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We Didn't Stop the Fire: Media Ownership Policy After *FCC v. Prometheus Radio Project*

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TABLE OF CONTENTS

I.	INTRODUCTION	95
II.	SECTION 202(H), THE ROOT OF IT ALL	96
III.	THE FIRE BEGINS.....	100
	A. The FCC’s Plan B	102
IV.	PUTTING OUT THE FIRE	108
	A. How the Opinion Construed the Facts/Background	108
	B. How the opinion construed the law as applied to the facts	111
	C. Justice Thomas’ Concurrence	113
	D. What was left out?	114
V.	CONCLUSION	117

I. INTRODUCTION

Despite the FCC's victory at the Supreme Court, media ownership will continue to be an important democratic issue complicated by the continuing mandate for action by the agency.¹ Even in the Internet age, broadcasting still plays a central role in providing access to local news and information providing a crucial mechanism for encouraging political participation.²

Between 1996 and 2017 the FCC implemented a media ownership policy with the intent of balancing the economic goals associated with the free market goals of competition, the democratic societal values associated with viewpoint diversity, and the operational concerns of localism.³ This regulatory matrix of competition, localism, and diversity has been the pillar of media ownership policy since the agency's rulemaking proceeding that implemented the newspaper-broadcast cross ownership ban in 1975.⁴

Beginning with the implementation of the 1996 Telecommunications Act,⁵ the FCC formally abandoned the trustee model that had guided the agency's regulation of broadcasters since 1927.⁶ In place of the traditional regulatory model in place since broadcasters were first licensed, the FCC adopted a new regulatory philosophy which relied on the use of an economic approach.⁷ This new "competition" focused philosophy had a dramatic effect on the agency's media ownership rules.⁸ Perhaps more importantly, the rules implementing this new philosophy resulted in a 39% reduction in radio station owners and a 33% reduction in television station owners between 1996-2010.⁹

Furthermore, attempting to balance the stated policy goals of competition, localism and diversity against decisions that rapidly approved mergers,¹⁰ proved difficult. And the FCC's failure to develop and use

1. Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM'NS L.J. 327, 328-29 (2019) (discussing the possibility of localism as a remedy for market failure).

2. *Id.* at 330.

3. *Id.*

4. *Id.* at 334. *See generally* In re Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975).

5. Telecommunications Act of 1996, 47 U.S.C. § 303.

6. Radio Act of 1927, 47 U.S.C. §§ 81-85, 119-21 (repealed 1934).

7. Ronald E. Rice, *Central Concepts in Media Ownership Research and Regulation*, in MEDIA OWNERSHIP: RESEARCH AND REGULATION (2008).

8. *See* Terry, *supra* note 1 at 334 ("[The FCC] increasingly came to use the level of economic competition in a media market to assess the level of viewpoint diversity . . . in the market.").

9. Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 75 Fed. Reg. 33227, 33227 (2010) (quadrennial rev.) (to be codified at 47 C.F.R. pt. 73) ("Today, there are 11,202 commercial radio stations and 3,143 owners, representing a 39% decrease in the number of [commercial radio station] owners since 1996. . . . [Today], there are 1,302 commercial stations and 303 owners, a 33% decrease in the number of owners.").

10. Christopher Terry, Stephen Schmitz & Eliezer (Lee) Joseph Silberberg, *The Score is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review*, 73 FED. COMM'NS L. J. 99,

empirical evidence in its rulemaking undermined the policy process across biennial reviews in 1998, 2000 and 2002, quadrennial reviews in 2006, 2010, and 2014.¹¹ This policy shortcoming culminated in the FCC's perpendicular actions in 2016 and 2017.¹²

Following the FCC's decision in 2003 to radically alter the metrics on media ownership policy with the Diversity Index, the Third Circuit Court of Appeals started a lengthy back and forth with the agency that spanned four court decisions, remand and more than 17 years of policy-litigation cycles where the FCC's policy implementation became a regulatory quagmire.¹³ Although the FCC has overcome a series of order vacations and remands from the Third Circuit Court of Appeals due to the unanimous, but narrow, decision from the Supreme Court, the agency remains in a precarious position. As it stands, the FCC has a mandate to complete an open, but unacted upon quadrennial review from 2018 as well as another quadrennial process slated to begin in 2022.¹⁴

This paper explores the decision in *FCC v. Prometheus Radio Project* in the context of more than 25 years of media ownership policy decisions by the agency suggesting that although the FCC finally managed to score a win in court, the narrow decision left many issues unresolved as the FCC now finds itself in a time pinch to meet the standing mandate for quadrennial reviews scheduled for 2018 and 2022.

II. SECTION 202(H), THE ROOT OF IT ALL

Before delving fully into the complicated narrative of the *Prometheus* case line, it is imperative to know how the matter came to the Court. That explanation begins with Section 202(h) of the Telecommunications Act of 1996.¹⁵ Section 202(h) of the Telecommunications Act specifies that:

107 (2020) (“The FCC openly encouraged further ownership consolidation to occur at a rate faster than the agency could empirically assess”) [hereinafter *Prometheus 4-0*].

11. See generally *id.* (discussing the Third Circuit's repeated admonition of the FCC for failing to develop an empirically sound methodology of evaluating market consolidation).

12. See Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9803, 9803, 9806–46 (2017) (quadrennial rev.) (explaining the FCC's reasoning for reversing course for each of the rules at issue). This is an important and underexamined fact about the FCC's decisions in 2016 and 2017. After the mandate the finish the 2010 and 2014 proceedings in *Prometheus III*, the FCC's decision after six years and two rule reviews was to change no rules. Fifteen months later, based on the same record, a FCC under new leadership decided that radical changes to media ownership were warranted based on petitions for reconsideration. See, e.g., *id.* at 9818 (“The NBCO Rule must be Eliminated.”).

13. See generally *Prometheus 4-0*, *supra* note 13, for a detailed history tracking media ownership from the implementation of the 1996 Telecommunications Act through the Third Circuit's final *Prometheus Radio Project v. FCC* decision in 2017.

14. See 47 U.S.C. § 161(a) (requiring the FCC to engage in “review” of “all regulations issued under this chapter” “in every even-numbered year”).

15. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 110 (1996).

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.¹⁶

promulgation review of its regulations every two years—but the presumptions that attend the command to revisit older rules are opaque.¹⁷

So much more is left unclear, however. For example, it is unclear how Section 202(h)'s text requires the FCC to act at all.¹⁸ There is, of course, no explanation for how the FCC should go about making that determination within the text of the provision. Nor is it obvious how the FCC is to determine the extent of its obligation to “determine” what is “in the public interest” so that regulations remain somewhat stable for more than just two years.

Furthermore, the primary focus of the section is difficult to determine from the plain text of the provision. The plain text of the provision indicates that rules “necessary in the public interest as the result of competition” are what the FCC is determining. But it is far from clear whether “competition” or “public interest” controls the sentence. To make matters worse, this command is ostensibly the primary purpose of the section, and parties have strenuously disagreed on which phrase controls the sentence.¹⁹

The FCC launched the first of the mandated biennial reviews for media ownership rules under Section 202(h) on March 12, 1998.²⁰ The 17 month

16. § 202(h), 110 Stat. at 111. Still, courts vehemently disagreed about the presumptive nature of this regulatory re-review. For example, the Third Circuit disagreed with the D.C. Circuit concerning whether or not there was a “presumption in favor of repealing or modifying the ownership rules.” *Compare* Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13624–25, 13624 n.13 (2003) (biennial rev.) (“Several parties . . . support the notion that Section 202(h) presumptively favors repeal or modification of the ownership rules.”), *with* Prometheus Radio Project v. Fed. Comm’n Comm’n, 373 F.3d 372, 423 (3d Cir. 2004) (“As discussed in Part II above, § 202(h) is not a one-way ratchet. The Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis.”) [hereinafter *Prometheus I*].

