

## Court Vacates Ownership Deregulation and Incubator Decisions

The U.S. Court of Appeals for the Third Circuit, sitting in Philadelphia, has vacated the FCC's rulings in the agency's 2017 order on reconsideration in its Quadrennial Regulatory Review for the combined 2010/2014 review cycles (the "Reconsideration Order"). In that Reconsideration Order, the Commission repealed the prohibitions on in-market broadcast-newspaper cross-ownership and radio-television cross-ownership. The "eight-voices" test was also repealed, under which the common ownership of two television stations in the same market was allowed only if at least eight independently owned stations would remain in the market post-merger. The court also vacated the Commission's order establishing the incubator program (the "Incubator Order"), designed to foster aid for struggling small radio station

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## Ownership Report Filing Window Postponed; Snapshot Date Remains October 1

The FCC's Media Bureau has announced the postponement of the filing window for the 2019 biennial ownership reports for broadcast stations. The filing window will now run from November 1, 2019, through January 31, 2020. The licensees of all kinds of broadcast stations (except for low power FM and translator stations) must file these reports in every odd-numbered year. The report is to disclose the principals and business entity structure exactly as in place on the snapshot date – October 1 of the filing year. Ordinarily, the filing window begins on October 1 and closes on December 1. The Bureau explains that the postponement this year will allow the Commission to complete revisions to the online Form 323 and Form 323-E in the Licensing and Management System. The Bureau says that these revisions will reduce and simplify burdens for filers, as well as enhance the agency's data collection process.

## FCC Proposes To Simplify Public Notice Requirements

The FCC's rules currently require broadcasters to broadcast and/or publish in newspapers public notices about their applications for new stations, certain modifications to existing stations, and assignments and transfers of control. The Commission proposes to modernize and simplify these notices in a *Further Notice of Proposed Rulemaking* (FCC 19-97) in Docket 17-264. The current requirements are codified in Section 73.3580 of the agency's rules, an unwieldy and confusing regulation that has been piece meal enlarged and amended over some 50 years. The current rule has different requirements for different kinds of stations and different kinds of applications. Under the new rules, these requirements would be replaced with a simplified template for announcements that would be used in almost all situations.

The Commission proposes to eliminate the requirement to publish notices in newspapers and replace it with online

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# Fines and Short Term Renewals Await Stations Without a Public File

The first round of radio station license renewal applications in the current renewal cycle were due to be filed by June 1 for stations in Washington, D.C., Maryland, Virginia, and West Virginia. The applications for most stations in this region with no significant problems were granted in late September. This has been the first opportunity for FCC staff to review renewal applications alongside the applicants' highly visible online Public Inspection Files. Thus far, at least two stations have been seriously sanctioned during of the license renewal review for shortcomings in their Public Files: WLLL(AM), Lynchburg, Virginia, and WPEX(FM), Kenbridge, Virginia. The Commission's Media Bureau directed a separate *Memorandum Opinion and Order and Notice of Apparent Liability* to each of them (DA 19-933 and DA 19-1020, respectively). The Bureau proposes to fine each station \$15,000 and to grant the renewal applications for only a short two-year license term.

Section III, Item 3 of the current version of the license renewal application form includes in Section III, an Item 3 that asks the applicant to certify that the documentation required to be placed in the station's online Public Inspection File has been placed in the file at the appropriate time. The WLLL licensee responded "No" to that item and attached an exhibit with the following explanation. The licensee's 92-year-old principal has operated the station "almost entirely on his own," and is not computer literate. He did not know how to access the station's online Public File, much less how to upload documents to it. The exhibit also states that the licensee was uncertain as to whether he prepared the Issues and Programs lists for the paper Public File during the early part of the license term before the online Public File was activated. The exhibit also indicated that the principal's adult children will be helping to operate the station in the future and to maintain the Public File.

The Bureau pronounced that "where such lapses occur,

neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation." "Notwithstanding the licensee principal's advanced age, it is the licensee's responsibility to comply with Commission Rules."

The WPEX licensee also responded to Section III, Item 3 with a "No," and attached an exhibit with its explanation: "The licensee had some difficulties in navigating the new on-line public inspection file and as such, certain deadlines were not meet [sic] with respect to the 'upload' of Issues-Programs Lists." Review by Commission staff revealed that no Issues and Programs lists were uploaded to the station's Public File.

