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MEMORANDUM TO MEMBERS

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

Gaming Out the Supreme Court's Media Ownership Review

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The United States Supreme Court has agreed to hear appeals by the Federal Communications Commission ("FCC" or the "Commission") and the National Association of Broadcasters ("NAB") of a decision by the US Court of Appeals for the Third Circuit that overturned a 2017 decision by the FCC attempting to relax its media ownership rules. After almost twenty years, is it possible that this may finally bring an end to the Third Circuit's hold on media ownership? It seems possible, although, in this proceeding, the years have taught us not to expect too much.

As readers (or at least those with long memories) know, this saga truly began in 2003, when the FCC under then-Chairman Michael Powell fundamentally restructured its rules regarding media ownership. Appeals were filed in numerous federal appellate courts and, after a judicial lottery, those appeals were consolidated in the Third Circuit Court of Appeals in Philadelphia. To the great consternation of much of the broadcast industry and the FCC, the proceeding has remained under the control of that court ever since.

The 2003 rule changes, and subsequent changes, were adopted as a result of a provision of the Communications Act of 1996 that required the FCC to review its media ownership rules on a biennial basis (now modified to a quadrennial review). Since that 2002 review, each of the FCC's subsequent decisions has ended up being at least partially overturned by the Third Circuit, which in addition to rejecting those rule changes has retained jurisdiction over the FCC's responses to those rulings. As a result, basically, none of the FCC's attempted rule changes have gone into effect, meaning that the media ownership rules in place now are essentially the same as those that existed in 2002 (and in some cases for many years prior to that).

The most recent FCC attempt to revise its ownership rules was a 2017 Order on Reconsideration completing the quadrennial review begun in 2014. That 2017 Order (which we reported on here), eliminated the Newspaper/Broadcast and Radio/Television Cross-Ownership rules and relaxed the local television ownership rules. On appeal, the Third Circuit overturned those changes, finding that the FCC had not properly considered how its rule changes would impact female and minority ownership. The NAB and FCC each petitioned the Supreme Court for writs of certiorari, which now have been granted.

So, what does this mean for the FCC's ownership rules and the broadcast industry? Not surprisingly based on the history of this proceeding, the answer is not entirely clear. Perhaps as a final example of how nothing related to this case is straightforward, the news of this review comes during both the possible confirmation of a new Supreme Court justice, and an extremely contentious presidential election which may result in a changed majority on the Commission. Even if majority control of the FCC does not change, at least two Commissioners, including the current Chairman, are expected to be replaced in the coming months.

Taking all that into consideration, what are the odds that the Supreme Court overturns the Third Circuit? I am not a gambling man, but I would put them at greater than 50 percent, particularly if Amy Coney Barrett is confirmed to the Court and participates in the ruling, but certainly no sure thing. While the conservative jus-

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tices currently on the court are no great fans of unfettered agency discretion, in this case it seems, at least to this author, likely that a majority may be swayed by the argument that the deregulatory bent of the 1996 Telecom Act and the quadrennial review requirements at issue here support judicial deference towards deregulatory actions by the Commission.

If the Supreme Court indeed overturns the Third Circuit and determines that the FCC did not need to further consider female and minority ownership, the most immediate impact would be that the FCC's 2017 ownership rule changes would go back into effect in the near term. If that were to occur, it could lead to increased broadcast deal-making, and potential consolidation, particularly among television stations in mid-size markets. The practical impact, however, could be limited in a Biden presidency in which the FCC switched to Democratic control. The manner in which the Court overturns the Third Circuit (if it does) is also likely to have a. major impact on what happens going forward.

If the FCC does switch to Democratic control, that new Democratic Commission would in 2021 be in a position to complete the currently pending 2018 quadrennial review or make other re-regulatory changes to the ownership rules. (As a reminder, the quadrennial review proceedings are also separate from any review of the FCC's national television ownership cap and related UHF discount, both of which could be revisited in a new Democratic Commission). Of course, any re-regulatory changes would once again raise the long-debated question of whether the quadrennial review provisions of the 1996 Telecom Act justify additional regulation or are only deregulatory in nature. That question is something that the Supreme Court could address in this proceeding, but if not, it will almost certainly be raised again. Even if the 2017 rules are allowed to continue unchanged under a Democratic FCC, applicants could likely expect a tighter review of waivers of the top-four prohibition on television duopolies.