17. It is unclear whether this form of regulatory budgeting is inherently deregulatory in nature as was argued before the Court. *See supra* note 19 (discussing the disagreement between circuit courts on the presumptive guidance of Section 202(h)).

18. *Compare* Opening Brief for Industry Petitioners at 20, Fed. Comm’n Comm’n v. Prometheus Radio Project, 141 S. Ct. 1150 (2021) (No. 19-1231) (“The plain text of the statute establishes a deregulatory presumption requiring the FCC to ‘repeal or modify’ any rule that is no longer ‘necessary in the public interest as the result of competition.’”), *with* Brief for Respondents Prometheus at 8, Fed. Comm’n Comm’n v. Prometheus Radio Project, 141 S. Ct. 1150 (2021) (No. 19-1231) (“For § 202(h), like the cross-referenced § 11, any ‘deregulatory presumption arises only after [the Commission] has determined . . . that a regulation is no longer necessary in the public interest.’”).

19. *See infra* note 163 and corresponding text.

20. The FCC already began the process of reviewing two ownership rules. The first, the television duopoly rule prevented a party from owning, operating, or controlling two or more broadcast television stations with overlapping “Grade B” signal contours, essentially preventing the ownership of more than

long review examined seven ownership policies using the guidelines set by Section 202(h).²¹ During review of its media ownership rules, but before approving changes to those rules, the FCC granted a series of conditional waivers to various owners, anticipating future review changes.²² By continuing to grant waivers, even conditionally, the FCC was encouraging further ownership consolidation to occur at a rate faster than the agency could empirically assess the results of its freshly approved mergers.²³ Indeed, when the 1998 Biennial Review concluded, the FCC admitted that it could not meaningfully assess the fallout of the sweeping ownership consolidation since 1996.²⁴

The difficulty the FCC faced in keeping up with the requirements of 202(h) was the first sign of cracks within the legislative scheme. 202(h) contemplated quick turn-around—every two years the FCC would keep pace with the industry it regulated. But that simply was infeasible. In fact, by the end of the very first review, the FCC had not yet completed approving the initial wave of mergers or assessing the outcomes of entities granted waivers.²⁵

After concluding the 1998 Biennial Review, the FCC proposed using the 2000 Biennial Review to build a framework to “form the basis for further action.”²⁶ The FCC couched the proposal as an opportunity to build a working framework for future reviews under Section 202(h), ahead of the biennial review process scheduled to begin in 2002. As part of the process,

one television station in a market. Additionally, the FCC launched a review of the “one-to-a-market” rule, which prohibited the common ownership of a television and a radio station in the same market. Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 13 FCC Rcd. 11276, 11276, 11279–80 (1998) (biennial rev.).

21. *See id.* at 11279–92 (discussing the seven policies for 202(h) review).

22. For example, QueenB’s request for waiver in DA 97-1067 at 14: “Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding.” Concrete River Associates, L.P., 12 FCC Rcd. 6614, 6618 (1997) (assigning a license to QueenB Radio and establishing that QueenB was granted temporary waiver as a “failed” station).

23. *See* Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd. 11058, 11061 (2000) (biennial rev.) (“As noted above, we have just recently substantially relaxed our local television ownership and one-to-a-market rules.”).

24. *See id.* (“It is currently too soon to tell what effect this will have on consolidation, competition, and diversity.”).

25. *See id.*

26. 2000 Biennial Regulatory Review, 16 FCC Rcd. 1207, 1210 (2001) (biennial rev.). While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau staff during the 2000 proceeding. *See id.*

the FCC proposed retaining, but modifying, three of its media ownership rules while eliminating a fourth.

In the 2002 Biennial Review NPRM, the FCC proposed four possible proxy methodologies for assessing diversity: viewpoint diversity, source diversity, program diversity, and outlet diversity.²⁷ Viewpoint diversity is a content-based measurement and policy.²⁸ While both source diversity and program diversity examine content indirectly, viewpoint diversity requires a direct analysis of the content itself.²⁹ More importantly the agency reenforced its long standing positions that viewpoint diversity was the ultimate policy objective of media ownership policy.³⁰

In context, the FCC's stated objective in the 2002 Biennial Review was to redefine the diversity goals of media ownership policy. By using the competition objective, the FCC implemented modifications to structural ownership regulation as a proxy for the goals of localism and diversity.³¹ Employing a raw counting methodology for media outlets, including newspapers, broadcasters, cable, and the Internet,³² the agency shifted media ownership policy away from the viewpoint diversity objective by creating an ownership environment that would "advance diversity without regulatory requirements."³³

On July 2, 2003, the FCC released an Order in the 2002 Biennial Review proceeding.³⁴ The FCC's 2002 Biennial Review Order retained the (then) existing limits on local radio ownership as defined by the Telecommunication Act, but it made two significant changes to its method for calculating the size of a radio market, adopting market definitions for radio as defined by Arbitron,³⁵ and including local non-commercial stations

27. Commission Broadcast Ownership Rules and Other Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd. 18503, 18516 (2002) (biennial rev.).

28. *See id.* at 18516–17.

29. *See id.* at 18517–18.

30. Viewpoint diversity "has been the touchstone of the [FCC]'s ownership rules and policies. We remain fully committed to preserving citizens' access to a diversity of viewpoints through the media." *Id.* at 18516–17. Despite its pole-position as a policy outcome, the FCC was reluctant to employ viewpoint diversity as a direct measurement or assessment methodology. The FCC was concerned that regulations involving judgments about content would be inherently subjective and would prove problematic under the First Amendment. *Id.* at 18512.

31. Though this view would not be stated in such language until 2003, this viewpoint is readily visible within the 2002 review process. *See* Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13620–23, 13668–91 (2003) (biennial rev.) ("The changes described herein provide a new, comprehensive framework for broadcast ownership regulation.").

32. *Id.* at 13391–99.

33. *Supra* note 30, at 18519. It should be noted that the FCC did acknowledge that there may be a need for regulation to protect viewpoint diversity in the *2002 Biennial Regulatory Review*, but its subsequent actions did not appear to suggest that it followed up on this musing.

34. *Supra* note 34, at 13620.

35. *Id.* at 13725; *see id.* at 13725–28 for a deeper explanation of how the FCC came to their decision.

when calculating the total number of stations in each market.³⁶ Furthermore,, the Order replaced two other existing media ownership rules with the FCC’s own creation: the Diversity Index.³⁷

None of the new limits, rule modifications, existence of the Diversity Index, or any rationale for any of the changes were made public ahead of the release of the Order implementing these changes on June 3, 2003.³⁸

III. THE FIRE BEGINS

Two groups—”citizen petitioners”³⁹ and “deregulatory petitioners”⁴⁰ —challenged the FCC’s 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated the petitions.⁴¹ After a preliminary hearing, the Third Circuit stayed implementation of the FCC’s rules pending review, and denied a petition

36. *Id.* at 13727. The 2003 Order also retained the dual network rule, which prohibited a merger between any two of the top four broadcast television networks, but the agency revised the national television ownership rule to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience. *Id.* at 13847–48 (dual network rule), 13842-43 (national television ownership rule).