The Commission's forfeiture policy lists the base amount of the forfeiture for failing to maintain a Public Inspection File at \$10,000. Having the discretion to adjust the amount of a fine as may be warranted, the Bureau raised the figure to \$12,000 for each of these stations on account of the length of time for which their Public Files were in such disrepair. The base amount of the fine for failing to file required information is \$3,000. This separate fine was proposed for the specific failure to provide the Issues and Programs lists. The Bureau added these two figures and proposed a fine in each case of \$15,000.

These violations were considered in the context of each station's license renewal. The Bureau declined to designate the renewal applications for hearing. However, it did find these infractions to be so serious as to warrant renewal of the licenses for a much shorter term than the usual eight years. In each case, the Bureau said that upon resolution of the forfeiture matter and if there are no other issues that would preclude the grant of the application, it would renew the license for a two-year term.

Each licensee has 30 days in which to pay the forfeiture or to seek its reduction or cancellation.

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## Freeze on New DBS Applications To Be Lifted

The FCC has amended its rules governing the Direct Broadcast Satellite ("DBS") service, opening the way for new entrants to provide new direct broadcast satellite television services, in a *Report and Order* (FCC 19-93) in Docket 06-160.

Under regulations of the International Telecommunications Union, the United States has been assigned eight slots for planned use by DBS satellites, spaced nine degrees apart on the orbital arc over the Western Hemisphere. In 2005, the Commission froze the acceptance and processing of applications for new DBS authorizations.

In a move to streamline processing and open the field to new services and competitors, the Commission will now accept applications for new DBS space stations on a first-come, first-served basis. The agency will consider proposals

for new space stations with less than nine degrees of orbital separation from other stations, provided the applicant can obtain coordination with the other affected station operators. The license term for new space stations has been extended from 10 to 15 years.

The Commission will also accept requests to access the United States market by non-U.S. licensed DBS space stations subject to the same processing rules as those governing U.S. licensed stations.

The Commission's International Bureau will issue a public notice to announce the date on which the agency will begin accepting new applications for DBS licenses and requests for access to the United States market by non-U.S. licensed space stations.

# Deadline for LPTV Reimbursement Claims Postponed

The FCC has extended the deadline for low power television and television translator stations to file their claims for reimbursement of repack-related expenses until November 14, 2019, at 11:59 p.m., Eastern Time. The original deadline for these filings had been October 15. In extending this deadline,

the Commission was responding to requests for more time from the LPTV Spectrum Rights Coalition and the National Translator Association.

For FM stations seeking reimbursement for repack-related expenses, the filing deadline remains October 15.

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## Demand for Tying Arrangement Does Not Violate Good Faith Negotiating Standard

The FCC's Media Bureau has rejected a Complaint filed by cable television system operator HolstonConnect, LLC, alleging that Nexstar Media Group, Inc., violated the Commission's requirement to negotiate television carriage arrangements in good faith. Holston operates a start-up cable service in northeastern Tennessee, where it sought retransmission consent agreements to carry Nexstar's WATE-TV, in the Knoxville DMA (an ABC affiliate) and WJHL-TV, in the Tri-Cities, TN-VA DMA (a CBS/ABC dual network affiliate). The Bureau explained its reasoning in a *Memorandum Opinion and Order* (DA 19-853).

Section 325(b)(3)(C) of the Communications Act prohibits a multichannel video programming distributor ("MVPD") from failing to negotiate in good faith for a retransmission consent. The prohibition applies equally to both the MVPD and the television station.

In implementing this statute, the Commission enunciated a two-part test for what constitutes good faith. The first part consists of an objective list of negotiation standards. Violation of these standards is a per se breach of the duty to negotiate in good faith. The three per se standards at issue in Holston's Complaint were (1) the failure by a party to put forward more than a single unilateral proposal; (2) the failure of a party to respond to the retransmission consent proposal of the other party, including reasons for rejecting a proposal; and (3) the failure of a party to meet and negotiate a retransmission consent agreement at reasonable times and places, or acting in a way that unreasonably delays negotiations.

The second part of the good faith test considers the totality of the circumstances. The Commission will consider allegations of facts that, standing alone, might not violate the per se standards, but which could constitute a failure to negotiate in good faith.

A significant point of disagreement between the parties was Nexstar's proposal that Holston carry all of the multicast program streams broadcast by WATE. Holston characterized this requirement for it to carry unwanted programming as a precondition to obtaining carriage of the stations that it desired as an "abusive tying arrangement,"

and a one-time take-it-or-leave-it demand — i.e., a single unilateral proposal. The Commission referenced its own prior decisions establishing that proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station, are presumptively consistent with competitive marketplace considerations.

