

Supreme Court Reinstates FCC Cross-Ownership Decision

In a unanimous decision authored by Justice Kavanaugh, the Supreme Court has reversed a ruling of the U.S. Third Circuit Court of Appeals and reinstated a 2017 decision by the FCC to update its media cross-ownership regulations.

In *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir., 2019), the Third Circuit had vacated the FCC's rulings in a 2017 order on reconsideration in the Commission's 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 In that Reconsideration Order, the Commission repealed the prohibitions on in-market broadcast-newspaper cross-ownership and radio-television cross-ownership.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, 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market was allowed only if at least eight independently owned stations would remain in the market post-merger was also repealed. The court also vacated the FCC's order establishing an incubator program (the "Incubator Order"), designed to foster aid for struggling small radio station operators and the development of new entrants in the radio broadcasting industry.

continued on page 7

FCC Considers Repetitive EAS

In the National Defense Authorization Act of 2021 ("NDAA"), Congress has instructed the FCC to make certain improvements to the Emergency Alert System ("EAS"). In response to this requirement, the FCC has released a *Notice of Proposed Rulemaking and Notice of Inquiry* ("NPRM") (FCC 21-36) to address the issues of Congressional concern, including an elevated visibility for EAS transmissions that rise to the level of national security alerts.

The law requires the FCC to conduct a rulemaking proceeding to modify the EAS rules to provide for repeating EAS messages while a national security alert remains pending that is issued by the President, the Administrator of the Federal Emergency Management Agency ("FEMA"), or any other entity the FCC determines appropriate under

continued on page 8

Auction 109 Short-Form Filing Window Is April 28 – May 11 Bidding Begins July 27

The schedule and procedures for AM/FM Auction 109 have been announced in a *Public Notice* (DA 21-361) in Docket 21-39 released by the FCC's Office of Economics and Analytics and Media Bureau. Construction permits for 136 new stations on currently vacant FM allotments, and construction permits for the former facilities of four deleted AM stations will be offered at auction. A complete list of the permits and the minimum opening bid for each is found on page 6. This auction group includes all of the 130 FM permits that had been set to be offered in Auction 106, which was scheduled in 2020, but cancelled due to the pandemic. Six other FM permits have been added for Auction 109.

Parties wishing to participate in the auction must file a Form 175 short-form application during the filing window that begins at noon on April 28 and closes at 6:00 p.m. Eastern

continued on page 2

IN THIS ISSUE

License Renewal Applications Snared.....	2
FM Application Filing Freeze Imposed....	3
Deadlines to Watch	4-5
Permits Offered in Auction 109.....	6

For more information about or help with any of the items reported in **Antenna™** please contact:

Donald E. Martin, P.C.

P.O. Box 8433

Falls Church, Virginia 22041

Tel: (703) 642-2344

Fax: (703) 642-2357

E-mail: dempc@prodigy.net

License Renewal Applications Snared by Public File Miscues

A broadcast station's online Public Inspection File comes under heightened scrutiny by the FCC during the period when the station's license renewal application is under review. Such was the case recently for five FM stations that independently entered into separate *Consent Decrees* with the FCC's Media Bureau to resolve investigations about Public Inspection File violations, and to persuade the FCC to grant their pending license renewal applications. The stations involved in these recent cases are KWQX, Perryville, Arkansas; KSTM, Indianola, Iowa; WVUR-FM, Valpraiso, Indiana; WPGT, Lake City, Florida; and WNPZ, Knoxville, Tennessee.

The five *Consent Decrees* are essentially identical. There is no specific explanation about what the violation was – only that it was a failure to comply with the Public Inspection File rules, Section 73.3526 or 73.3527 of the FCC's Rules. The license renewal application includes a question asking the applicant whether it has uploaded all required materials to the online Public File in a timely manner. Some of these applicants answered that question in the affirmative. Even though upon its own review, the Media Bureau found that to be inaccurate, these applicants received the same treatment as those that admitted to mistakes in maintaining the Public File.

In a nod to the recent economic disruptions to the broadcast industry caused by the covid pandemic, the Media Bureau states in each Decree that it "believes that the exceptional circumstances brought about by the industry's economic situation . . . warrant resolution of the Bureau's investigation under the terms and conditions described below." This seems to be an explanation and justification for the relatively light sanction of only a one-year compliance

plan and no civil penalty. Section 1.80 of the FCC's Rules lists the base amount of the forfeiture for a Public File violation at \$10,000. The Media Bureau has the discretion to impose such a fine, adjust it in either direction as the facts may warrant, or forgo it altogether.