37. *Id.* at 13778. That diversity index is a modified version of the Herfindahl-Hirschman Index (HHI) – an antitrust tool traditionally applied by the Department of Justice and the FTC for analyzing impact of mergers on market consolidation. *Id.* at 13777.

38. This was just the first time that the FCC failed to notice such changes. *See Prometheus Radio Project v. Fed. Comm’n Comm’n*, 652 F.3d 431, 451 (3d Cir. 2011) (holding that the FCC 2006 Quadrennial Review provided too little information to the public about what the FCC intended to do, that it did not sufficiently explain what the FCC considered as options, and that it did not provide sufficient time for public comment) [hereinafter *Prometheus II*]; Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC’s Incubator Program*, 24 COMM’N L. & POL’Y 403, 416 (2019).

39. In the *Prometheus I* opinion, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” “Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (“UCC”) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule.” *Prometheus I*, 373 F.3d at 381 n.1.

40. *See id.* at 381 n.2, stating that the “Deregulatory Petitioners,” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).”

41. *Id.* at 382.

filed jointly by members of the deregulatory petitioners and the FCC to return the case to the D.C. Circuit.⁴²

Following argument, the Third Circuit, released a 2-1 decision, which stayed and remanded most of the FCC's 2003 Order.⁴³ Among the primary reasons for remand was the FCC's arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.

The majority interpreted Section 202(h) as a requirement to periodically justify existing regulations, which absent the review provision, the FCC would not have an obligation to complete.⁴⁴ Additionally, when the FCC engages in the review of its rules, it must determine if rules remain useful to the public interest. Rules deemed no longer useful must be repealed or modified.⁴⁵ But after reviewing a rule, regardless of what the FCC determined to be the proper action, whether "retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."⁴⁶

Judge Ambro then invalidated the FCC's new cross-ownership limits and Diversity Index methodology for failing hard look review.⁴⁷ While the ruling noted that the FCC's decision to replace cross-ownership rules with the new limits was constitutional and allowable in context of Section 202(h)'s mandate, its procedure was its ultimate flaw, as the FCC failed to demonstrate a reasoned analysis.⁴⁸ In effect, the majority did not hold that the FCC had impermissibly modified regulations under Section 202(h)'s mandate, but had simply not provided a reasonable rationale for its modifications.

Judge Scirica concurred in part and dissented in part in *Prometheus I*.⁴⁹ Judge Scirica disagreed with the majority's ruling on the basis of the traditional administrative law premise that the court should provide agencies deference in areas which they are expert.⁵⁰ Scirica argued that the FCC was due greater deference on implementation of the Diversity Index and

42. *Id.* at 389.

43. *Id.* at 435; *see also* Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13747 (2003) (biennial rev.) for a description of the cross-ownership rule explanation by the FCC.

44. *Prometheus I*, 373 F.3d at 395 ("[Section] 202(h) extends this requirement to the [FCC]'s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the [FCC]'s rulemaking authority and to contravene 'traditional administrative law principles.'").

45. *Id.*

46. *Id.* at 395.

47. *Id.* at 435. *See generally* Motor Vehicle Mfr's Ass'n v. State Farm, 463 U.S. 29 (1983) (establishing the "Hard Look Doctrine").

48. *Prometheus I*, 373 F.3d at 418.

49. *Id.* at 435.

50. *Id.* ("Whether the standard is 'arbitrary or capricious,' 'reasonableness,' or some variant of a 'deregulatory presumption,' the Court has applied a threshold that supplants the well-known principles of deference accorded to agency decision-making.").

proposed changes to the rules.⁵¹ Instead, Scirica accused the Third Circuit of supplanting the agency's policy decision with the court's own.⁵²

A. THE FCC'S PLAN B

Following its first loss at the Third Circuit, in 2006, the FCC began its first quadrennial review under the amended Section 202(h) of the Telecommunications Act.⁵³ Unfortunately, the agency did not publicly release all the information weighing on its decision making, and this led to public embarrassment that derailed the modification process. A Senate hearing unearthed an unreleased FCC report from 2003 that empirically demonstrated local ownership of television stations added significant content to local television news broadcasts.⁵⁴ Shortly after this study released, news reports also surfaced that then-FCC Chairman Michael Powell ordered all copies of the draft study destroyed—Chairman Powell denied (and continues to deny) those allegations.⁵⁵

Five days later, a second unreleased FCC study became public.⁵⁶ The study, titled “Review of the Radio Industry,” criticized the FCC's implementation of media ownership policy, perhaps even more fiercely than the television localism study.⁵⁷ After examining the effects of consolidation on the radio industry between 1996 and March 2003, the report reached five major conclusions, all of which would have caused problems for the FCC if its 2002 Biennial Review docket included the empirical data.⁵⁸

When the FCC concluded its 2006 Quadrennial Review in late 2007, the actions proposed were modest. The FCC proposed revising only a partial repeal of the 1975 prohibition on newspaper-broadcast cross-ownership, but only in the top 20 media markets.⁵⁹ However, the FCC took greater action

51. *Id.* at 435 (Scirica, C.J., dissenting in part, concurring in part).

52. *Id.* (“In so doing, the Court has substituted its own policy judgment for that of the Federal Communications Commission and upset the ongoing review of broadcast media regulation mandated by Congress in the Telecommunications Act of 1996.”).

53. Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 21 FCC Rcd. 8834, 8834–35, 8836 n.10, 8838 (2006) (quadrennial rev.).

54. *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*, FCC 1–2 (2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf.

55. David Folkenflik, *FCC Study of TV Ownership Comes to Light*, NPR (Sept. 15, 2006), <https://www.npr.org/templates/story/story.php?storyId=6082952>.

56. *See id.*; *see also* *Review of the Radio Industry*, FCC, <https://docs.fcc.gov/public/attachments/DOC-267479A1.pdf> (last visited Aug. 28, 2020) [hereinafter *The Media Bureau Staff Research Paper Series*].

57. *The Media Bureau Staff Research Paper Series*, *supra* note 59, at 2–4 (“All figures displayed in the associated charts represent ‘smooth’ lines rather than the actual data.”).

58. *See id.*

59. *Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule*, FCC 2 (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf *see also* Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 23 FCC Rcd. 2010, 2018 (2007) (Quadrennial Rev.).

outside of the 2006 Quadrennial Review. In a parallel rulemaking proceeding, the FCC released a new minority ownership policy⁶⁰ that established a novel class of license applicants called “eligible entities” which the FCC suggested could promote women and minorities.⁶¹

Both the Quadrennial Review and the eligible entity program were challenged under the existing remand from *Prometheus I*.⁶² This brought the same parties back before the Third Circuit—and *Prometheus II* came out along the same 2-1 split.⁶³

Despite the FCC’s relatively modest approach taken on media ownership in 2006 Quadrennial Review, the Third Circuit found that the FCC’s rationale, ultimate policy decision, and lack of evidence to support its decisions, demonstrated that the FCC failed to create an adequate method of addressing diversity of ownership.⁶⁴

Again, Judge Scirica concurred in part and dissented in part—much for the same reasons as he did in *Prometheus I*. Once more Judge Scirica indicated that he dissented from the *Prometheus* court’s conclusion that the FCC had fallen short of the requirements imposed by the Administrative Procedure Act.⁶⁵ Even more pointedly, Scirica indicated that the FCC could not have failed the APA’s notice requirements because the FCC had explicitly indicated why it was seeking comment.⁶⁶ In his mind, there was no basis to vacate the FCC’s order on the basis of the FCC’s failure to satisfy administrative law requirements.⁶⁷

The Third Circuit then issued another remand, this time of the FCC’s 2007 decisions on media ownership, citing the agency’s continuing series of procedural and evidentiary problems.⁶⁸ Suggesting that the agency had “in

60. Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd. 5922, 5924–25 (2008).

