideration Order, and the RTCO and LTO Rules had not been changed since 1999.

In 1996, in response to the disruptive effect of cable networks and the internet on traditional broadcast television and print newspapers, Congress included in the Telecommunications Act of 1996 (the Act) a requirement for the FCC to review its media ownership rules every four years to ensure that they remain in the public interest and to repeal or modify any rules that it determines no longer serve such public interest. In 2002, the FCC established that its quadrennial public interest test would incorporate several public policy goals, including (1) fostering competition, (2) localism, and (3) diversity (including both viewpoint diversity and minority and female ownership). Late in the second term of President Obama, the FCC adopted an order that found that the rules continued to serve the public interest and chose to retain them with only minor modifications. Just one year later, however, President Trump's FCC under then-Chairman Ajit Pai reconsidered the 2016 order and made a new, contrary determination that the media ownership rules no longer served the public interest. As a result, the 2017 Reconsideration Order repealed two of the rules and modified the third in a party-line 3-2 vote (with current Acting FCC Chairwoman Jessica Rosenworcel dissenting). In summary, the 2017 Reconsideration Order made the following changes to the ownership rules:

- **NBCO Rule (Repealed):** To promote viewpoint diversity, the NBCO Rule had prohibited the common ownership or control of a daily print newspaper in conjunction with an AM, FM, or TV broadcast station "if the station's service contour encompasse[d] the newspaper's community of publication." In the 2017

Reconsideration Order, the FCC found that viewpoint diversity would not be hindered by allowing newspaper/broadcast combinations. The repeal means that any newspaper (whether print or digital) is now "allowed to combine with television and radio stations within the same local market" so long as they comply with the remaining broadcast ownership and antitrust laws.

- **RTCO Rule (Repealed):** The RTCO Rule had prohibited "an entity from owning more than two television stations and one radio station" in certain markets. Again, the FCC determined that the rule did not sufficiently promote viewpoint diversity to remain tenable "in light of broadcast radio's diminished contributions to viewpoint diversity and the variety of other media outlets that contribute to viewpoint diversity in local markets."
- **LTO Rule (Modified):** The 2017 Reconsideration Order modified the LTO Rule to eliminate the "Eight-Voices Test," which stipulated that "at least eight independently owned television stations must remain in the market after combining ownership of two stations in a market." It also amended the "Top Four Prohibition," which placed restrictions "on ownership of two top-four ranked stations in the same market." Instead of a blanket ban on ownership of multiple top-four stations, the FCC adopted a new "hybrid" approach under which it would consider proposed acquisitions on a case-by-case and market-specific evaluation process.

Prometheus Radio appealed the 2017 Reconsideration Order to the U.S. Court of Appeals for the Third Circuit. The Third Circuit vacated and remanded the 2017 Reconsideration Order. While it did not challenge the authority of the FCC to conclude that the three ownership rules no longer served the public interest, the Third Circuit found that the FCC's conclusion that the rule changes would have a "minimal effect" on minority and female ownership was arbitrary and capricious because it was not supported by the record. The Third Circuit directed the FCC to conduct "new empirical research or in-depth theoretical analysis" before adopting any order to repeal or modify the rules.

The Supreme Court Decision

In *Prometheus*, a unanimous Supreme Court (Justice Thomas concurring separately) overturned the Third Circuit's determination that the 2017 Reconsideration Order was arbitrary and capricious under the APA. The Court explained that judicial review under the APA's arbitrary and capricious standard is deferential, and a court may not "substitute its own policy judgment for that of the agency." The Court added that the APA only requires a reviewing court to ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." The Court noted that the 2017 Reconsideration Order analyzed the record evidence of "dramatic changes" in the media market and determined that the three ownership rules were no longer necessary to serve the FCC's public interest goals of promoting competition, localism, and viewpoint diversity. Prometheus Radio asserted that the FCC had ignored record evidence and relied on flawed data in reaching its conclusion that repealing and modifying the three rules would not harm minority and female ownership. But the Court found that the FCC did not "ignore" record evidence—it simply interpreted it differently. The Court clarified that the APA does not require universal acceptance of an agency's interpretation of record evidence, it only requires that an agency consider and interpret such record evidence to meet the deferential standard of review under the APA. The Court also found that nothing in the APA requires an agency to conduct or commission new empirical studies where the record is sparse; it merely requires that the agency consider the data in the record.