The agreement adopted in each of these cases is that the licensee admits to the rule violation and agrees to implement a one-year compliance plan in exchange for the Media Bureau's termination of the investigation and the prompt granting of the station's pending license renewal application. Processing of the license renewal application had been suspended during the investigation about rule violations.

The compliance plan requires the appointment of a senior manager to implement and oversee execution of the plan. The plan must include the following elements:

(1) Adoption of a compliance manual that includes (a) a thorough explanation of the requirements of the Public Inspection File rule; (b) operating procedures for covered staff to follow; and (c) procedures for periodic review.

(2) A compliance training program for all staff who have duties related to the Public Inspection File.

(3) A compliance report to be submitted to the FCC one year after entering into the agreement in which the compliance officer shall certify that the compliance plan has been fulfilled successfully, or if not, explain the noncompliance and steps taken to avoid its recurrence.

The agreement will terminate upon submission of the compliance report unless the Media Bureau is not satisfied that the licensee demonstrated substantial compliance with the *Consent Decree*. In that event, the Media Bureau may extend the termination date for up to 24 additional months.

Auction 109 Short-Form Filing Window Is April 28 – May 11 continued from page 1

Time on May 11. Each applicant must identify on one short-form application all of the permits for which it intends to bid. An applicant cannot file more than one application. Subsidiaries of a common parent entity, and entities under common control are limited to filing one consolidated application listing all of their desired permits with disclosures about the group arrangement. All parties with attributable interests in the application must be identified in the short-form. An engineering exhibit is not required unless the applicant wishes to have a specific site or service area protected while the application is pending.

In its short-form application, an applicant must provide a brief description of, and identify each party to, any partnership, joint venture, consortium, agreement, arrangement, or understanding of any kind relating to the construction permits being auctioned, including any agreement that addresses or communicates directly or indirectly bids (including specific prices), bidding strategies (including the specific construction permit(s) or license(s) on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls or is controlled by the applicant, is a party.

To preserve the integrity of the auction process, the FCC's rules prohibit auction applicants from cooperating or collaborating on bidding. This prohibition includes communicating with or disclosing to each other in any manner the substance of their own, or each other's, or any other applicant's bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements. This restriction begins on the deadline for filing short-form applications (May 11) and continues until after the down payment deadline. This prohibition applies to the applicant entity, its partners, officers, board members, and any party holding at least a 10 percent equity interest. Applicants have a duty to report to the FCC any violations of or attempts to violate these restrictions about which they come to have knowledge, including incidents in which they are not directly involved. This rule does not restrict communications about operational matters that do not include bid amounts or bidding strategy, nor communications totally unrelated to the permits in the auction.

The FCC's rules provide for "new entrant" credits for

continued on page 3

FM Application Filing Freeze Imposed During Auction Filing Window

The FCC will open a filing window for construction permits to be offered for sale in Auction 109 for new stations on 136 vacant FM channels from April 28 to May 11. To foster a stable environment for the filing of applications, the FCC

will freeze the filing of all FM minor change applications (both commercial and noncommercial) during the filing window. This is to avoid the possibility of a minor change application becoming mutually exclusive with an auction application.

Auction 109 Short-Form Filing Window Is April 28 – May 11 continued from page 2

bidders who have attributable ownership interests in not more than three other mass media. For this purpose, mass media are defined as full power radio and television stations, cable television systems, daily newspapers, and direct broadcast satellite transponders. An applicant with no other media interests can claim a 35 percent credit against the purchase price if it is a winning bidder. A credit of 25 percent is available to an applicant with attributable interests in not more than three other mass media as long as none of them serves the area where the subject permit is located. Eligibility for these credits is determined by disclosures on the short-form about other media ownership interests that are attributable to the applicant. This includes media interests held by individuals or other entities that are partners, officers, directors or holders of 5 percent or greater equity interest in the applicant.

After the filing window closes, the FCC will review the short-form applications and announce groups of mutually exclusive applications to be set for auction. In any case where a permit was identified on just one short-form application, there will be no need for competitive bidding, and the applicant will be invited to submit a long-form application.

