UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675 & 03-3708

Prometheus Radio Project, et al. v. FCC, et al.

Prometheus Radio Project, Petitioner in No. 03-3388
Media General, Inc., Petitioner in No. 03-3577
National Association of Broadcasters, Petitioner in No. 03-3578
Network Affiliated Stations Alliance, et al., Petitioners in No. 03-3579
Fox Entertainment Group, Inc., et al., Petitioners in No. 03-3580
Viacom, Inc., Petitioner in No. 03-3581
National Broadcasting Company, Inc., et al., Petitioners in No. 03-3582
Sinclair Broadcast Group, Inc., Petitioner in No. 03-3651
Media Alliance, Petitioner in No. 03-3665
Paxson Communications Corporation, Petitioner in No. 03-3675
National Council of the Churches of Christ in the United States, Petitioner in No. 03-3708

Present: SCIRICA, Chief Judge, AMBRO and FUENTES, Circuit Judges

O R D E R

FUENTES, Circuit Judge

I. INTRODUCTION

Before the Court is Network Petitioners' Joint Motion to Transfer Venue. In their Motion, Fox Entertainment Group, Fox Television Stations, Viacom, NBC and Telemundo (hereinafter collectively referred to as "the Networks") argue that this case, randomly assigned to this Court pursuant to 28 U.S.C. § 2112(a), should be transferred to the United

States Court of Appeals for the D.C. Circuit. Petitioners Media General and Sinclair Broadcast Group have filed briefs supporting the Networks' Motion, as has Respondent FCC. Specifically, the Networks observe that, under 28 U.S.C. § 2112(a)(5), this Court may transfer venue of the case "[f]or the convenience of the parties in the interest of justice." The Networks contend that the six FCC rule changes (hereinafter "the 2002 Review") include changes made in direct response to decisions from the D.C. Circuit, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), and Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002). These two decisions invalidated two prior FCC rules, both of which were replaced in the 2002 Review.

Thus, the Networks argue that the 2002 Review is an attempt to comply with the D.C. Circuit's mandate, and that the D.C. Circuit Court is therefore best equipped to evaluate that compliance. In a related argument, the Networks claim that the D.C. Circuit Court has the most expertise with FCC matters (including exclusive jurisdiction over appeals involving specific licensing grants by the FCC) and is therefore generally best able to adjudicate such matters.[1]

Petitioners Prometheus Radio Project, Media Alliance, and the National Council of

[1] The Networks make two other arguments in favor of transfer, but neither is very persuasive to this Court. First, the Networks observe that almost all of the counsel in this case reside in Washington, and conclude that it would be most convenient for the parties to litigate there. We note, however, that Philadelphia is less than two hours by train from Washington, which we do not consider a significant inconvenience. Second, the Networks suggest that Prometheus, the party that initially filed in the Third Circuit, does not have associational standing, but we do not reach this issue as the Networks have not formally contested Prometheus's standing.

the Churches of Christ (hereinafter referred to collectively as "Citizen Petitioners") have filed a brief opposing the Networks' Motion. Citizen Petitioners argue that the genesis of the 2002 Review is qualitatively distinct from the two D.C. Circuit Court decisions for several reasons, and that D.C. Circuit Court's exclusive jurisdiction over FCC licensing decisions is irrelevant to its jurisdiction over FCC rulemaking decisions. For the reasons that follow, we conclude that the interest of justice does not support transfer of this case to the D.C. Circuit.

II. DISCUSSION

In Fox, a group of television network and cable system owners challenged two then-existing FCC rules: 1) a prohibition against any entity controlling enough television stations that they would reach more than 35% of the television households in the United States ("the NTSO rule"); and 2) a prohibition against common ownership of a broadcast station and a cable television statement in the same market ("the CBCO rule"). Fox, 280 F.3d at 1034-35. The D.C. Circuit held that the FCC had not adequately justified either rule as being necessary for the public interest, as required by § 202(h) of the Telecommunications Act of 1996. Fox, 280 F.3d at 1040-53. The D.C. Circuit remanded the NTSO rule to the FCC for a more persuasive justification, but vacated the CBCO because it could not conceivably be justified. Id. Less than two months later, the D.C. Circuit Court issued Sinclair, which dealt with the FCC's prohibition of any entity owning more than one local television station unless the market area had at least eight independent "voices." Specifically, in counting how many independent voices existed in a market area, the FCC only counted TV stations, thereby

excluding radio stations, newspapers and cable systems. Sinclair, 284 F.3d at 163-165. The D.C. Circuit Court found that the FCC had not adequately justified this limitation on the voices pool as necessary for the public interest, and remanded the rule to the FCC for a more persuasive justification. Id.