The Court's APA analysis in *Prometheus* is not limited to the FCC and will likely affect both how federal agencies adopt orders pursuant to the APA and how stakeholders will challenge such orders. Stakeholders will

have to expend the resources to populate the docket with affirmative evidence in support of their views. Federal agencies may find themselves with even more fulsome records with which to contend in fulfilling their administrative law functions.

Implications for Media Ownership—Key Takeaways

While the outcome of the *Prometheus* decision turns on key issues of administrative law, its effect provides some clarity, continuing uncertainty—and potentially changed opportunities for M&A and other station-level transactions in the broadcast TV industry and the regulatory framework in which such deals are conducted:

- **M&A Impact Limited in the Near-Term.** While certain regulatory matters are resolved by the Court's decision, as a practical matter, the full regulatory context for broadcast M&A remains unsettled for near-term deal making. At present, the FCC is deadlocked with two Democratic commissioners and two Republican commissioners and one unfilled Democratic position. The Biden administration has also not yet nominated someone to serve as chair of the agency. In addition, the nominees to serve as chief of the Antitrust Division of the U.S. Department of Justice and the chair of the Federal Trade Commission have also not been named and both will have significant roles to play in considering media M&A transactions for traditional station license deals. Moreover, the Court's resolution of Trump-era deregulation effectively segues into another FCC quadrennial review mandated by the Act. The new Biden-appointed leadership of the FCC will soon need to reassess the necessity for media ownership rules under its public interest test. The dissenting opinion issued by then-Commissioner Rosenworcel may provide insight into how a Democratically controlled FCC will come out in its quadrennial review; it is hard to predict how the FCC under President Biden may assess the market changes since that time.
- **New Potential for Groupwide Deals and Swaps.** As a result of the elimination of the Eight-Voices Test, an M&A station group acquirer can now retain non-top-four stations in overlap markets where previously it would have had to spin off these stations to bring the deal into compliance with the local ownership rules. The elimination of the rule may also create new opportunities for existing strategics to own a second station in a market—so-called "duopolies"—by acquiring a non-top-four station in a market where it already owns and operates a top-four station. This opportunity for accretive growth may be particularly valuable given that consolidation in the broadcasting market has narrowed the field for group-wide acquisitions. The result is that one of the more available accretive deal opportunities is for groups to grow through synergies in existing markets. The elimination of the Eight-Voices Test opens the door to incumbent strategics crafting "swap" transactions or undertaking surgical single-station acquisitions that deliver increasingly valuable synergies that result from dual-station ownership in a market.
- **Residual Regulatory Uncertainty.**
    - Strategics and investors focused on broadcast M&A may find that while the *Prometheus* decision pulls back a first layer of legacy local ownership rules, it does not provide absolute clarity. First, at the FCC level, the newly revised "hybrid" top-four rule allows for an exception to the legacy policy only upon the Commission's grant of an application for a waiver of the top-four prohibition. Uncertainty around how such waivers will be assessed—and whether a newly constituted FCC would take a more jaundiced approach to such requests—leaves the practical effect of the rule modification uncertain. While the potential for waivers opens a door for deal-making, the current uncertainty is anathema to deal markets.
    - Moreover, combinations that may be permitted under the FCC's new regulations will still need to comply with antitrust laws with respect to local advertising markets. Thus, ultimate clarity around

possible M&A opportunities may turn on the willingness of the Biden administration's antitrust authorities to accept an expanded definition of the local ad "market" to include cable television, over-the-top (OTT) streaming services, and the internet as part of the relevant competitive advertising market.

- **New Opportunities for Innovation in Deal Structures.** While the *Prometheus* decision does not eliminate regulatory uncertainty, we also see the potential for well-crafted and innovative deal structures to navigate new strategic opportunities created by the reforms.

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