To be eligible to bid, an applicant must deposit an upfront payment with the FCC by 6:00 p.m. Eastern Time on June 16. The amount of the upfront payment submitted by a bidder determines initial bidding eligibility, the maximum number of bidding units on which a bidder may be active (bid or hold provisionally winning bids) in a given round. Each permit is assigned a specific number of bidding units equal to the number of dollars required for the minimum opening bid. Bidding units assigned to each construction permit do not change as prices rise during the auction. Upfront payments are not attributed to specific construction permits. Rather, a bidder may place bids on any of the construction permits selected on its short-form application as long as the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. Eligibility cannot be increased during the auction; it can only remain the same or decrease. At a minimum, an applicant's upfront payment must cover the bidding units for at least one of the construction permits it selected on its short-form application. The total upfront payment does not affect the total dollar amount a bidder may bid on any given construction permit. Upfront fees will be refunded to applicants who do not become winning bidders.

To ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in

the auction before participating. Bidders are required to be active (bid or hold provisionally winning bids) on a specified percentage of their current bidding eligibility during each round of the auction. A bidder's activity level in a round is the sum of the bidding units associated with construction permits covered by the bidder's new bids in the current round and provisionally winning bids from the previous round. During Stage One of this auction, bidders will be required to be active with at least 80 percent of their eligible bidding units. That requirement will rise to 95 percent in Stage Two. The FCC will decide if and when to move from Stage One to Stage Two based on its judgement about the timely progress of the auction. Each applicant will have the option to exercise as many as three activity rule waivers to remain inactive during a round without penalty. Otherwise, an applicant's eligibility will be reduced to the extent that its bidding units active in the round fall below the required minimum.

Bidding in this auction will begin on July 27, and will be conducted online in simultaneous multiple rounds. All permits will be available in each round until the auction closes. A system of incremental bidding will be used. After the minimum opening bid has been accepted, bids in the next round must be one of several acceptable increments of the provisionally winning bid from the previous round. The lowest acceptable incremental bid will be 10 percent greater than the provisionally winning bid from the previous round. Higher incremental bids may be placed at additional increments of 5 percent. An applicant would have the option to submit a bid consisting of the sum of the provisionally winning bid and one of nine incremental percentages of that bid, i.e., the provisionally winning bid plus 10, 15, 20, 25, 30, 35, 40, 45 or 50 percent.

The auction will conclude when there is a round in which no new higher bids are placed for any permit. The FCC will release a public notice to announce the winning bidders. Down payments will be due within 10 business days of that announcement. Each winning bidder must submit sufficient funds, when combined with its upfront deposit, to equal 20 percent of the purchase price of the permit. The remaining balance of the net winning bid will be due 10 business days later. Unless a later date is set, each applicant must also then file a long-form application within 30 days of the announcement of the winning bidders. The long-form is to include a complete engineering exhibit and be accompanied by the standard construction permit application filing fee. When a long-form application has been accepted for filing by the FCC, it will be subject to petitions to deny.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

April 1	Deadline to file license renewal applications for radio stations in Texas , and television stations in Indiana, Kentucky, and Tennessee .	April 10	Deadline for noncommercial station to place quarterly report re third-party fundraising in Public Inspection File.
April 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 Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas .	April 10	Deadline for Class A TV stations to place certification of continuing eligibility for Class A status in Public Inspection File.
April 1	Deadline for all broadcast licensees and permittees of stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas 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).	June 1	Deadline to file license renewal applications for radio stations in Arizona, Idaho, Nevada, New Mexico, Utah, and Wyoming and television stations in Michigan and Ohio .
April	Radio stations in Texas , and television stations in Indiana, Kentucky, and Tennessee begin broadcasting post-filing announcements within five business days of acceptance of application for filing and continuing for four weeks.	June 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 Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia, and Wyoming .
April 10	Deadline to place quarterly Issues/Programs List in Public Inspection File for all full service radio and televisions stations and Class A TV stations.	June 1	Deadline for all broadcast licensees and permittees of stations in Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia, and Wyoming 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).

Proposed Amendments to the Television Table of Allotments

The FCC is considering petitions to amend the digital television Table of Allotments by changing the channel allotted to the communities identified below. The deadlines for submitting comments and reply comments are shown.

