

**Media Access Project Report on
Oral Argument in Media Ownership Court Challenge in *Prometheus
Radio Project v. FCC***



Yesterday, on February 11, 2004, Media Access Project and its co-counsel represented the public interest petitioners in the court case challenging the FCC's new relaxation of the media ownership rules, issued last June. On behalf of the lead client, Prometheus Radio Project, MAP's attorneys argued that the FCC's applied the wrong legal standard and irrationally and inconsistently adopted the rules in violation of law.

The argument went very well from the public interest perspective. It is always risky to guess what a court will do based on an oral argument. The judges take the opportunity to make sure they fully understand arguments and the implications of arguments, therefore, they sometimes play devil's advocate or ask tangential question. Just because a judge challenges a point during oral argument doesn't mean he or she disagrees with it. On the whole, however, the judges closely questioned and were very skeptical of the FCC's rules, and were also skeptical of the industry's challenges seeking to loosen the rules even further.

The judges are taking this case very seriously. One indication of that was the length of time spent during oral argument. Ordinarily oral argument will last for 30 minutes. In this case, the court scheduled three hours of oral argument. Beyond that, the judges ignored the time limits, meaning that the case lasted from 9:30 am until 6 pm. In total the lawyers spent almost eight hours in court, an extraordinarily long time.

The public interest lawyers were: Andrew Jay Schwartzman, President & CEO of MAP, his co-counsel Angela Campbell of Georgetown's Institute of Public Representation, on behalf of Media Alliance, and Glenn Manishin, of the law firm Kelley, Drye & Warren, on behalf of Consumer Federation of America and Consumers Union. The public interest advocates argued first, and were scheduled for 45 minutes, but argument lasted about 2 ½ hours. All the other attorneys also got extended time to present their points.

The highlights of the argument were as follows:

- In a highly unusual step, Judge Ambro had carefully worked out sample calculations of the diversity index prior to the argument. He asked the FCC attorney to explain various inconsistent outcomes the public interest petitioners had described, including the fact that the Dutchess County Community Television station had more value than the *New York Times* for diversity. This discussion seems to indicate that the court is very concerned that the diversity index is flawed.
- The same judge characterized the diversity index as making "hypothetical" assumptions when the FCC could have instead relied upon real market data.
- One judge quoted the brief of United Church of Christ saying that while the number of stations has increased, the number of owners decreased, and challenged Clear Channel's lawyer's argument that a single owner owning several radio stations could offer more diversity.
- Public interest lawyers showed that the FCC got its duty expressly backward as between protecting competition and diversity. The law and facts show that rules to protect competition are not enough to protect diversity: more restrictive rules are needed to protect diversity than competition.

- Public interest lawyers and the allied lawyers for Capitol Broadcasting were able to show that the FCC failed to consider whether the UHF discount should be lowered. The FCC and the industry claimed that the public had never argued the discount should be lowered, but MAP was able to prove that the question had been ignored by the agency.
- The judges seemed to believe the FCC retains some ability to continue to regulate in the public interest despite recent legislative changes in the 1996 Act. When the NAB challenged the FCC's decision to revise the radio rules to tighten market definitions, one judge was extremely skeptical that the FCC could not fix a problem, even if the correction leads to more regulation.
- The court refused to give credence to newspaper industry arguments that it should question the historic Supreme Court decision in *Red Lion* that broadcasting should be regulated in the public interest, and a similar Supreme Court decision, *N.C.C.B.*, which upheld the constitutionality of the rule prohibiting joint ownership of a TV station and a newspaper in the same city.
- Public Interest advocates made the point that the FCC counted television stations that did not offer local news in the diversity index, even when the FCC had said that it would try to promote local news. This is particularly helpful because the courts are likely to overturn the FCC when it makes inconsistent decisions.
- MAP explained that the court should not conclude that if there is conflicting evidence about media regulation, the law requires the FCC to deregulate because the industry would always be able to produce conflicting evidence and thus force deregulation.

What will the court do? It is impossible to predict what the court will do, but generally, the reaction from the court was as favorable as we could have expected. Although we are unsure whether the court will rule in our favor about the legal standard in the biennial review provision (section 202(h)), it seems that the court believed that several of the FCC's new rules will be overturned. In particular, it seems that the diversity index will not be upheld. This means that the FCC's repeal of the newspaper-broadcast rule and the new cross-media limit will likely have to be redone. The court also seemed skeptical of Clear Channel's and the NAB's challenges to the parts of the local radio and TV rules the FCC did not relax. Finally, while the court was concerned that the FCC had not adequately explained the UHF discount (which helps to control how restrictive the national television rule is), it was also concerned that the recent legislation adopting a 39% national TV cap also froze the UHF discount. This is important, because even though Congress adopted a 39% national TV cap, the FCC has always implemented it using a discount which it cannot defend. If the FCC is reversed on the UHF discount, the national TV cap would be applied to all TV owners equally, and would be more restrictive. If the law freezes the discount, it will allow the major TV owners to retain their current holdings.

If the public interest advocates win, the court will reverse the FCC's decision, and send it back for the FCC to try again. If the court reverses the FCC, it will most likely leave the stay in place, which means that the FCC's new rules will not go into effect until the FCC fixes them.

When does the next step occur? Courts do not have any deadline to make a decision. Courts typically take several months to write an opinion. While this court has been moving quickly in this case, it is also very complicated, and therefore it may well take significant time for it to come to a decision. The earliest the court would likely rule is in two months.