We conclude that the issues in the case before us are not closely related enough to warrant transfer to the D.C. Circuit. The 2002 Review is an omnibus biennial review of media ownership rules compelled by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, not by Fox and Sinclair. It is true that at least two rules in the 2002 Review were crafted with Fox and Sinclair in mind: 1) the 35% cap on national audience reach was increased to 45%; and 2) the number of voices required for two-station ownership was reduced to five, while three-station ownership is now allowed for the largest TV markets. The 2002 Review, however, contains several other rules challenged by the various Petitioners, and is, in the FCC's own words, "the most comprehensive look at media ownership regulation ever undertaken by the FCC." FCC Initiates Biennial Review of Broadcast Ownership Rules, FCC Document Number 2261988A1 (Sept. 12, 2003). Indeed, the 2002 Review is a *statutorily* mandated review of media ownership regulations that merely incorporates responses to Fox and Sinclair.

Moreover, the remand instructions from the D.C. Circuit Court are not the complicated sort that would require special expertise from future reviewing courts. The D.C. Circuit Court simply instructed the FCC to justify its rules on media ownership with an eye

to the public interest: this Court is no less qualified than any other Court of Appeals to determine whether the FCC has appropriately considered the public interest in its decision-making. Furthermore, the remand instructions were general, not the sort of specific mandate that requires hands-on stewardship by the same judges that issued the prior decision: this fact is underscored by the reality that if this case was transferred to the D.C. Circuit, the adjudicating panel could be composed of an entirely different set of judges than those who decided Fox or Sinclair (which were not decided by the same panel of judges).

In short, the similarity between Fox/Sinclair and this case is highly generalized: they are similar only in the sense that both require examination of whether certain FCC rules (a subset of the rules in the 2002 Review) serve the public interest. If this level of similarity suffices to justify transfer, then all appeals from FCC media ownership rulemaking would effectively be placed before the D.C. Circuit Court. As Citizen Petitioners point out, if Congress had meant to give the D.C. Circuit Court exclusive jurisdiction over such appeals, it would have explicitly done so, in the way that it gave that Court exclusive jurisdiction over FCC licensing decisions. In conclusion, we find that this case is separable and independent from Fox and Sinclair, and that transfer is therefore unwarranted. The Networks' Motion is therefore DENIED.

Dated: September 15, 2003
nmb/cc: All Counsel of Record

SCIRICA, *Chief Judge,* dissenting.

I would transfer this matter to the United States Court of Appeals for the District of Columbia.

The consolidated cases at issue were randomly assigned to this Court through a lottery process under 28 U.S.C. § 2112(a)(1), (3). This Court may transfer the cases "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). Courts have recognized that the initial lottery under § 2112 determines only "which court will determine venue, not which court will ultimately hear the case." *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *see also City of Gallup v. FERC*, 702 F.2d 1116, 1121 (D.C. Cir. 1983) ("[O]nce all petitions have been consolidated in [the initial] court, it must be determined whether the 'convenience of the parties in the interest of justice' counsels transfer to yet another circuit.").[2]

"In evaluating a transfer motion, a court will consider the policies of sound judicial administration, such as: one circuit's familiarity with the issues and parties from prior litigation; the need for continuity and consistency in reviewing a series of agency decisions; and, the facilitation of judicial economy." *Abourezk v. FPC*, 513 F.2d 504, 505 n.1 (D.C.

[2]Prometheus argues that its choice of forum in which to litigate favors maintaining jurisdiction in this Court. This factor is of diminished significance in light of the lottery procedure under § 2112. Prometheus' choice of forum should not be afforded greater significance than that of any other party that filed a petition for review during the 10-day lottery period.