In the event the Supreme Court upholds the Third Circuit, the 2017 rule changes would be sent back to the FCC for further review and consideration in light of their effect on female and minority ownership. That review would likely be consolidated into the pending 2018 quadrennial review. The outcome of any such review would, of course, also be significantly impacted by whether a Republican or Democratic-controlled FCC is conducting that review. It would also raise the possibility of a significant delay in reaching a final decision, as one of the problems pointed out by the Third Circuit was that the FCC did not have the data necessary to determine the impact of its rules on female and minority ownership. If this Third Circuit decision is upheld, the FCC's task would be two-fold – first to gather the necessary data, and second to analyze it and adopt rules accordingly

A secondary issue the Supreme Court may address is whether the Third Circuit is allowed to retain jurisdiction over further appeals. To this point, the Third Circuit has considered all of the Commission's media ownership rulings since 2004 since each of those in part addressed a remand of previous changes from the Third Circuit. The NAB, FCC, and many broadcast owners have long wanted to remove the case from the Third Circuit, but have thus far been unable to do so. If the Supreme Court does end up overturning the Third Circuit, it is certainly possible that they could also rule on whether the Third Circuit could retain jurisdiction over further appeals. Even if the Supreme Court upholds the Third Circuit, they could speak to that Court's ability to exert authority over reviews of subsequent quadrennial review decisions. In either case, however, even if the Supreme Court does not allow the Third Circuit to assert jurisdiction on its own, there is always the possibility that another judicial lottery could send a subsequent appeal back to the Third Circuit anyway.

While any of these outcomes are reasonably likely, there are any number of other far more unlikely outcomes of the case. One such unlikely outcome that has been discussed would be for the Supreme Court to use this case to undermine or narrow the scope of *Chevron* deference. Under *Chevron*, federal courts have long afforded significant deference to regulatory agencies such as the FCC when they interpret vague statutory directives. Certain conservative members of

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the Supreme Court have questioned whether *Chevron* deference is really appropriate in most cases; if a new conservative Justice is added to the bench before this case is decided, the theory goes, the Court could question how much deference the FCC's decisions should receive. One of the problems with this theory, however, is that it would essentially require that the Supreme Court reject the FCC's attempt at deregulation and uphold the decision, if not the reasoning of the Third Circuit. The Third Circuit decision in effect found that the FCC had exceeded its authority by not considering the impacts of its decision on female and minority ownership. In short, a case where the agency decision under review is one that was deregulatory in nature would not seem the most likely candidate for a challenge to *Chevron*.

Of course, it is possible to come up with any number of other potential outcomes of the Supreme Court review (and if 2020, not to mention the history of this proceeding, have taught us nothing, it is to never rule out an outlandish outcome), these seem the most likely. And it is worth remembering that whatever happens with this review, the FCC has not yet completed its mandated 2018 quadrennial review, and another such review must start in 2022. If experience is any guide, whatever decisions the FCC adopts in those proceedings are likely to be appealed by one or more parties. As always, the saga of the FCC's media ownership rules has a ways to go.

FCC Announces End of the Filing Freeze on TV Station Modifications

The FCC's Media Bureau announced via *PN* the end of a filing freeze on certain full power and Class A TV station modifications that lasted more than 16 years and the leadership of seven FCC chairpersons. The freeze was part of the FCC's effort to keep a stable technical database first during the DTV transition, and then the incentive auction and associated repack; now that the transition is over and the post-incentive auction is complete, the FCC deemed it an appropriate time to end the freeze and allow additional discretionary changes to television facilities.

Modification proposals that can now be filed include:

- Petitions for rulemaking to change channels in the DTV Table of Allotments.
- Petitions for rulemaking to add new DTV allotments.
- Petitions to swap in-core channels.
- Petitions for rulemaking to change communities of license.
- Modification applications that increase a full power or Class A station's service area beyond an area that is already served.

This lifting of the freeze will be effective 15 days after the publication of the *PN* in the *Federal Register*. We will notify you when this publication occurs.

Final Deadlines Established for FCC Repack Reimbursement

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Attention all repacked television broadcast stations (and eligible LPTV and FM stations): the FCC has established final deadlines for submission of all reimbursement expenses invoices and documentation. The Commission also reminds stations to finish up and close-out or money might be left on the table.

The FCC's Incentive Auction Task Force and Media Bureau have announced via *Public Notice* ("PN") the following filing deadlines for eligible entities to submit all remaining invoices and other documentation on FCC Form 2100, Schedule 399 Reimbursement Form for reimbursement from the TV Broadcaster Relocation Fund, and to initiate close-out procedures:

- Full Power TV and Class A TV stations in Repack Phases 1-5: **October 8, 2021.**
- Full Power TV and Class A TV stations in Repack Phases 6-10: **March 22, 2022**.
- LPTV stations, FM stations, and MVPDs: **September 5, 2022**.

Stations that were granted Phase changes are expected to meet the deadline associated with their revised Phase.

In addition to setting deadlines, the Commission uses the PN to chide broadcasters for "unnecessarily delaying making final submissions to the program and initiating interim close-out procedures." Reading the tea leaves, it seems that such delays are creating some accounting problems in the management of the Fund: the FCC stresses in the PN that it cannot make final reimbursement allocations until all invoices are submitted and close-out procedures are begun. The Commission also nudges stations to submit invoices as soon as costs are incurred, not to wait until after construction is complete, and reminds stations that failure to complete construction and/or failure to submit all of the necessary documents by these new deadlines may result in a station being denied the full reimbursement it would otherwise be eligible for.

Lastly, stations are reminded that reimbursement funds are subject to possible audit, so stations should be careful to pay their vendors the funds received for each invoice. Stations unable to prove that the funds were validly disbursed may be forced to pay the money back to the government. To ensure documentation is available for a potential audit, stations are further reminded that they must retain all documentation for 10 years after the last reimbursement is received.

