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Andrew Jay Schwartzman
Media Access Project

Harold Feld
Media Access Project

Parul Desai
Media Access Project

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Andrew Jay Schwartzman*

Harold Feld**

Parul Desai***

*Andrew Jay Schwartzman is President and CEO of Media Access Project. Mr. Schwartzman represented Office of Communication, Inc., United Church of Christ, *et al.* in Sinclair v. FCC, 284 F.3d 148 (D.C. Cir. 2002).Andrew Jay Schwartzman represented intervenors/*amici curiae* Consumer Federation of America and Office of Communication, Inc., United Church of Christ in Fox Television Stations, Inc. v. FCC (*Fox I*), 280 F.3d 1027, 1039 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).
**Harold Feld is Senior Vice President, Media Access Project. Mr. Feld represented intervenors/*amici curiae* Consumer Federation of America and Office of Communication, Inc., United Church of Christ in *Fox I*.
***Parul Desai is Assistant Director, Media Access Project.

I. INTRODUCTION

This is a story about a reasonably obscure provision of the Telecommunications Act of 1996 ("1996 Act"), and about the story behind the story. Sadly, it is a tale that demonstrates one of the pitfalls of undertaking comprehensive omnibus legislation.

The notion of a comprehensive rewrite of the Communications Act of 1934 had—and still has—understandable appeal. Technology has advanced ever more quickly, and by the early 1990's it clearly had rendered many aspects of the Communications Act incomplete, archaic, and/or overbearing.

However, it bears notice that the broad definitional scope of the Act—which created an independent Federal Communications Commission ("FCC") and empowered the FCC to regulate all interstate and foreign communication by wire or radio—worked very well and proved capable of adapting remarkably to changed circumstances. The FCC was able to deal with radar, lasers, microwave ovens, television, communications satellites, cable television, and countless other developments long before Congress adopted amendments specifically addressing them.

However, there are costs as well as benefits from undertaking a top to bottom rewrite of the Communications Act. In particular such legislation inevitably becomes a vehicle for insertion of seemingly small, seemingly benign, provisions which can, in fact, effect significant changes in power relationships.

The 1996 Act was generally regarded as a bill which created local telephone competition and which promoted competition between and among the cable and telephone industries. Contemporary press reports devoted scant attention to the broadcast ownership and digital television provisions in the statute. Few members of Congress other than members of the originating committees were likely aware of those aspects of the bill.

When legislation is complicated and far reaching, it is inevitably the case that effective lobbyists can use it as a vehicle for amendments which are likely to go unnoticed and without discussion. Other affected parties, especially the general public, are usually left in the dark.

Section 202(h) of the 1996 Act is one such amendment.[1] As originally enacted, it directed the FCC to subject its broadcast ownership rules to

1. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996). Another such provision is 47 U.S.C. § 204(a)(3) (2002). *See also* ACS of Anchorage v. FCC, 290 F.3d 403, 410–14 (D.C. Cir. 2002).

what amounted to non-stop scrutiny.[2] On its face, it simply calls on the FCC to conduct periodic reviews of its broadcast ownership rules. Section 202(h) reads as follows:

> *Further Commission Review*: 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.[3]

There is no legislative history explaining its origin or what Congress may have intended in adopting it. Nor could there have been any meaningful discussion of what its unidentified sponsors may have sought, or what the conference committee which adopted it might have thought, as Section 202(h) was not subject to any public discussion prior to its adoption. Indeed, for several years after enactment of the 1996 Act, no one would publicly claim credit for having anything to do with its drafting and enactment.

Seven years after Section 202(h) became law, an intrepid reporter, named Alicia Mundy, ultimately discovered the story of Section 202(h)'s birth. She found that Section 202(h) was "carefully crafted language" developed in secret by two in-house lobbyists then employed by Rupert Murdoch's News Corp.[4]

Mundy reported that the two lobbyists, Peggy Binzel and Preston Padden, recognized that Congress was ultimately unlikely to make significant changes to the national ownership cap, which limited how many TV stations one company could own. Thus, as Ms. Mundy states:

> That's when Binzel and Padden and others devised a plan to keep the cap in play after the bill, in whatever form, passed . . . . If the networks and deregulators in the Senate, such as [Senator John] McCain, couldn't get legislation to remove the cap, they could punt it to the FCC. It meant that the FCC would have to eliminate or justify the cap, and this presented companies with an opportunity to use the FCC's innate lethargy . . . against itself . . . .
>
> Several veteran Republicans and Democrats who signed on to that original bill are now busy denouncing its consequences, acting as

2. The provision has been amended to provide for quadrennial rather than biennial review. Because of the length of time it took to conduct these proceedings, the original requirement for biennial review meant that, in practice, there was nonstop scrutiny.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996).