Cir. 1975). When considering a motion to transfer, our own Court has given weight to the "desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of judicial effort." *United Steelworkers of America, AFL-CIO v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).

Sound judicial administration and consistency favor transferring this matter to the D.C. Circuit. Tied to these principles is the fundamental jurisprudential underpinning that agency decisions on remand should be reviewed by the remanding court. *See Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (Transfer is appropriate where "the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary to maintain continuity in the total proceeding."). Because the FCC order at issue, at least in part, was on remand from a sister circuit, this principle, grounded in comity, presents the most fundamental ground for transfer of the consolidated cases.

The FCC promulgated its order, 2002 Biennial Regulatory Review, 68 Fed. Reg. 46, 286 (Aug. 5, 2003), as required by the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996). But the order was also promulgated with explicit directives from the D.C. Circuit. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), and *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit considered the national and local television ownership rules whose promulgation after

remand is at issue in the consolidated cases. Though the challenged order modified four additional rules not at issue in those cases, *Fox* and *Sinclair* are critical.

The D.C. Circuit interpreted the language and purpose of 47 U.S.C. § 202(h) to contain a "presumption in favor of repealing or modifying the ownership rules." *See Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 164. The court faulted the FCC for taking an impermissible "wait and see" approach. *Fox*, 280 F.3d at 1042. Specifically, the *Fox* court remanded the national television ownership rule, in part, because the FCC failed to provide an "analysis of the state of competition in the television industry." *Id.* at 1044. In *Sinclair*, the court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception is not arbitrary and capricious." 284 F.3d at 152. The D.C. Circuit cited the deficiencies of the FCC's prior orders and provided specific instructions for promulgating the order now at issue in the consolidated cases.

As noted, in promulgating all of the rules in the challenged order, the FCC was directed to follow and implement a mandate from the D.C. Circuit. Whether the agency decision on remand remedied these short-comings and faithfully carried out the court's directive will be part of this appeal. As the court that issued the remand, the D.C. Circuit is best positioned to construe the scope of its mandate and evaluate the agency's response. *See, e.g., Arkansas Midland R.R. v. STB*, 2000 U.S. App. LEXIS 18003, at *2 (D.C. Cir. June 8, 2000) ("[T]he same or interrelated proceedings were previously under review in the Eighth Circuit Court of Appeals, and petitioner is now seeking review of an order entered, in part,

on remand from the Eighth Circuit. Transfer to the Eighth Circuit, therefore, is appropriate 'for the convenience of the parties in the interest of justice.'").

Interests of continuity and consistency in reviewing a series of related agency decisions favor transfer of the consolidated cases to the D.C. Circuit as well. The relationship between the consolidated cases and *Fox* and *Sinclair* is "sufficiently close for the interest in consistent results to come into play." *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (D.C. Cir. 1980).

Construing a prior order of another circuit may cause inter-circuit tension and raises the prospect of inconsistent decisions, both of which should be avoided if possible. Absent a transfer, "the peculiarly undesirable possibility of conflicting results," *Spencer v. Kugler*, 454 F.2d 839, 847 (3d Cir. 1972), and concomitant inconsistent mandates to the agency, could occur. For example, if this Court were to remand the order at issue, the agency could be placed in the unenviable position of rewriting rules in accordance with two potentially divergent directives. Conversely, when a remanded order is reviewed in the issuing court, consistent results are more likely.

In addition to the prospect of conflicting decisions on remand, the importance of consistency is particularly relevant for at least one other reason. Congress has vested the D.C. Circuit with exclusive authority to review FCC grants and denials of applications to construct new radio and television stations or to assign or transfer control of licenses for existing stations. 47 U.S.C. § 402(b)(1)-(3). The D.C. Circuit is also the exclusive forum

for appeals brought by any party "adversely affected by any order of the Commission" granting or denying station licensing or construction applications. 47 U.S.C. § 402(b)(6). These appeals of agency decisions may overlap with the issues raised by this appeal, highlighting the need for consistent results.

Based on the foregoing reasons, I would transfer the consolidated cases for reasons of comity and sound judicial administration.