In any event, the Commission found that the record showed that there had been back-and-forth between the parties, unhampered by unreasonable delay, and that Nexstar had indeed offered variations on its proposal in the form of price reductions. However, Nexstar had coupled price reduction with a one-year extension of the length of the contract. Holston complained that implementation of this term would lead to an "exorbitant rate." The Commission demurred, observing that nothing in its good faith retransmission consent rules prohibits a party from adjusting its bargaining position as circumstances change. The agency said that Holston's argument wrongly conflated willingness to negotiate with the failure to reach an agreement.

The Commission also rejected Holston's claim that Nexstar's behavior violated the totality of the circumstances test for good faith negotiations. The agency will entertain complaints under this test in cases where retransmission consent proposals are sufficiently outrageous or feature differences in MVPD agreements not based on competitive marketplace consideration, so as to breach the good faith obligation. Holston alleged that Nexstar's demand for outrageous rates combined with its demand for carriage of unwanted programming at exorbitant cost constituted an abuse of power foreclosing market entry for Holston, and thereby amounting to a violation of the totality of the circumstances test. However, the Commission summarized the proceeding by confirming that complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed.



# DEADLINES TO WATCH



## License Renewal, FCC Reports & Public Inspection Files

October 1	Deadline to file license renewal applications for radio stations in <b>Florida, Puerto Rico</b> and <b>the Virgin Islands</b> .	November 1 & 16	Radio stations in <b>Florida, Puerto Rico</b> , and <b>the Virgin Islands</b> broadcast post-filing announcements regarding license renewal applications.
October 1	Deadline to place EEO Public File Report in Public Inspection File and on station's Internet website for all nonexempt radio and television stations in <b>Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, the Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands</b> and <b>Washington</b> .	November 1 & 16	Radio stations in <b>Alabama</b> and <b>Georgia</b> broadcast pre-filing announcements regarding license renewal applications.
October 1	Deadline for all broadcast licensees and permittees of stations in <b>Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, the Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands</b> and <b>Washington</b> to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).	December 1	Deadline to place EEO Public File Report in Public Inspection File and on station's Internet website for all nonexempt radio and television stations in <b>Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota</b> , and <b>Vermont</b> .
October 1 & 16	Radio stations in <b>Florida, Puerto Rico, North Carolina, South Carolina</b> and <b>the Virgin Islands</b> broadcast post-filing announcements regarding license renewal applications.	December 2	Deadline to file license renewal applications for radio stations in <b>Alabama</b> and <b>Georgia</b> .
October 1 & 16	Radio stations in <b>Alabama</b> and <b>Georgia</b> broadcast pre-filing announcements regarding license renewal applications.	December 2	Deadline for all broadcast licensees and permittees of stations in <b>Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota</b> , and <b>Vermont</b> to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).
October 10	Deadline to place Issues/Programs List for previous quarter in Public Inspection File for all full service radio and television stations and Class A TV stations.	December 2	Deadline for television stations that provided ancillary or supplementary services during the 12-month period ending September 30, 2019, to file annual Ancillary/Supplementary Services Report.
October 10	Deadline to file Children's Television Programming Reports for all commercial full power and Class A television stations for the period July 1 - September 15, 2019.	December 1 & 16	Radio stations in <b>Alabama, Florida, Georgia, Puerto Rico</b> , and <b>the Virgin Islands</b> broadcast post-filing announcements regarding license renewal applications.
October 10	Deadline to file quarterly Transition Progress Reports for television stations subject to modifications in the repack.	December 1 & 16	Radio stations in <b>Arkansas, Louisiana</b> , and <b>Mississippi</b> broadcast pre-filing announcements regarding license renewal applications.
October 10	Deadline for noncommercial stations to file quarterly report re third-party fundraising.		

**DEADLINE FOR LPTV STATIONS  
TO FILE REIMBURSEMENT CLAIMS  
RE TELEVISION REPACK  
NOVEMBER 14, 2019**





# DEADLINES TO WATCH



## Deadlines for Comments in FCC and Other Proceedings

DOCKET

COMMENTS

REPLY COMMENTS

(All proceedings are before the FCC unless otherwise noted.)