4. *See* Alicia Mundy, *Put the Blame on Peggy, Boys*, CABLE WORLD, June 30, 2003, http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=063003&file=put_blame_peggy.inc.

> though provision 202h had been dropped on their doorstep by some wayward stork. Although these senators would like to distance themselves from 202h, it is actually their very own love child.[5]

For a while, at least, it appeared that Section 202(h) would be a potent weapon. Although the Clinton-era FCC initially construed Section 202(h) as little more than a reporting requirement, News Corp., which reportedly had retained litigation counsel even before the FCC completed its first biennial review,[6] mounted a successful judicial challenge, obtaining a ruling that temporarily gave a broad reading to Section 202(h).[7]

II. JUDICIAL CONSTRUCTION OF SECTION 202(h)

The FCC's first biennial review proceeding was initiated in a timely fashion in1998, but was not completed until June 20, 2000, shortly before the Commission was required to initiate its next review (i.e., 2000). As soon as the FCC completed the 1998 biennial review, News Corp. and other broadcasters immediately challenged the action in the U.S. Court of Appeals for the D.C. Circuit.

In *Fox I*, the petitioners challenged the FCC's determination that the retention of the national television ownership rule and the cable broadcast cross-ownership rule were necessary in the public interest, within the meaning of Section 202(h).[8] In siding with the broadcasters, the Court found that the FCC's decision to retain both rules under the necessary public interest standard was arbitrary and capricious.[9] The Court made clear that it was not construing what the term necessary meant; that is, the Court was not deciding if it imposed a higher standard of "indispensable" or a lower standard of "useful" as the FCC had failed to justify retention of the rules under both standards.[10] The Court remanded the national television ownership rule and vacated the cable broadcast cross-ownership rules. Significantly, in determining the appropriate remedy, the Court construed Section 202(h) to "carr[y] with it a presumption in favor of repealing or modifying the ownership rules."[11] Unbeknownst to the Court, the FCC would eventually attempt to use this language to prescribe an

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5. *Id.*

6. Binzel had already lined up an appellate lawyer for the inevitable day of reckoning—Ed Warren of Kirkland and Ellis. *Id.*

7. *See* Fox Television Stations, Inc. v. FCC (*Fox I*), 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

8. *Id.* at 1040.

9. *Id.* at 1045, 1049.

10. Fox Television Stations, Inc. v. FCC (*Fox II*), 293 F.3d 537, 539–40 (D.C. Cir. 2002).

11. *Fox I*, 280 F.3d at 1048.

extreme deregulatory scheme.

A few months after *Fox I*, but before *Fox II*, a different panel of the D.C. Circuit relied upon the *Fox I* "presumption" in finding that the FCC's decision to restrict local television ownership had also been arbitrary and capricious and remanded the rule back to the FCC.[12] Again, as in *Fox I*, the *Sinclair* Court did not construe the definition of "necessary."

Following its obligation under Section 202(h), the FCC initiated yet another biennial review in 2002. This time it did so by issuing a single notice of proposed rule making ("NPRM"). Rather than deal with each provision separately, the NPRM proposed to address all of the FCC's broadcast ownership rules: (1) national TV ownership; (2) local duopoly (on remand from *Fox* and *Sinclair* decisions); (3) local radio ownership; and, (4) broadcast cross-ownership. Relying on *Fox* and *Sinclair*, the FCC conducted its review with the notion that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[13] Thus, the FCC majority ultimately concluded the review by determining that existing ownership restrictions were no longer necessary to achieve the Communication Act's goals of diversity, localism, and competition. Consequently, the FCC's June 2003 *Biennial Review* decision either eliminated or greatly relaxed most of the existing ownership rules. For example, the national TV audience cap was increased from 35% to 45%.[14]

