Court Remands Local TV Ownership Rule for Further Consideration

The United States Court of Appeals for the D.C. Circuit has ruled that the FCC's decision to count only broadcast television stations in its voice-count test for local television market duopoly is arbitrary and capricious. In Sinclair Broadcast Group, Inc. v. FCC, 2002 U.S.App. LEXIS 5965 (D.C.Cir. 2002), the court remanded the rule back to the Commission for further study. The rule was adopted by the Commission in a 1999 Report and Order concluding a rulemaking proceeding that generally reviewed television broadcasting regulations. Sinclair Broadcast Group asked the Court of Appeals to review that decision.

The common control of two broadcast television stations in the same market is generally prohibited. The regulation in question, Section 73.3555(b) of the FCC's rules, permits common control of two stations in the same market under certain limitations. At least one of the stations under common control must not be one of the four highest rated stations in the market, and eight independently owned, full-power, operational television stations (i.e., voices) must remain in the market after the consolidation. The purpose of the rule is to promote diversity in the options for local television programming available to the public.

Sinclair asserted that the rule is arbitrary because (1) the media voice-count is limited to the number of television stations in the market and does not include other media; and (2) the necessary numerical value of eight voices has no rational basis. The court declined to address directly the question of how the FCC should determine how many media voices a market should have. It observed however, that the Commission would have the opportunity to revisit this question because the rule is being remanded for further study of the other prong of Sinclair's objection regarding what media should be included in the voice-count.

The crux of Sinclair's argument about the arbitrariness of the Commission's voice-count formula was that the agency had used different voice-count formulas in circumstances where it was difficult to discern the need for different formulas. Specifically, the Commission included a voice-count provision in both the local television duopoly rule under discussion in this case and the radio-television cross-ownership rule that restricts the common ownership of both radio and television stations in the same market. In the context of the cross-ownership rule, that voice-count includes not only broadcast radio and television stations, but also daily newspapers with circulation exceeding 5% of households in the market, and cable systems providing generally available service to households in the same market (where all systems are counted as one voice).

Sinclair argued, and the court agreed, that the Commission had failed to explain why its voice-count for the television duopoly rule included only television, while the voice-count for the cross-ownership rule included other media as well. The court was sensitive to the fact that in regulatory matters such as the FCC's rules concerning diversity and media concentration, it must give substantial deference to the decision-making authority of the expert agency. The court is generally unwilling to overturn an agency decision on such topics unless an appellant can demonstrate that the rule is patently unreasonable, having no relationship to the underlying regulatory problem. In this case, the court decided that Sinclair had demonstrated the unreasonableness of the voice-count rule as presently constructed -- or at least the inadequacy of the Commission's explanation for the present construction of the rule. The court sent the rule back to the FCC to consider it again and to develop a well-explained, rational basis for it.

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