COMMUNITY	STATION	PRESENT CHANNEL	PROPOSED CHANNEL	COMMENTS	REPLY COMMENTS
Kearney, NE	KHGI	13	18		Apr. 16
Lubbock, TX	KCDB	11	36		Apr. 16
Savannah, GA	WTOC-TV	11	23		Apr. 19
Superior, NE	KSNB-TV	4	--	Apr. 21	May 6
York, NE	KSNB-TV	-	24	Apr. 21	May 6
Toledo, OH	WLMB	5	37	Apr. 21	May 6
Augusta, GA	WRDW-TV	12	27		Apr. 22
Cedar Rapids, IA	KCRG-TV	9	32	Apr. 22	May 7
Cape Girardeau, MO	KFVS	11	32		Apr. 23
Albany, GA	WFXL	12	29	Apr. 26	May 10
Tulsa, OK	KTUL	10	14		Apr. 26
Green Bay, WI	WLUK-TV	12	18	Apr. 26	May 10
St. George, UT	KMYU	9	21	Apr. 28	May 13
Hannibal, MO	KHQA-TV	7	22	Apr. 30	May 17
Jonesboro, AR	KAIT	8	27	May 3	May 17
Amarillo, TX	KVII-TV	7	20	May 3	May 17
Oswego, IL	WAOE	-	10	May 12	May 27
Peoria, IL	WAOE	10	-	May 12	May 27
Schenectady, NY	WRGB	6	35	FR+30	FR+45
Bristol, VA	WCYB-TV	5	35	FR+30	FR+45

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



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 21-87; Public Notice (DA 21-313) Transfer of control of Quincy Media, Inc. to Gray Television, Inc.	April 12 (Petitions to Deny)	April 27 (Oppositions)
Docket 16-155; Public Notice (DA 20-1545) Standard questions for review of foreign ownership proposals		April 19
Docket 15-94; NPRM (FCC 21-36) Emergency Alert System	April 20	May 4
Docket 20-36; NPRM (FCC 20-156) Unlicensed operations in TV white spaces		April 26
Docket 15-94; NOI (FCC 21-36) Emergency Alert System	May 14	June 14
Docket 20-443; NPRM (FCC 21-13) Allocating terrestrial mobile services to share spectrum with satellite services	FR+30	FR+60

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

Paperwork Reduction Act Proceedings

The FCC is required by 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
Radio service authorization application, Form 601-2.0	Apr. 26
ATSC 3.0 simulcasting, Sections 73.3801, 73.6029, 74.782, Form 2100	Apr. 27
Antenna structure registration, Sections 17.4, 17.48, 17.49	May 3
International broadcast stations, Forms 309, 310, 311	May 7

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 the community of license for each station. 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 **April 13, 2021**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Cross City, FL	Archer, FL	WUFQ	203	88.5
Morris, IL	Somonauk, IL	WCSJ(AM)	N/A	1550
Cheyenne, WY	Laporte, CO	KKPL	260	99.9