61. *Id.* at 5925–26. The eligible entity proposal was not a direct minority ownership policy, but a broader and comprehensive policy for diversity, which the agency suggested could eventually include women and minorities as eligible entities, *see id.*

62. *Prometheus II*, 652 F.3d 431, 437 (3d Cir. 2011).

63. *Id.* at 472 (vacating and remanding the NBCO rule but leaving intact the other rules from the FCC’s 2008 Order).

64. *Id.* at 469 (citing Commissioner Copps’ part concurrence part dissent, commenting that, “We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn’t have. . . . [W]e don’t even know how many minority and female owners there are”); *In re Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922, 5983 (2008).

65. *Prometheus II*, 652 F.3d at 472–73 (Scirica, J., concurring in part and dissenting in part).

66. *Id.* at 474.

67. *Id.* at 474–75.

68. “[T]he [FCC] failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based ‘eligible entity’ definition, and the FCC’s decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women,” *id.* at 437–38.

large part punted” on the minority ownership issue,⁶⁹ the *Prometheus II* remand mandated that the FCC address minority ownership before the completing of the then unfinished 2010 Quadrennial Review.

Following its second loss in court, and facing another remand that now applied to a majority of its media ownership policies, the FCC nominally continued the ongoing 2010 Quadrennial Review required under Section 202(h).⁷⁰ As time passed, the FCC demonstrated minimal public commitment to conducting the review process or proposing new minority ownership policies.⁷¹ Ultimately, the agency ran out the four-year clock on the 2010 Quadrennial Review without releasing another decision.⁷² As time to complete the proceeding expired, the agency continued the 2010 Quadrennial Review as well as a formal response to the remands issued by the Third Circuit in 2004 and 2011 by extending the ongoing process into the launch of the 2014 Quadrennial Review.

The launch of the 2014 Quadrennial Review proceeding continued to demonstrate the FCC’s lack of interest in resolving the remands handed down in 2004 and 2011.⁷³ In the year that followed, the agency failed to release a new proposal and released no new empirical research evaluating the outcomes of media ownership policy. Following the extended period of inaction by the agency, the deregulatory petitioners, the citizen petitioners, and the FCC returned to the Third Circuit in April 2016.⁷⁴

The Third Circuit panel in *Prometheus III* mandated agency action to conclude the open 2010 and 2014 proceedings and deliver a new proposal for a functional minority ownership policy before the end of the calendar year.⁷⁵ The court argued that the FCC’s delay “keeps five broadcast ownership rules in limbo.”⁷⁶ This delay resulted in “significant expense to parties that would be able, under some of the less restrictive options being

69. “Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order,” *id.* at 471–72.

70. Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant of Section 202 of the Telecommunications Act of 1996, 29 FCC Rcd. 4371, 4372 (2014) (Quadrennial Rev.).

71. *Prometheus II*, 652 F.3d at 465.

72. See 2014 Commission’s Broadcast Ownership Rules, *supra* note 73, at 4371, 4402 & nn. 185–86. In which the FCC explains its reasoned disagreement with the Third Circuit’s holdings that the agency’s rulemaking procedures and outcomes on media ownership were insufficient. For further explanation on the FCC’s about-face due to no commenter objection, *see id.* at 4407.

73. *Id.* at 4372–73.

74. *Prometheus Radio Project v. Fed. Commc’ns Comm’n*, 824 F.3d 33, 37 (3d Cir. 2016) [hereinafter *Prometheus III*].

75. *See id.* at 52.

76. *Id.* at 51.

considered by the [FCC], to engage in profitable combinations.”⁷⁷ The court also observed that the FCC’s delay “hamper[ed] judicial review because there is no final agency action to challenge.”⁷⁸

Once more Judge Scirica concurred and dissented. While Scirica indicated that he agreed with the Third Circuit opinion’s disposition of two of the rules at issue, he did not agree with the majority on its treatment of the FCC’s inaction related to broadcast ownership rules.⁷⁹ However, that dissent was constrained.⁸⁰ While Scirica indicated he would not have vacated the broadcast ownership rules, he indicated he would compel the FCC to take final action on the matter.⁸¹ In fact, Scirica indicated he would go so far as to preclude venue change to ensure that the final action was taken by the FCC.⁸²

In sum, the Third Circuit held once more that that the FCC’s ongoing failure to develop—and support with empirical evidence—a policy plan to increase ownership of stations by women and minorities doomed the agency’s action (or in this case, lack thereof).⁸³

In response, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as a response to the *Prometheus I* and *Prometheus II* remands.⁸⁴ After six years of agency inaction, the FCC decided to maintain all of the existing media ownership rules “with some minor modifications.”⁸⁵

Significantly, the FCC lacked any direct evidence to support retaining the existing rules.⁸⁶ Instead, the FCC relied only on competition as a proxy indicator to justify the rules, saying that the other two key elements of media ownership policy—localism and viewpoint diversity—no longer were the focal point in assessing the state of the media environment.⁸⁷

Legal challenges to the agency’s non-action decision quickly followed, but in November 2017, before those challenges reached oral argument, FCC

77. *Id.* at 51–52.

78. *Id.* at 52.

79. *Id.* at 60–61 (Scirica, J., concurring in part and dissenting in part).

80. *Id.*

81. *Id.* at 61.

82. *Id.* at 61–62 (indicating that Judge Scirica would issue a writ of mandamus to ensure that the FCC completed final agency action in its review).

83. *Id.* at 60.

84. Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 31 FCC Rcd. 9865–66 (2016) (Quadrennial Rev.). It should be noted that in that Order the FCC acknowledged that high speed Internet and other technological innovations unregulated by the FCC have changed how many Americans consume media, but stressed that localism—and the newspapers, television stations, and radio stations that provide local content—remain indispensable.

85. *Id.* at 9865.

86. *See id.*

87. *Id.* (“These rules promote competition and a diversity of viewpoints in local markets, thereby enriching local communities through the promotion of distinct and antagonistic voices.”).

leadership changed as a result of the 2016 presidential election. the FCC released a new media ownership policy as an Order on Reconsideration of the August 2016 Order.⁸⁸ The Order on Reconsideration included an elimination of the newspaper-broadcast cross-ownership rule⁸⁹ and the radio-television cross-ownership rule.⁹⁰ Unlike the Second Report and Order from August 2016, the Order on Reconsideration neither included a revision to the local radio ownership rule nor directly addressed the Third Circuit's mandate to develop a viable minority ownership policy.⁹¹

The consolidated challenges to the 2016, 2017, and 2018 Orders on media ownership returned to the Third Circuit for oral arguments in June 2019. On September 23, 2019, in the fourth and final 2-1 decision written by Judge Ambro, the Third Circuit handed down the fourth *Prometheus Radio Project* decision which, in practical terms, undermined the FCC's decision making from 2011 to 2019.⁹²

The panel ruled that yet again the FCC failed to resolve the two core issues it botched in the two earlier cases: first, meeting the basic administrative law standard to provide empirical evidence to support a rational policy decision and proposing a policy solution that would increase ownership by women and minorities. The FCC showed no embarrassment when it admitted that the failure to respond to the court's earlier mandates was intentional. Judge Ambro's decision stated that by any rational analysis the FCC's effort to support its choices was inadequate and could not even pass a more deferential review.⁹³

Judge Ambro's decision proposed the need for the FCC to recognize that the outcomes of ownership policy are the direct results of choices made

88. *Id.*

89. *Id.*; *see also id.* at 9870 (stating that the FCC no longer believed that the newspaper-broadcast cross-ownership rule promoted "viewpoint diversity, localism, or competition" and therefore, "does not serve the public interest").