Both Congress and public interest groups immediately reacted. Congress began the process of enacting a resolution of disapproval pursuant to 42 U.S.C. § 9655, but this became unnecessary once the Third Circuit issued a stay in September 2003.[15] Later, Congress partially overruled the Commission by amending the national ownership cap in Section 202(c) from 35% to 39%, thereby showing its disapproval of the FCC's attempt to increase the cap to 45%.[16] Congress provided additional relief in the form of directing that subsequent reviews would be conducted quadrennially rather than biennially.[17]

The new rules were then successfully challenged by public interest groups.[18] In *Prometheus*, the Third Circuit took a careful and detailed

12. Sinclair Broad. Group v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002).

13. *See* 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, para. 11 (2003) (citing *Fox I*, 280 F.3d at 1048, and *Sinclair*, 284 F.3d at 159).

14. *Id.* para. 501.

15. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3rd Cir. 2004).

16. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

17. *Id.* at § 629(3).

18. *See* Prometheus, 373 F.3d at 395 (allowing many public interest groups to participate in the suit).

approach in construing the FCC's duty under Section 202(h). Of greatest relevance to this discussion, the court expressly rejected the FCC majority's application of a "presumption in favor of deregulation."[19] For the FCC to determine whether a rule was indeed necessary in the public interest, the *Prometheus* court, unlike the *Fox* and *Sinclair* courts, decided the appropriate standard for which the FCC was to conduct its review. The *Prometheus* court adopted the reasoning of a D.C. Circuit opinion issued after the FCC had issued its *Biennial Review* decision.[20]

The *Prometheus* court concluded that the meaning of "necessary" was to be "convenient," "useful," or "helpful" and not "essential" or "indispensable."[21] Using this standard, while the court affirmed much of the FCC's *Order*, the court also remanded some of the provisions because the FCC had "fall[en] short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis."[22]

In adopting the less stringent standard, the court noted that neither *Fox* nor *Sinclair* held that the term "necessary" resulted in a presumption in favor of modifying or repealing existing regulations.[23] Rather, the *Fox* and *Sinclair* courts finding of a presumption was limited to the context in which it was made.[24] That is, since the *Fox* and *Sinclair* Courts had already determined the challenged rules were arbitrary and capricious, the presumption was only applicable to the appropriate remedy: whether to vacate or remand the rule.[25]

Despite the attempt to deregulate through the back door, it would seem that the courts have resolved ambiguities relating to the interpretation of Section 202(h) in favor of making it a less intrusive provision.

III. CONCLUSION

The history of Section 202(h) is ultimately one of a partially successful legislative ambush. Although, in the end, the statute has been construed as not creating a new standard of review, and Congress has cut the frequency of review by half, Section 202(h) nonetheless remains as a major resource drain for the FCC and offers broadcasters an assured opportunity to seek greater ownership deregulation on a regular schedule.

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19. *Id.* at 423.
20. *Id.* at 393 (citing Cellco P'ship v. FCC, 357 F.3d 88, 98 (D.C. Cir. 2004)).
21. *Id.* at 394.
22. *Id.* at 435.
23. *Id.* at 393.
24. *Id.*
25. *Id.*

One obvious lesson is that members of Congress—even those not on the originating committees—have a serious obligation to review what comes out of conference and to question unexplained provisions. Reducing both the expectations for, and size of, legislative packages would make it more likely that rank and file members could actually review what comes out of conference. However, even where they do so, it remains the case that unless Congress makes wholesale changes in its traditional rules, those with special access to the legislative process will always be able to add measures such as Section 202(h) to large, or major bills. Such changes are unlikely to happen soon, if ever. While more modest changes affording greater transparency would at least assure greater public notice, they would not likely alter the process significantly. Campaign finance reform, which minimized the role of money in the legislative process, probably would also help by reducing incentives to give special access to contributors. However, that too would probably not end the tradition of inserting seemingly small amendments into big bills.

Responsible legislators thus face a dilemma. Targeted legislation may be less susceptible to manipulation of the kind represented by Section 202(h). However, such small scale measures do not facilitate the big picture vision that can only come with more comprehensive legislation. Viewed in that light, Section 202(h) and similar provisions may impose unavoidable costs in any major legislative rewrite of the Communications Act.