DEADLINE FOR ANALOG LOW POWER TV AND TV TRANSLATOR STATIONS TO TRANSITION TO DIGITAL MODE

JULY 13, 2021

CONSTRUCTION DEADLINE FOR UNBUILT LPTV DISPLACEMENT CONSTRUCTION PERMITS ISSUED BEFORE JULY 13, 2018 IS

JULY 13, 2021

Construction Permits Offered in Auction 109

FM PERMITS	CHANNEL	OPENING BID	FM PERMITS	CHANNEL	OPENING BID
Kotzebue, AK	280A	\$ 1,500	Narrowsburg, NY	275A	\$ 40,000
Yakutat, AK	280A	750	Sagaponack, NY	233A	45,000
Camden, AL	230A	3,500	Shelter Island, NY	277A	45,000
Maplesville, AL	292A	10,000	Westfield, NY	265A	25,000
Thomaston, AL	280C3	15,000	Clayton, OK	262A	1,500
Rison, AR	255A	7,500	Millerton, OK	265C2	10,000
Desert Hills, AZ	292A	25,000	Wayne, OK	266A	20,000
Ehrenberg, AZ	228C2	15,000	Wright City, OK	295A	10,000
First Mesa, AZ	281C	15,000	Boardman, OR	231C3	7,500
Overgaard, AZ	234C1	20,000	Huntington, OR	228C1	45,000
Salome, AZ	231A	1,500	Powers, OR	293C2	15,000
Sells, AZ	285A	1,500	Edgefield, SC	238A	25,000
Snowflake, AZ	259C2	25,000	Englewood, TN	250A	25,000
Tusayan, AZ	222C1	2,500	Albany, TX	255A	1,500
Boonville, CA	300A	7,500	Big Lake, TX	252C2	1,500
Cartago, CA	233A	1,500	Big Lake, TX	281C1	35,000
Coalinga, CA	247B1	45,000	Bogata, TX	247A	20,000
Cottonwood, CA	221A	35,000	Canadian, TX	235C1	25,000
Earlimart, CA	228A	45,000	Carrizo Springs, TX	228A	7,500
Essex, CA	280B	750	Carrizo Springs, TX	295A	3,500
Ft. Bragg, CA	253B1	10,000	Centerville, TX	274A	2,500
King City, CA	275A	5,000	Crystal Beach, TX	268A	1,500
Ludlow, CA	261B1	1,500	Encino, TX	250A	2,500
Randsburg, CA	275A	1,500	Fort Stockton, TX	263C	15,000
Sacramento, CA	300B	45,000	Groom, TX	273A	1,500
Battlement Mesa, CO	275C3	75,000	Hale Center, TX	236C1	20,000
Dotsero, CO	261A	25,000	Junction, TX	277C3	1,500
Eckley, CO	257C1	7,500	Lockney, TX	271C3	7,500
Hugo, CO	222A	1,500	Lovelady, TX	288A	7,500
Stratton, CO	246C1	7,500	Milano, TX	274A	7,500
Cross City, FL	249C3	20,000	Mount Enterprise, TX	279A	10,000
Fort Walton Beach, FL	295A	60,000	Mullins, TX	277A	5,000
Pembroke, GA	257C1	75,000	Olney, TX	282A	3,500
Haynesville, LA	286A	3,500	Paint Rock, TX	296C3	2,500
Oil City, LA	285A	15,000	Premont, TX	264C3	10,000
Dunkerton, IA	280A	60,000	Richland Springs, TX	235A	1,500
Rockford, IA	225A	25,000	Rising Star, TX	290C3	5,000
Abingdon, IL	291A	25,000	Roscoe, TX	228A	10,000
Orange, MA	247A	45,000	Rule, TX	253A	1,500
Carney, MI	260A	5,000	Sanger, TX	281C3	75,000
Custer, MI	260A	7,500	San Isidro, TX	255A	750
Houghton, MI	242C1	25,000	San Isidro, TX	278A	750
Lake Isabella, MI	255A	45,000	Teague, TX	237C3	10,000
Onekama, MI	227C3	20,000	Trinity, TX	251A	10,000
Pigeon, MI	267A	10,000	Wellington, TX	253C3	3,500
Grand Marais, MN	245C3	1,500	Wells, TX	254A	10,000
Bourbon, MO	231A	15,000	Huntington, UT	287C3	10,000
Cuba, MO	269A	20,000	Paragonah, UT	258A	20,000
Maryville, MO	285C3	15,000	Hardwick, VT	290A	10,000
Wheatland, MO	272A	10,000	West Rutland, VT	298A	25,000
Bruce, MS	233A	10,000	Coupeville, WA	266A	25,000
McLain, MS	245A	10,000	Kahlotus, WA	283A	2,500
New Albany, MS	268A	25,000	Raymond, WA	300A	7,500
New Augusta, MS	269A	45,000	Trout Lake, WA	236A	10,000
Valier, MT	289C1	10,000	Crandon, WI	276A	1,500
Bayard, NE	251A	15,000	Tomahawk, WI	265C3	10,000
Gackle, ND	256C1	15,000	Albin, WY	282C3	2,500
Groveton, NH	268A	10,000	Cora, WY	274C2	3,500
Jefferson, NH	247A	10,000	Lusk, WY	242A	750
Stratford, NH	254A	10,000	Manville, WY	255C1	5,000
Animas, NM	279C1	2,500	Marbleton, WY	257C1	3,500
Chama, NM	241C3	2,500	Meeteetse, WY	259C	10,000
Des Moines, NM	287C	10,000	Medicine Bow, WY	259C3	750
Lovington, NM	269C3	25,000	Rawlins, WY	298C2	5,000
Skyline-Ganipa, NM	240A	10,000	Rozet, WY	256C3	20,000
Caliente, NV	264A	1,500	Wamsutter, WY	285A	750
Tonopah, NV	224A	1,500	Wheatland, WY	293A	3,500
Keeseville, NY	231A	75,000			
Livingston Manor, NY	296A	25,000			

continued on page 7

Construction Permits Offered in Auction 109 continued from page 6

FORMER AM CALL SIGN	COMMUNITY	FREQUENCY	CLASS	OPENING BID
KFTK	East St. Louis, IL	1490	C	\$ 50,000
KQQZ	Fairview Heights, IL	1190	B	50,000
WQQW	Highland, IL	1510	D	50,000
KZQZ	St. Louis, MO	1430	B	50,000