90. *Id.* at 9950.

91. *See id.* at 9867. The existence of the *Prometheus Radio Project* line of cases, but does not mention the majority's remand on a functional minority ownership rule. Instead the FCC merely notes that the case involves, "[v]arious diversity-related decisions, certain media ownership rules and the decision not to attribute SSAs." This is not to say that the FCC did not at least attempt—albeit unsuccessfully—to create an ownership regime which was at least intended to aid minority and female owners. The FCC termed its creation the "incubator program," *id.* at 9911–12. The incubator proposal paved avenues for additional ownership consolidation, including opportunities to exceed the local limits set by Congress in the Telecommunications Act for companies willing to incubate a startup through assistance and foster new entrant broadcasters, *id.* at 9912; *see also* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, 33 FCC Red. 7911, 7911–12 (2018) (in which the FCC describes the Incubator Program as method to foster new and diverse voices into the broadcast industry).

92. *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 939 F.3d 567, 589 (3d Cir. 2019) ("We do conclude . . . that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the 'eligible entity' definition from the 2016 Report & Order.") [hereinafter *Prometheus IV*].

93. *Id.* at 585–86.

by the agency. Prophesizing that this would likely not be the last review of media ownership policy, Judge Ambro stated that in future reviews the FCC would have to show its work and even determine whether other choices or approaches might be better.⁹⁴

Judge Scirica concurred and dissented for the fourth and final time. While Judge Scirica joined with much of the majority opinion, he noted that by interfering in the FCC's administrative process for so long, the Third Circuit had essentially caused the relevant media ownership rules to remain in place for fifteen years.⁹⁵ In doing so, the Third Circuit had caused the FCC to not comply with the purpose of Section 202(h)—keeping up with the changes in the media marketplace.⁹⁶ And because the public interest changes as the media marketplace changes, the Third Circuit had interfered with the FCC's ability to act in the public interest despite the FCC's repeated attempts to regulate.⁹⁷ By choosing to not grant the FCC the deference it deserves as an expert agency implementing an iterative statute, Judge Scirica accused the majority of creating a self-fulfilling prophecy of FCC failure to meet the standards the *Prometheus* court chose to impose.⁹⁸

Over Judge Scirica's argument that the FCC was due deference, the Third Circuit vacated and remanded the bulk of the FCC's regulatory action on minority ownership, including the 2017 Reconsideration Order.⁹⁹ The Third Circuit, yet again, retained jurisdiction over the remanded issues and all other petitions for review.¹⁰⁰

The day after the decision released, the FCC also released an Order approving a merger of TV stations under one of the ownership deregulations vacated in *Prometheus IV*.¹⁰¹ Then the FCC and the National Association of Broadcasters (NAB) each requested a rehearing and *en banc* review on November 7, 2019. The FCC's filing argued that the Third Circuit had for

94. *Id.* at 586.

95. *Id.* at 589 (Scirica, J., concurring in part and dissenting in part).

96. *Id.* at 591 (“Embodied in Section 202(h) is the imperative that the broadcast ownership rules stay in sync with the media marketplace.”).

97. *Id.*

98. *Id.* at 593.

99. *Id.* at 587–88.

100. *Id.* (“Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the ‘eligible entity’ definition from the 2016 Report & Order. On remand the [FCC] must ascertain on record evidence the likely effect of any rule changes it proposes and whatever ‘eligible entity’ definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the [FCC] must provide a substantial basis and justification for its actions whatever it ultimately decides.”).

101. *See* Consent to Assign Certain Licenses from Red River Broadcast Co., LLC to Gray Television Licensee, LLC, 34 FCC Rcd. 8590, 8590, 8593 (2019) (justifying the granting of a license to Gray Television on the basis that the decision was case-by-case and circumstance specific).

fifteen years functionally replaced the FCC's authority on media ownership policy. Less than two weeks later, on November 20, 2019, Judge Ambro authored a decision denying a review by the full panel.

On November 29, 2019, the panel issued a mandate formally implementing the remand. On December 20, 2019, the FCC's Media Bureau responded to the mandate with an order which concluded the 2014 Quadrennial Review, the 2010 Quadrennial Review, and the incubator program.¹⁰² The Media Bureau's Order reimplemented the long-standing newspaper-broadcast cross-ownership ban, radio-television cross-ownership rule, local television ownership rule, local radio ownership rule, and television JSA attribution rules.¹⁰³ The FCC marked the 2017 Order on Reconsideration and the incubator program as repealed.¹⁰⁴ Finally, the 2016 Order's reinstatement of the eligible entity designation was also repealed in line with the Third Circuit's remand in *Prometheus IV*.¹⁰⁵ In the end, *Prometheus IV* left the FCC's media ownership rules where they had been since the decision in *Prometheus I* in 2004, and arguably since the implementation of the Telecommunications Act.

IV. PUTTING OUT THE FIRE

A. HOW THE OPINION CONSTRUED THE FACTS/BACKGROUND

Given the diversity of issues that the *Prometheus* case line concerned, one might imagine that the Supreme Court's construal of the matter would reflect that diversity. That was only partially the case. In its retelling of the facts, Justice Kavanaugh, speaking for a unanimous court, gave a brief retelling of how the matter came before the Court. The opinion explained that Section 202(h) in the Telecommunications Act of 1996 required the FCC to "repeal or modify any ownership rules that the agency determines are no longer in the public interest."¹⁰⁶ That requirement led the FCC in its *2017 Reconsideration Order* to order the repeal two rules (the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule) and modify a third (the Local Television Ownership Rule).¹⁰⁷ That 2017 order was challenged by *Prometheus Radio Project*, along with other parties, as arbitrary and capricious under the Administrative Procedure Act.¹⁰⁸

102. Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 34 FCC Rcd. 12360, 12360-61 (2019) (Quadrennial Rev.).

103. *Id.*

104. *Id.*

105. *Id.*

106. Fed. Comm'n's Comm'n v. *Prometheus Radio Project*, 141 S. Ct. 1154, 1154 (2021) [hereinafter *Prometheus V*].

107. *Id.*

108. *Id.*

In his opinion, Justice Kavanaugh also gave a constrained retelling of the history of the matter. First, Justice Kavanaugh began by reaffirming the FCC's broad authority to regulate in the public interest, and acknowledged that the FCC has affirmatively sought to promote competition, localism, and viewpoint diversity by, "ensuring that a small number of entities do not dominate a particular media market."¹⁰⁹ Kavanaugh went on to acknowledge that Section 202(h) had been adopted by Congress because of Congress's fear that the FCC's ownership rules would remain the same due to regulatory inertia.¹¹⁰ According to this view, Congress's foresight on the matter was appropriate since passage of time and technological advancement in media had "dramatically" changed and broadened the marketplace that these rules applied to.¹¹¹ The opinion also noted that the three rules being modified had been adopted in the 1960s and 1970s as part of "an early-cable and pre-Internet age" that was "more limited" in terms of media sources.¹¹² In effect, the opinion's history more than implied that the ownership rules at issue were the kind of rules that Congress had intended to address when it legislated.