Docket 18-202; FNPRM Kidvid rules		Oct. 15
Docket 17-317; FNPRM Must-carry notifications		Oct. 15
Docket 05-231: Public Notice Petition for Rulemaking re live closed captioning quality metrics	Oct. 15	Oct. 30
U.S. Department of Justice Antitrust Division, U.S. v Nexstar Media Group, Inc. Proposed Final Judgment and Competitive Impact Statement	Oct. 15	n/a
Docket 19-193; NPRM LPFM technical rules	Oct. 21	Nov. 4
Docket 10-162; Public Notice FCC policies and practices to ensure accessibility of its programs and activities	Oct. 21	n/a
Docket 11-154; Public Notice Waiver of IP closed captioning requirement for Pluto TV	Oct. 24	Nov. 7
Docket 19-212; NPRM Electronic filing in the Wireless Radio Services	Oct. 30	Nov. 14
Docket 19-177; NPRM EEO compliance and enforcement		Nov. 4
Docket 19-290; Public Notice Procedures for FM Auction No. 106	Nov. 6	Nov. 20
Docket 19-214; NPRM Streamlining Administrative Hearings	Nov. 6	Nov. 21
Docket 19-105; FNPRM Regulatory fees	FR+30	FR+60
Docket 17-264; FNPRM Public notice of the filing of applications	FR+30	FR+45

FR+N means the filing deadline is N days after publication notice of the proceeding in the Federal Register.

## Cut-Off Date for AM and FM Applications to Change Community of License

The FCC has accepted for filing the applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **October 29, 2019**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Apache Junction, AZ	Sun Lakes, AZ	KVVA-FM	296	107.1
Barstow, CA	Hinkley, CA	KWIE	267	101.3
Panama City, FL	Upper Grand Lagoon, FL	WLTG(AM)	n/a	1430
Macomb, IL	Carthage, IL	WCAZ(AM)	n/a	1510
Lowell, MA	Lawrence, MA	WLLH(AM)	n/a	1400
Lefors, TX	Stinnett, TX	KBDW	219	91.7
Memphis, TX	Lefors, TX	KHNZ	267	101.3
Sanderson, TX	Rankin, TX	NEW	286	105.1



# DEADLINES TO WATCH



## Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Non-duplication and syndicated exclusivity rules, Sections 76.122, 76.123, 76.124	Oct. 15
International broadcast stations, Forms 309, 310, 311	Oct. 28
Commercial leased access, Sections 76.970, 76.971, 76.975	Oct. 28
Public Inspection Files, Sections 73.3526, 73.3527	Nov. 8
Children’s television programming, Sections 73.671, 73.673	Nov. 8
FM translator time of operation, Section 74.1263	Nov. 26
Radio astronomy coordination zone in Puerto Rico, Sections 25.203(I) and 73.1030(a)(2).	Dec. 3
AM pre-sunrise and post-sunset authorization, Section 73.99	Dec. 9
Experimental authorizations, Section 73.1510	Dec. 9
AM auction Section 307(b) submissions	Dec. 9

### TELEVISION REPACK

#### STATIONS ASSIGNED TO PHASE 6

TESTING PERIOD BEGINS: **SEPTEMBER 7, 2019**

COMPLETION DEADLINE: **OCTOBER 18, 2019**

#### STATIONS ASSIGNED TO PHASE 7

TESTING PERIOD BEGINS: **OCTOBER 19, 2019**

COMPLETION DEADLINE: **JANUARY 17, 2020**

## FCC Proposes To Simplify Public Notice Requirements continued from page 1

publication. The agency suggests that this would be less costly for applicants and would make the notice more accessible to the public. The public notice about an application would be posted on an Internet website with a hyperlink to the actual application in the station’s online Public Inspection File.

Under the proposed rule, the notice would be published on the station’s website or on a website closely affiliated with the station. If the station’s website is used, the notice should be conspicuously posted on the home page. The text of the notice should be apparent to the average Internet user, with a reasonably large font in a contrasting color from the background. The website must be publicly accessible without payment, registration or any other requirement that would be an obstacle for the user to overcome. The Commission tentatively concludes that the vast majority of stations will be able to post their notices in this manner.

If an applicant does not operate a website or have access to an affiliated site, the Commission proposes that the notice should be posted on a locally targeted, publicly accessible

site. The site must be available to members of the public without charge, registration or other obstacles, and it must be targeted to the area served (or to be served) by the station, such as a site operated by a local government or a local newspaper.