It seems pretty straightforward that a station would want to seek any reimbursement it is owed, but sometimes real life is more complicated. We here at CommLawBlog are aware of some stations still trying to design and complete final post-transition facilities, having transitioned to their new channels with temporary or auxiliary facilities. The FCC understands these issues, but it is signaling that time and patience with these arrangements is running out; stations would be wise to buckle down and finalize plans.
As always, contact your communications counsel if you have questions or concerns about finishing your reimbursement efforts.

FCC Adopts STIR/SHAKEN Rules to Combat Illegal Robocalls

The FCC recently released a *Report and Order* ("Order") to promote the use of the STIR/SHAKEN framework (which we wrote a useful primer on) in combatting caller ID spoofing. The FCC is giving carriers until June 30, 2021 to implement STIR/SHAKEN. However, if a carrier wants to receive an exemption from the Caller ID Requirements they must file by December 1, 2020.

Exemption requests must be filed in the Commission's Electronic Comment Filing System (ECFS), be signed by an officer of the company, and contain detailed support regarding the assertions in the certification. Voice service providers that receive an exemption will also need to file a second certification regarding whether they achieved the implementation goal they committed to (as required by the initial exemption certification).

Fletcher Heald Partner Frank Montero Named "*Radio's Point Man in DC*" by Radio Ink

Fletcher Heald partner Frank Montero was featured on the cover of this month's *Radio Ink* magazine. The cover story interview describes Frank's decades of experience in broadcasting, how the industry is handling the COVID-19 crisis, potential changes to FCC leadership, and legal issues broadcasters could face in the future. For more details, check out *Radio Ink*'s link to the issue.

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Now Available: Broadcasting During Times of Emergency

Fletcher Heald attorneys Frank Montero and Davina Sashkin with Pat Roberts of the Florida Association of Broadcasters ("FAB"), and their special guests Lisa Fowlkes and Christina Clearwater of the FCC's Public Safety and Homeland Security Bureau, and Craig Fugate, former FEMA Administrator and founder of Fugate Consulting, presented a webinar in consultation with the FAB entitled "Broadcasting During Times of Emergency". They addressed topics ranging from FCC EAS requirements, IPAWS, hurricanes, COVID-19, and DHS and FCC assistance for broadcasters.
If you didn't catch the webinar live you may watch the full video recording of the webinar on YouTube.

Now, more than ever, broadcasters must be aware of their vital role in mitigating disaster and the resources that Federal and state governments have to offer.

Upcoming FCC Broadcast Deadlines for November – January

Broadcast Deadlines:

November 16, 2020

Amending the Schedule of FCC Application Fees - Comments are due in response to the FCC's Notice of Proposed Rulemaking requesting comments on proposed changes to its application fee schedule, which the FCC considers to be significant and which include fee amounts, most of which would increase though a few would decrease or be eliminated, and other processes covered by its fee requirement.

November 30, 2020

Amending the Schedule of FCC Application Fees - Reply comments are due in response to the FCC's Notice of Proposed Rulemaking requesting comments on proposed changes to its application fee schedule, which the FCC considers to be significant and which include fee amounts, most of which would increase though a few would decrease or be eliminated, and other processes covered by its fee requirement.

December 1, 2020

Radio License Renewal Applications Due – Applications for renewal of license for radio stations located in Colorado, Minnesota, Montana, North Dakota, and South Dakota must be filed in the Licensing and Management System (LMS). These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity (EEO) Program Report, also filed in LMS, regardless of the number of full-time employees.

Radio Post-Filing Announcements – As of this writing, radio stations licensed in Colorado, Minnesota, Montana, North Dakota, and South Dakota must begin broadcasts of their post-filing announcements concerning their license renewal applications on December 1. These announcements must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the Online Public Inspection File (OPIF) within seven days, or by February 23. The updated rules governing PNs are now in effect.

Television License Renewal Applications Due – Applications for renewal of license for television stations located in Alabama and Georgia must be filed in LMS. These applications must be accompanied by Schedule 396, the Broadcast EEO Program Report, also filed in LMS, regardless of the number of full-time employees.

Television Post-Filing Announcements – Under current regulations, television stations licensed in Alabama and Georgia must begin broadcasts of their post-filing announcements concerning their license renewal applications on December 1. These announcements must continue on December 16, January 1, January 16, Febru-

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ary 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days, or by February 23. The updated rules governing PNs are now in effect

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont must place EEO Public File Reports in their OPIFs. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

January 30, 2020

Children's Television Programming Reports – Each commercial TV and Class A television station must electronically file its annual Children's Television Programming Report, on FCC Form 2100 Schedule H, to report on programming aired by the station and other efforts in 2020 that were specifically designed to serve the educational and informational needs of children.

Commercial Compliance Certifications – Each commercial TV and Class A television station must post to its OPIF a certification (or certifications) of compliance during 2020 with the statutory limits on commercial time during children's programming. The certification(s) should cover both the primary programming stream and all subchannels aired by the station.