Following this exposition, the opinion expounded on what Section 202(h) required. The Court generally accepted the FCC's view from the *2002 Biennial Regulatory Review—Report*.¹¹³ By that view, 202(h) established "an iterative process that requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace."¹¹⁴ This did not mean the FCC would replace its long-accepted public interest goals—in fact, the opinion noted that FCC stated repeatedly that its "traditional public interest goals of. . . competition, localism, and viewpoint diversity would inform its Section 202(h) analysis."¹¹⁵ The opinion acknowledged that the FCC went a step further, and stated that section 202(h) review "would assess the effects of the ownership rules on minority and female ownership."¹¹⁶ The opinion left out, however, that though the

109. *Id.* at 1155 (citing Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd. 18503, 18515–27 (2002) (Biennial Rev.)).

110. *Id.* at 1156 (describing the process of modification and repeal as one that "requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace").

111. *Id.* at 1155.

112. *Id.*

113. *See Id.* at 1156–57 (citing Biennial Regulatory Review, 18 FCC Rcd. 4726, 4732 (2003) (Biennial Rev.)).

114. *Id.* at 1156.

115. *Id.*

116. *Id.*

FCC had stated as much in its 1998 and 2002 biennial reviews,¹¹⁷ the agency's actions did not substantiate its words.¹¹⁸

Justice Kavanaugh then went on to explain that since the 2002 review, the FCC had repeatedly endeavored to change several of its rules pursuant to its Section 202(h) authority, including the three at issue before the Court.¹¹⁹ Those efforts had been repeatedly stymied by the Third Circuit, who had held the FCC's regulatory orders as unlawful for "the last 17 years."¹²⁰ The opinion then emphasized that the Third Circuit's rejection of the FCC's orders had essentially frozen the rules at issue.¹²¹

The opinion's factual background then skipped from 2002 to 2016.¹²² By the opinion's retelling, in 2016 the agency promulgated the 2016 order—the fruit of its 2014 biennial review. That order retained the existing rules with only "minor modifications."¹²³ Interested parties petitioned the FCC for reconsideration, which was granted, and the FCC undertook a new public interest analysis.¹²⁴ On reconsideration the FCC determined that rapid change in the media marketplace had "render[ed] some of the ownership rules obsolete," and the FCC concluded that the rules "no longer served the agency's public interest goals of . . . competition, localism, and viewpoint diversity."¹²⁵ The FCC also stated that these changes in ownership rules were unlikely to harm minority and female ownership.¹²⁶ Of course, this skip in time left out events in the interim that made this assertion dubious—such as the FCC's hiding of studies which were critical of the results of the FCC's attempts at relaxing its ownership rules.¹²⁷

The opinion went on to relate that, unhappy with the FCC's determinations in its 2017 Reconsideration Order, Prometheus and other groups petitioned for review by the Third Circuit. The Court explicitly noted

117. *See id.* (citing Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd. 11058, 11061–62 (2000) (1998 biennial rev.); 2002 Biennial Regulatory Review, 18 FCC Rcd. 13620, 13627, 13634, 1364 n.67 (2002 biennial rev.)).

118. *See Prometheus Radio 4-0*, *supra* note 13, at 9 ("The 1998 Biennial review concluded 17 months later, in which the FCC declared it could not meaningfully assess the effects of ownership consolidation since 1996, primarily because it had not yet completed the initial wave of mergers.").

119. *Prometheus V*, 141 S. Ct. at 1156 (2021).

120. *Id.*

121. *Id.* ("As a result, those three ownership rules exist in substantially the same form today as they did in 2002.").

122. *Id.* ("The current dispute arises out of the FCC's most recent attempt to change its ownership rules.").

123. *See id.* (quoting Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864, 9865 (2016) (quadrennial rev.) (internal quotations removed)).

124. *Id.* at 1157.

125. *Id.*

126. *Id.*

127. *See Prometheus Radio 4-0*, *supra* note 13, at 26 ("The study, titled 'Review of the Radio Industry,' criticized the FCC's implementation of media ownership policy . . . [T]he number of owners decreased by 35% thanks almost entirely to mergers between existing owners.").

that the Third Circuit agreed with the FCC that three ownership rules no longer supported the FCC's public interest goals.¹²⁸ Nevertheless, the opinion explained that the Third Circuit, over Judge Scirica's dissent, held that "the record did not support the FCC's conclusion that the rule changes would 'have minimal effect' on minority and female ownership."¹²⁹ The Court concluded by explicitly acknowledging the terms of the Third Circuit's remand: the FCC was directed to "'ascertain on record evidence" effect that any rule changes were likely have on minority and female ownership, 'whether through new empirical research or an in-depth theoretical analysis.'"¹³⁰

B. HOW THE OPINION CONSTRUED THE LAW AS APPLIED TO THE FACTS

On this retelling of the facts, the Court reversed the Third Circuit's decision in *Prometheus IV*.¹³¹ Specifically, the Court held that the FCC's decision to repeal and modify the ownership rules at issue was within "the zone of reasonableness" required by the APA.

In reversing the Third Circuit's decision in *Prometheus IV*, the Court opinion focused entirely on construing the matter through basic principles of administrative law.¹³² Specifically, the opinion focused on three general points: (1) the deferential nature of *State Farm* review; (2) the FCC's acknowledgement of its imperfect data; and (3) the inability of courts to impose on an agency additional burdens that are not statutorily imposed—either by the organic statute or the APA.¹³³

The opinion first explained that the APA's arbitrary and capricious standard merely requires that agency action be "reasonable and reasonably explained."¹³⁴ The opinion expanded on this basic tenet of administrative law by stating that *State Farm* review requires that courts "simply ensures that the agency has acted with a zone of reasonableness and has reasonably considered the relevant issues and reasonably explained the decision."¹³⁵ In other words, the Court merely held what is already well-accepted administrative law precedent: *State Farm* review only requires that an agency act reasonably and provide a sufficiently reasonable explanation for

128. *Prometheus V*, 141 S. Ct. at 1158.

129. *Id.* (quoting *Prometheus IV*, 939 F.3d at 584).

130. *Id.* (quoting *Prometheus IV*, 939 F.3d at 590).

131. *Id.* at 1161.

132. *See id.* at 1157–61.

133. *See id.* at 1158–60. In fact, much of the decision turned on a general discussion of what *State Farm* review requires of an agency, *see also id.* at 1158 ("Judicial review under [hard look review] is deferential, and a court may not substitute its own policy judgment for that of the agency.").

134. *See id.* The Court explained in greater depth that "[t]he APA's arbitrary-and-capricious standard requires that the agency action be reasonable and reasonably explained A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision," *id.*

135. *Id.*

its actions.¹³⁶ It does not allow courts to substitute their own policy preferences for the agency's policy preferences.¹³⁷

In the eyes of the Court, the FCC sufficiently completed all that was required of it.¹³⁸ As the Court explained it, the FCC rigorously reviewed the record evidence, and then concluded that repealing both cross-ownership rules at issue and modifying the third rule would serve to further the current public interest and satisfy the requirements of Section 202(h).¹³⁹ The Court emphasized that the agency explained its findings and also sought public comment in order to give due consideration to the possible impact the rule changes would have on minority and female ownership.¹⁴⁰ And according to this narrative, “no arguments were made that would lead the FCC to conclude that the existing rules were necessary to protect or promote minority and female ownership”—in fact, comments received by the FCC suggested the opposite.¹⁴¹ On that record, the FCC cleared *State Farm* review because the agency could reasonably conclude that its actions in the 2017 order were reasonable and reasonably explained.