Supreme Court Reinstates FCC Cross-Ownership Decision continued from page 1

The FCC adopted the Reconsideration Order in the course of performing its responsibilities under the Telecommunications Act of 1996 to review its broadcast ownership rules on a regular basis (now every four years) to determine whether marketplace competition has made such rules no longer necessary. The FCC is mandated to repeal or modify any regulation that it finds to be no longer serving the public interest.

In a ruling on an appeal from earlier FCC actions in the 2010 and 2014 review cycles, the Court of Appeals had ordered the Commission to “include a determination about the effect of the rules on minority and female ownership” in the broadcast industry in its ultimate conclusion to those proceedings. In its 2017 decision, the FCC had found that media deregulation would have little impact on diversity of ownership.

On appeal, public interest advocates, including the lead appellant, the Prometheus Radio Project, did not argue that it was fundamentally inappropriate, per se, for the FCC to abolish the cross-ownership rules. Rather, before the Court of Appeals (and later, as appellees before the Supreme Court), their principal argument was that the FCC had failed to make a rational determination about the effect that the deregulation would have on minority and female ownership in the broadcast industry. The Court of Appeals agreed with the appellants, concluded that the record was inadequate to make such a determination, and that the resulting decision was arbitrary and capricious, contrary to the requirements of the Administrative Procedure Act (“APA”).

The FCC’s position throughout this proceeding has been that it has been unable to access significant amounts of data to support a finding about the potential impact on minority and female ownership. It solicited such information during the Quadrennial Review comment periods, but none was submitted. According to the Court, the FCC therefore relied on the data that it had and the absence of countervailing data to predict that changing the rules was not likely to harm minority and female ownership.

The Supreme Court explained the APA’s standard for finding that an agency’s action is arbitrary and capricious. The agency’s action must be reasonable and reasonably explained. Judicial review under this standard must be

deferential to the agency. The court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness, has reasonably considered the relevant issues, and reasonably explained its decision.

Prometheus had argued that the FCC’s numerical calculations about potential effects on ownership diversity were overly simplistic and that the data sets were materially incomplete. However, the Court noted that the FCC acknowledged the gaps in the data, and that it had repeatedly asked for data on this issue, but very little was provided. Prometheus had claimed that the FCC ignored the data that did exist. The Supreme Court said that the FCC simply interpreted them differently. The Court acknowledged that the FCC did not have “perfect empirical or statistical data.” However, the APA does not impose a general obligation on agencies to conduct or commission empirical studies. Further, the Court observed that nothing in the Telecommunications Act of 1996 or any other statute requires the FCC to conduct its own empirical research before exercising its discretion to deregulate the cross-ownership rules.

The Court concluded that in light of the sparse record on minority and female ownership, and the FCC’s findings that the repealed rules no longer served the Commission’s objectives with respect to competition, localism and viewpoint diversity, it could not say that the agency’s decision fell outside of the zone of reasonableness for purposes of the APA. The Third Circuit’s decision was therefore reversed.

The Court noted in a footnote that the Third Circuit had also vacated the FCC’s separate Incubator Order and a definition of “eligible entity” in a 2016 Order. The Third Circuit vacated those actions based solely on its conclusion that the FCC failed to adequately consider minority and female ownership in the 2017 Reconsideration Order. Because the Court reversed the Third Circuit as to the 2017 Reconsideration Order, the Third Circuit’s judgment as to the Incubator Order and the “eligible entity” definition is also reversed.

The decision is *Federal Communications Commission, et al., v. Prometheus Radio Project, et al.*, 2021 U.S. LEXIS 1740.

FCC Considers Repetitive EAS continued from page 1

the circumstances. National security alerts are defined as those that carry warnings of national security events, such as a missile threat, terror attack, or other act of war or threat to public safety. Typical local or regional EAS alert messages are explicitly excluded from this definition, such as weather alerts, AMBER alerts, and local disaster alerts.