Where the applicant can post the notice on a website without cost, the Commission proposes that it be posted continuously for a minimum of 30 days, beginning no earlier than the release date of the Commission’s public notice of accepting the application for filing, and no later than five days following the release of that notice. In cases where the applicant does not have access to its own or an affiliated website, and has to compensate a website operator to display its notice, the Commission proposes to require the notice to be posted for a period of not less than 24 consecutive hours, once a week for four consecutive weeks, beginning no earlier than the release date of the agency’s public notice about the application and no later than five days following that release.

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# FCC Proposes To Simplify Public Notice Requirements continued from page 6

Noncommercial stations presently only need to broadcast the public notice. Newspaper publication is not required for noncommercial stations that are on the air. The Commission asks whether this exemption should carry over to online publishing of the notices.

The text for the online announcement for an applicant with an existing authorization would be standardized as follows:

On [DATE], [APPLICANT NAME], [PERMITTEE/ LICENSEE] of [STATION CALL SIGN], [STATION FREQUENCY], [STATION COMMUNITY OF LICENSE], filed an application with the Federal Communications Commission for [TYPE OF APPLICATION]. Members of the public wishing to view this application can visit [INSERT HYPERLINK TO APPLICATION LINK IN APPLICANT'S ONLINE PUBLIC INSPECTION FILE, OR IF STATION HAS NO ONLINE PUBLIC FILE, TO APPLICATION LOCATION IN THE LICENSING AND MANAGEMENT SYSTEM].

The following text would be used for applicants who do not yet have an authorization for the proposed station:

On [DATE], [APPLICANT NAME], applicant for [A NEW (STATION TYPE) STATION ON] [STATION FREQUENCY], [STATION COMMUNITY OF LICENSE], filed an application with the Federal Communications Commission for [TYPE OF APPLICATION]. Members of the public wishing to view this application can visit [HYPERLINK TO APPLICATION LOCATION IN LICENSING AND MANAGEMENT SYSTEM].

Announcements to be broadcast over the air are also proposed to be streamlined and standardized. As with the newspaper notices, the current rules provide for different contents and schedules for the notice for different kinds of applications. The Commission proposes to commence all on-air announcements with the acceptance of the application for filing. The renewal application pre-filing announcement would be abolished. The messages in these announcements should direct the audience to the application itself in the applicant's online Public File or to the LMS database. Announcements for all kinds of applications would have the same on-air schedule. They would be broadcast a total of four times, once per week for four consecutive weeks, anytime between 7:00 a.m. and 11:00 p.m. local time.

Section 73.3580 currently includes scripts that broadcasters must follow for on-air announcements. Broadcasters have complained that these scripts are too long. The Commission proposes to update and shorten them. It suggests the following script for use on both radio and television to announce all types of applications.

On [DATE], [APPLICANT NAME], licensee of [STATION CALL SIGN], [STATION FREQUENCY], [STATION COMMUNITY OF LICENSE], filed an application with the Federal Communications Commission for [TYPE OF APPLICATION]. Members of the public wishing to view this application or obtain information about how to file comments and petitions can visit [publicfiles.fcc.gov](http://publicfiles.fcc.gov) and search in [STATION CALL SIGN]'s public file.

The following script is proposed for stations that do not have an online Public File.

On [DATE], [APPLICANT NAME], licensee of [STATION CALL SIGN], [STATION FREQUENCY], [STATION COMMUNITY OF LICENSE], filed an application with the Federal Communications Commission for [TYPE OF APPLICATION]. Members of the public wishing to view this application or obtain information about how to file comments and petitions can visit [www.fcc.gov/searchlms](http://www.fcc.gov/searchlms), and search in the list of [STATION CALL SIGN]'s filed applications.

The Commission proposes to require a television station to use visuals of the full text of the on-air announcement along with the spoken text.

The Commission requests public comment about these standardized texts and scripts. Should they include other elements, such as a link to the public notice about the pleading cycle, or a statement of the purpose of the application? Should a controlling shareholder be named? If a waiver of the Commission's rules is requested, should that fact be referenced in the notice? The current recommendation that foreign language stations broadcast these announcements in their primary language would be retained.

Categories of applications that are exempt from the public notice requirements now, such as minor modification applications, would continue to be exempt. The Commission clarifies that although low power FM stations are not mentioned in Section 73.3580, they are subject to the requirements of that section, and they would be subject to the new rules as well.

Section 73.3594 of the Commission's rules sets out the requirements for public notices about hearings before an administrative law judge. The Commission proposes to standardize the text and schedule for these announcements in a way that would be similar to Section 73.3580 announcements.