Next, the Court went on to reject the contentions of Prometheus that the FCC oversimplified its analysis of the relevant data sets, that the data was incomplete, and that the FCC had ignored superior evidence on the record. First, the Court noted that the FCC acknowledged the gaps in the data it had accumulated.¹⁴² The Court then emphasized that though the FCC repeatedly requested data on the issue of minority and female ownership, none was received.¹⁴³ Furthermore, the data that Prometheus indicates supported its contentions was simply interpreted differently by the FCC—and that interpretation was reasonable given the nature of the data.¹⁴⁴ By the Court's view, the FCC did what it could with the data that it had, and its policy decisions were reasonably derived from the data that it possessed, and that is

136. *See* *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

137. *Prometheus V*, 141 S. Ct. at 1158, 1160.

138. *Id.* at 1160 (“In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA.”).

139. *Id.* at 1158.

140. *Id.*

141. *Id.* It should be noted that it is questionable what the Court refers to as “arguments” given the unearthing of the Powell study which concluded the opposite of what the Court claims here. *See Prometheus 4-0*, *supra* note 13, at 26.

142. *Prometheus V*, 141 S. Ct. at 1159.

143. *Id.* (“And despite repeatedly asking for data on the issue, the Commission received no other data on minority ownership and no data at all on female ownership levels.”).

144. *Id.* at 1159–60 (indicating that “the Free Press studies were purely backward-looking, and offered no statistical analysis of the likely future effects of the FCC's proposed rule changes on minority and female ownership.”).

all that is required of the agency to satisfy APA arbitrary and capricious review.¹⁴⁵

Finally, the Court acknowledged that though the FCC did not have perfect data,¹⁴⁶ there was no requirement on the FCC to collect the data.¹⁴⁷ In fact, the Court emphasized that not only does the APA not impose such a requirement, Section 202(h) does not require this on the part of the FCC either.¹⁴⁸ So while the Court did not explicitly say that lower courts may not impose extra burdens not imposed by statute on agencies, its citation of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel* and its affirmation that Section 202(h) does not require data aggregation implied the invocation of this basic principle of administrative law.¹⁴⁹ The Court's concluded by stating that the FCC's request of data and decision-making on the data received was sufficiently inside the zone of reasonableness required by the APA.¹⁵⁰

C. JUSTICE THOMAS' CONCURRENCE

Justice Thomas's Concurring opinion approaches some of the issues left unaddressed by in the majority opinion by looking as far back to the FCC's actions in the 2002 Biennial review.¹⁵¹ Although the larger point Justice Thomas sought to convey is that the FCC had no obligation to consider minority or female ownership, he conflated several ideas together. In doing so, he concluded that "the FCC's ownership rules-unlike some of its nonownership rules-were never designed to foster ownership diversity."¹⁵²

While FCC statements at many points over the last 25 years would directly contradict Justice Thomas's conclusion, including a handful that Justice Thomas cites himself, in the 2002 Biennial NPRM, the FCC, citing

145. *Id.* (stating that having imperfect data and making decisions based upon imperfect data "is not unusual in day-to-day agency decision making").

146. *Id.* at 1160. It should be noted that Prometheus specifically mentioned the fact that the FCC had *no data* on female ownership when making the decision, but the Court did not include that detail, instead opting for the narrative argued by the Industry Petitioners. Compare Brief for Respondents Prometheus Radio Project, et al. at 30, 33, Fed. *Prometheus V*, 141 S. Ct. 1150 (No. 19-1231) ("[T]here was no NTIA data on female ownership . . . [A]ny ostensible conclusion as to female ownership was not based on any record evidence at all.") (internal quotations omitted), with Opening Brief for Industry Petitioners at 14, Fed. *Prometheus V*, 141 S. Ct. 1150 (No. 19-1231) ("Section 1 provides no support for the conclusion that Section 202(h) requires the Commission to promote minority and female ownership.").

147. *Prometheus V*, 141 S. Ct. at 1160 ("And nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h).").

148. *Id.* ("The APA imposes no general obligation on agencies to conduct . . . statistical studies. . . . And nothing in the Telecommunications Act . . . requires the FCC to conduct . . . statistical studies before exercising its discretion under Section 202(h).").

149. *Id.* See *supra* notes 151–53 at 1160.

150. *Id.* at 1160.

151. *Id.* at 1162

152. *Prometheus V*, 141 S. Ct. at 1161 (Thomas, J., concurring).

Sinclair states that “ownership limits encourage diversity in the ownership of broadcast stations.”¹⁵³ The agency continues to state that, “the control of media outlets by a variety of independent owners is outlet diversity.”¹⁵⁴

Justice Thomas also shortchanges the conclusions made by the Third Circuit when reviewing the FCC’s decision making. Justice Thomas focused on the premise that the FCC made a decision based on the record before it, as well as a corresponding premise that the Third Circuit could not mandate that the agency consider minority or female ownership.¹⁵⁵ This, like Justice Kavanaugh’s opinion, left out a significant element of each of the four remands: that the Third Circuit was concerned about *how* and *why* the FCC had drawn its conclusions.

But, rather oddly, J. Thomas’s concurrence lacks reference to the empirical and investigative elements that were so central to the Third Circuit’s decisions.¹⁵⁶ In 2003, the Third Circuit pointed out (correctly) that the FCC’s Diversity Index was mathematically flawed.¹⁵⁷ That same court followed this up in 2007 with the assertion that the FCC had failed to demonstrate how its Eligible Entity program could correct the ownership imbalance the program was implemented to fix.¹⁵⁸ The Third Circuit’s majority opinion in 2016 in *Prometheus III* was intended to push the FCC to act in a proceeding it had extended beyond the statutory mandates when it failed to complete the 2010 and 2014 Quadrennial Reviews.¹⁵⁹ The decision in *Prometheus IV* similarly spoke to more than the FCC’s misguided Incubator Proposal, and Justice Thomas makes no effort to address the Third Circuit’s assessment of a failing grade to the FCC in “any introductory statistics class.”¹⁶⁰

D. WHAT WAS LEFT OUT?

The Court’s opinion is undoubtably, and likely needfully, narrow. But, in reducing *Prometheus* case line’s intricacies to easily resolved questions of basic administrative law, the Court chose carefully which questions it sought

153. Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd. 18503, 18515 (2002) (quadrennial rev.).

154. *Id.* at 18516.

155. *Prometheus V*, 141 S. Ct. at 1161 (Thomas, J., concurring).

156. *See id.* (Thomas, J., concurring).

157. *Prometheus 4-0*, *supra* note 13, at 16.

158. *Prometheus II*, 652 F.3d at 471-72; *Hatching Some Empirical Evidence*, *supra* note 41, at 414, 414 n.80.

159. *Prometheus III*, 824 F.3d 33, 37 (3d Cir. 2016) (“We conclude that the FCC has unreasonably delayed action on its definition of an ‘eligible entity’—a term it has attempted to use as a lynchpin for initiatives to promote minority and female broadcast ownership—and we remand with an order for it to act promptly.”). It is also important to return to the fact that the Third Circuit said what it meant and meant what it said in no uncertain terms, *see id.* (“Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay. . . . [W]e note that this remedy, while extreme, might be justified in the future if the Commission does not act quickly to carry out its legislative mandate.”).

160. *Prometheus IV*, 939 F.3d at 586, *rev’d sub nom. Prometheus V*, 141 S. Ct. 1150 (2021).

to answer and which it did not seek to answer. And likely because of this, the majority's unanimous decision leaves out much of what the Third Circuit's decisions turned on. Most notably it declined to provide clarity and guidance on the statutory language Section 202(h), how the agency should resolve the ongoing unacted upon 2018 review (to say nothing of the agency's requirement to begin a new review in 2022), and what "the public interest" requires of FCC.