The FCC deliberated various possible scenarios for delivering the repeat of a Presidential message, including the President originating the repeat message by way of a live rendition or a recording of the original, developing a mechanism in the EAS delivery system to automatically repeat a message within a given period of time, or relying on all local EAS participants to transmit locally automated reruns of the original message. The NPRM includes a lengthy discussion of the intricate technical issues that could disrupt the flow of new messages if automation mechanisms were introduced anywhere in the delivery architecture of the legacy EAS system. For example, the President's ability to promptly originate a second different message, if necessary, in the rapidly changing environment of an emergency would be impaired. Consequently, the Commission's tentative proposal is to permit the President (or the President's authorized designee) to repeat the original message, either live or by recording, upon his or her own initiative. The Commission requests public comment on this tentative conclusion.

The NDAA also requires the FCC to adopt regulations that encourage the creation and operation of State Emergency Communications Committees ("SECCs"). The chief executive of each state is encouraged to establish a SECC if the state does not already have one, and to review the SECC's composition and governance. SECCs are volunteer organizations composed of state broadcaster associations, EAS participants, emergency management personnel, and other stakeholders. The Commission proposes amending its Rules to encourage state chief executives to establish SECCs, although it appears that every state and all but two of the territories already currently have a SECC.

The SECC has the responsibility for developing the State EAS Plan, which must be filed with the FCC and approved by the Chief of the Public Safety and Homeland Security Bureau. The State EAS Plan describes state and local EAS operations, pathways for the distribution of alerts, and contains guidelines to be followed by EAS participants' personnel, emergency officials, and National Weather Service personnel to activate alerts. As part of its mandated review,

the FCC proposes to adopt a rule requiring each SECC to certify that it has met at least once during a 12-month period to review and update its State EAS Plan. The Commission also proposes to begin to treat as confidential the State EAS Plans filed with it to prevent "malefactors" from obtaining them and potentially hindering emergency planning efforts.

The NDAA requires the FCC to establish a system to receive false EAS alerts for the purpose of examining their causes. The impetus for this element of the law was an incident in Hawaii in 2018 when an alert falsely warned the public about a nonexistent inbound ballistic missile attack. The Commission proposes revising its rules to add sections to state that if the FEMA Administrator, or a state, tribal, local, or territorial governmental entity becomes aware of the transmission of an EAS false alert, they are encouraged (but not required) to send an email to the FCC's Ops Center with as many details as possible. EAS participants, such as broadcasters, are required to report incidents of false alerts that they transmit.

The Commission declines to define the term, "false alert." By so doing, the FCC attempts to avoid the possibility that an incident might go unreported because the party with knowledge about it determined that it did not meet the technical definition of the term. The FCC wants all questionable incidents to be reported.

The FCC is required to complete the rulemaking portion of this proceeding by June 30, 2021. Comments about these rule proposals are due by April 20. The deadline for reply comments is May 4.

In the same document, the FCC released a *Notice of Inquiry* to explore the feasibility of EAS participation for Internet-related services. This study is also required by the NDAA, under which the FCC must examine the feasibility of updating the EAS "to enable or improve alerts to consumers provided through the Internet, including through streaming services." Accordingly, the FCC seeks comment on the definition of "streaming services" and whether it would be technically feasible for streaming services to complete each step that EAS participants complete to ensure the end-to-end transmission of EAS alerts, including monitoring for relevant incoming alerts, receiving and processing alerts, retransmitting alerts, presenting alerts in an accessible manner to geographically relevant consumers, and testing.

The deadline for comments filed in response to the *Notice of Inquiry* is May 14. Reply comments must be submitted by June 14.

ANTENNA™ is an information service about current events in communications law edited and published by Donald E. Martin. This publication is produced only to report on current events and factual matters in the field of communications law. Publication and dissemination of this material is not intended to constitute the practice of law or the rendering of legal advice. No attorney-client relationship shall be deemed to exist between the publisher or provider and any other party as a result of the publication, dissemination, distribution or other use of this material. The publisher attempts to ensure that the information reported is accurate, but no warranty, express or implied, is given as to the accuracy or completeness of any information or statement published herein. All material published herein is protected by copyright and all rights are reserved. © 2021 Donald E. Martin, P.C.