The Commission solicits public comment on these proposals and others described in the *Further Notice*. Comments must be submitted within 30 days of when notice of this proceeding is published in the Federal Register. Reply comments will be due 45 days after that publication.

# Court Vacates Ownership Deregulation and Incubator Decisions

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operators and the development of new entrants in the radio broadcasting industry. The court remanded these decisions back to the Commission for further review.

The FCC's Reconsideration Order derived from the agency's responsibilities under Section 202(h) of the Telecommunications Act of 1996. The Act requires the Commission to review its broadcast ownership rules on a regular basis (now every four years) to determine whether any of such rules are necessary in the public interest as the result of competition. The law gives the Commission the mandate to repeal or modify any regulation that it finds to be no longer serving the public interest. An ongoing issue in these reviews concerns what impact, if any, deregulation has on diversity in the ownership of broadcast stations.

In a previous ruling on an appeal from earlier FCC actions in the 2010 and 2014 review cycles, the court had ordered the Commission to "include a determination about the effect of the rules on minority and female ownership" in its ultimate conclusion to those proceedings. The principal issue in the present appeal concerns claims that the Commission failed to make such a determination in connection with the deregulation of cross-ownership and the implementation of the incubator program. The court said that the Reconsideration Order "ostensibly included such a determination, . . . and . . . concluded that the broadcast ownership rules have minimal effect on female and minority ownership. But these conclusions were not adequately supported by the record, and they are arbitrary and capricious."

The Commission had attempted to draw a trend line between ownership data gleaned from a 1999 study by the National Telecommunications and Information Administration and from its own records developed from data collected in the broadcast ownership reports beginning in 2009. The FCC found no appreciable change in minority ownership over this period and therefore concluded that changes in its ownership rules had little effect on minority ownership. The court said this was like comparing apples to oranges. There was no effort to account for the different collection methodologies used by the two agencies, nor to control for other variables, such as whether the percentage of the total stations owned by minorities increased or decreased during the decade under review. The court observed that the "FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class."

The court also criticized the Commission for failing to consider the effect of the rule changes on female ownership even though it had been instructed to do so. The Commission said that no data on female ownership was available and that it was not required to fund new studies. The court found

that this failure alone was enough to justify remand of the Reconsideration Order.

The FCC's Incubator Order was the culmination of a decade-long effort by the court to push the Commission to define the term, "eligible entity." Eligible entities are entitled to certain preferences in broadcast proceedings, the purpose for which is to encourage broadcast ownership by minorities and women. The incubator program is designed to encourage established broadcasters (in exchange for a waiver of the radio multiple ownership limits) to assist small struggling station operators or new entrants in radio. The court was unable to find how this program would foster minority or female ownership in light of the qualification criteria to be eligible for incubation. The eligibility criteria concern the size of the entity, in terms of revenue and the number of stations owned, with no reference to minority or female status.

The court remanded both the Reconsideration Order and Incubator Order back to the Commission, requesting reasoned rationales for its decisions, instead of relying on faulty and insubstantial data. The Commission had concluded that consolidation would not harm ownership diversity. The court said that it could not determine whether or not that was true because the Commission's decisions lack sufficient reasonable explanation. The agency offered no theoretical model or analysis of what the likely effect of consolidation would be on diversity.

The court acknowledged that promoting ownership diversity is not the only policy goal that the Commission must consider. It observed that the agency might be within its rights to adopt a deregulatory policy – even if the rule changes would have an adverse effect on ownership diversity – if it provided a meaningful evaluation of that effect and explained why it believed the trade-off was justified for other policy reasons. Instead, the court found the Commission's evaluation and explanation insufficient. The court said this failure violated the Commission's obligations under the Administrative Procedure Act to justify its rulemaking decisions with a reasoned explanation.

The FCC now can opt to undertake the review ordered on remand, ask the Third Circuit Court of Appeals for an en banc rehearing, or appeal this decision to the Supreme Court. In a statement released the same day, Chairman Pai said, "We intend to seek further review of today's decision . . ."

The decision is entitled *Prometheus Radio Project v. FCC*, 2019 U.S. App. LEXIS 28673. The Prometheus Radio Project has been the lead appellant in three prior appeals of the Commission's interrelated Quadrennial Reviews, resulting in decisions known as *Prometheus I, II, and III*. This decision will no doubt come to be known as *Prometheus IV*.

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