At the heart of the matter is what Section 202(h) authority both required of the FCC and empowered the FCC to do. All parties to the matter briefed the Court on what Section 202(h) required.¹⁶¹ While both sets of petitioners argued that the FCC was correct in its modification and elimination of ownership rules—whether because the 202(h)'s purpose is deregulatory in nature¹⁶² or forward-looking in nature¹⁶³—Prometheus argued that 202(h) review's purpose is merely review and specifically in the public interest.¹⁶⁴ These three readings need not be mutually exclusive to one another, and all three can plausibly be held as legitimate readings of 202(h): one could plausibly read 202(h) as a forward-looking provision meant to ensure deregulation where needed to further the public interest and continued regulation in favor of the public interest where needed. But though all three might be commensurable with one another, each reading prioritizes a different facet of the statutory language.¹⁶⁵ The Court did not obviate the

161. See Brief for the Petitioners at 33, *Prometheus V*, 141 S. Ct. 1150 (No. 19-1231) ("Section 202(h) requires the FCC to review existing ownership regulations quadrennially to determine "whether any of such rules are necessary in the public interest as the result of competition.") [hereinafter Brief for Petitioners]; see also Opening Brief for Industry Petitioners at 25–27, *Prometheus V*, 141 S. Ct. 1150 (No. 19-1231) ("The text of Section 202(h) is clear. The FCC must periodically evaluate its broadcast ownership rules and "repeal" or "modify" any such rule that is no longer "in the public interest as the result of competition.") [hereinafter Opening Brief]; Brief for Respondents Prometheus Radio Project, et al. at 27, *Prometheus V*, 141 S. Ct. 1150 (No. 19-1231) ("Beginning with the text, § 202(h) mandates 'regulatory review,' and doubles down on the public-interest focus of that review.") [hereinafter Brief for Respondents].

162. Brief for Petitioners, *supra* note 164, at 43 ("Section 202(h) contemplates an iterative process by which the FCC makes frequent assessments of the public interest, re-vises its rules accordingly, and then monitors the effects of the new rules in anticipation of the next quadrennial review.").

163. See Opening Brief, *supra* note 164, at 26 ("Section 202(h) is the capstone of this deregulatory effort.").

164. See Brief for Respondents, *supra* note 164, at 27 ("The Commission must first determine whether ownership rules remain 'necessary in the public interest' Any modification is made only after a determination that the rules are 'no longer in the public interest.'").

165. Compare Brief for Respondents, *supra* note 164, at 8, ("Nor does § 202(h) require deregulation at all costs."), with Opening Brief, *supra* note 164, at 26 ("Section 202(h) requires the Commission to consider competition, not minority and female ownership. The plain text of the statute establishes a deregulatory presumption requiring the FCC to repeal or modify any rule that is no longer necessary in the public interest as the result of competition.") (internal quotations omitted), and Brief for Petitioners, *supra* note 164, at 43 ("Section 202(h) contemplates an iterative process by which the FCC makes frequent assessments of the public interest, re-vises its rules accordingly, and then monitors the effects of the new rules in anticipation of the next quadrennial review.").

question of which prioritization is the most plausible or even if all three readings truly are consonant with one another.¹⁶⁶

This problem becomes magnified when one considers the second major element left unresolved by Justice Kavanaugh’s opinion—how to resolve the 2018 review. Whatever the agency decides to do to conclude the 2018 review in the short time remaining before the 2022 quadrennial review process is scheduled to begin will be subject to legal challenge. By approving the FCC’s 2017 decision, but not providing some guidance on future reviews moving forward, Justice Kavanaugh’s opinion does little to assuage the likelihood of the FCC finding itself back in court defending another pair of media ownership decisions in the near future. Of the shortcomings of the breadth of the Court’s narrow decision, the failure to remand the entire proceeding back to the agency to be resolved as part of the open and ongoing 2018 review process, an action proposed by the Citizen Petitioners, will be the one with the most lasting consequences for the agency.

Third, and most importantly, the Court never spoke to what “the public interest” really requires of the FCC. While the Court decided the matter neatly on administrative law grounds, the issues present in the *Prometheus* case line were not limited to rote administrative law questions. At the heart of the matter is how much room to run will be granted to agencies by the courts in regulating in the public interest—and this was touched upon by each party brief.¹⁶⁷ Yet this was entirely absent from the opinion. In fact, in skipping from the 2002 review to the 2016 review and then 2017 order, the Court appeared to intentionally avoid the drama that was *Prometheus*.¹⁶⁸ Perhaps this makes sense, since the full history of this matter may not lend itself to a clear-cut administrative law decision.

A full history of *Prometheus* clouds the conclusion that the Third Circuit had obviously violated basic tenets of administrative law with considerations of equity. While J. Kavanaugh’s opinion was careful to point out that the opinion only spoke to the FCC’s decision in the *2017 Reconsideration Order*,¹⁶⁹ the matter was so much more than just one reconsideration order. This matter consisted of nearly two decades of fighting about what ownership of media would look like. In the course of seventeen years of litigation the media world saw an agency suppress studies,

166. See *Prometheus V*, 141 S. Ct. at 1150.

167. See Brief for Petitioners, *supra* note 164, at 33 (arguing that the Third Circuit’s consideration of minority and female ownership as dispositive of whether the FCC was acting in the public interest was incorrect as a matter of law); see also Opening Brief, *supra* note 164, at 30 (explaining the historic, contextual meaning of “in the public interest” as the phrase relates to the FCC); see also Brief for Respondents, *supra* note 164, at 23 (indicating that the question before the Court really turns on the “Iodestar” question of what acting in the public interest means).

168. *Prometheus V*, 141 S. Ct. at 573–77.

169. *Prometheus V*, 141 S. Ct. at 1156 n.1 (“The FCC currently has two other ownership rules that are subject to its quadrennial Section 202(h) review . . . [And] [t]he FCC has one additional ownership rule . . . Those other rules are not at issue in this case.”).

those studies coming to light, rapid change in media markets, consolidation of the media market in larger media corporations, the establishment of the Internet as a dominating force in the media market, and much more. It was a drama, a tragicomedy, and an effort in squaring agency action (and inability to act) with the public interest. Those complications are likely why the Court avoided the thorny normative question of what the public interest requires, but that avoidance leaves the disposition of the matter in the lurch.

In the end, the Citizen Petitioners were handed the narrow administrative decision they sought, and, unfortunately for Prometheus Radio Project, the decision was unfavorable.¹⁷⁰ Importantly though, the decision's narrow focus does little, in practical terms, to resolve the longstanding impasses that motivated the litigation in the first place. Justice Kavanaugh's opinion, which focused almost exclusively with the FCC's 2017 media ownership decision certainly provides some additional deference to the FCC on media ownership decision-making. With the FCC's composition subject to political swings based on the Presidential administration, giving the FCC additional deference on how to interpret and apply the requirements of Section 202(h), the FCC's rationales and approach to media ownership policy will also likely ebb and flow based on the controlling party. As these ongoing decisions unfold, the likelihood for inconsistent action is just as likely to increase efforts towards future legal challenges to those decisions.

V. CONCLUSION

The Court looked at twenty-five years of regulatory decision making, more than seventeen years across four decisions by the Third Circuit, shrugged, and focused only on the FCC's 2017 Order on Reconsideration which was the least significant agency action during of this lengthy process. In the end, or at least the end for now, Justice Kavanaugh's opinion imposes at least a brief pause while we all wait for more judicial review of the agency's next round of action.

170. *Id.* at 1150.
