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Pro Bono – Law Firms

Safeguarding The Consumer's Interests In Landmark Media Ownership Case

The Editor interviews ***Glenn B. Manishin****, Partner, Kelley Drye & Warren LLP. Questions about this article can be addressed to him at gmanishin@kelleydrye.com.*

Editor: How did the Federal Communications Commission's change in media-ownership rules ignite a firestorm?

Manishin: Last summer the FCC essentially eviscerated about three to four decades of consistent regulation of the communications industry. Grounded in the First Amendment, federal policy had recognized that broadcasting technology constrains freedom of speech. For example, not everybody can own a television station because a limited number of frequencies are available. In addition, the importance of diverse discourse to American values cautions against concentration of ownership of broadcast television, radio and other communications outlets.

At its founding, the FCC promulgated the chain broadcasting rules. These rules limited the ability of NBC, which then owned not just one but two radio networks, to add more affiliates. Over time expansion of these rules has been based upon the same First Amendment principles. That is, federal regulation is needed to help ensure expression of diverse points of view at the local level as opposed to one voice expressing a solitary national doctrine.

By eliminating or dramatically scaling back every rule covering media concentration – that is, the number of radio stations or television stations one entity could own, as well as the cross-ownership rules that precluded a TV station from owning the local newspaper and the like – the FCC ignited a firestorm among those who feared that our society would lose its venues for the vigorous debate that is essential for the future of this country.

Glenn B. Manishin

Editor: Why did the appellate court overturn the FCC's evisceration of the rules governing media concentration?

Manishin: This was a landmark case in more ways than one. Every major media conglomerate in the country participated. Oral argument before the Court of Appeals consumed eight hours, an unprecedented amount of time. The length of the opinion illustrates the court's concern and care in crafting it.

First, the court upheld the FCC's authority to change its media concentration rules in light of changed circumstances. While finding nothing inherently illegal about deregulating media concentration, the court firmly rejected the FCC's substitute rules.

The biggest rule change at issue involved the FCC's evisceration of the prohibition of a newspaper owning a broadcast television station in one local market or vice versa. Based on the theory that local TV stations and newspapers compete for coverage of local news and public affairs, the prohibition of cross ownership promotes the First Amendment principles I talked about before – diversity and localism.

The FCC replaced the cross-ownership prohibition with a diversity index purportedly modeled on the antitrust guidelines used by Department of Justice to address mergers. The diversity index led to absurd results actually contradicting the very antitrust theory that the FCC had used. First, the merger guidelines say if a market is above 1000 points under an index of concentration, it'll be suspect and presumptively unlawful. In contrast, the FCC would find cross ownership suspect only where the diversity index was 1800 or higher. Second, the antitrust guidelines say that if a proposed merger would produce a 100 point increase in market concentration, the government would oppose it. The FCC said it would opposed cross-ownership only if a 400 point increase in its diversity index would result.

Finally and most significantly, the FCC said that its diversity index would not look at the actual market share of firms in the market. This is counterintuitive. If you want to examine whether there's concentration in the market, you have to look at how big the firms are. A market with six equal sized television stations is very different from one where two or three stations have the majority of the market share, and that's exactly what the appellate court reasoned. Indeed, the FCC in its own ruling had said that it would not permit any of the top four TV

stations to merge among themselves because their market shares have been dominant and persistent over time.

In my oral argument, I pointed out to that the FCC's reasoning was internally contradictory. The theory supporting its four-station merger bar was directly inconsistent with the reasoning it gave for its diversity index for cross ownership. The absurd results are illustrated very simply. In New York City, the Duchess County Community College television station received more weight in the FCC's diversity index than The New York Times.

Editor: How did the case come before the Third Circuit?

Manishin: Because the FCC rule changes had impact around the country, appeals were filed before a number of appellate courts courts. Through the federal judiciary's lottery process, they were consolidated and transferred to the Third Circuit.

One of the early procedural issues was whether the consolidated appeals should stay in Philadelphia or be moved to D.C. The judges in Philadelphia said that they are as capable as the D.C. court to address questions of federal administrative law. Many observers viewed this as a significant win based on their comparison of the courts' approaches to questions of federal administrative law.

Editor: What led to your representation of the Consumers Union and the Consumer Federation of America in convincing the appellate court to overturn the FCC's media-ownership rules?

Manishin: I was schooled in the law at a time when the commitment to pro bono work and doing something of value was stressed. Throughout my career, I've worked on pro bono matters, including ten years serving as a director of the National Law Center on Homelessness & Poverty and over the past several years working on pro bono matters for public interest groups in communications areas where I don't represent clients.

I represented CFA in a landmark appeal from the 1996 Communications Act in the *Iowa Utilities Board* case, which ended up in the Supreme Court. Since I've worked on behalf of CFA and the Consumers Union for many years, I was very enthusiastic about contributing my skills to this landmark case.

Editor: What experience did you and the other attorneys from your firm bring to your pro bono representation of these consumer groups?

Manishin: Our depth of litigation experience was one of the principal skill sets that my associate Stephanie Joyce and I contributed to the appeal. Stephanie is an extremely capable and accomplished attorney. Her tremendous versatility and range of skills are coupled with a level of determination and sense of responsibility that are unusual in young lawyers.

We were able to advise on what issues were appropriate to raise before the court, which were most likely to succeed, how the issues should be framed, and how the vast record of tens of thousands of pages of evidence and testimony in the court record could be marshaled in a way that was understandable and digestible to the appellate judges.

Editor: What central points of your arguments did the appellate court find most persuasive?

Manishin: The court had allocated 2.5 hours for this oral argument, giving me seven minutes. They ended up letting me speak as long as I wanted. My opening statement extended for nearly an hour.

I was one of three lawyers who argued collectively for the citizen petitioners. Andrew Schwartzman of the Media Access Project talked about the legal standard, a rather arcane issue under section (202)(h) of the Communications Act. I talked about the economic and competitive issues, focusing on such concerns as the diversity index. Angela Campbell, representing the Media Alliance group, talked about the Administrative Procedure Act, such as whether the FCC's actions could be squared with the evidence in the record.

A long standing doctrine in administrative law says that the court reviewing administrative cases shouldn't substitute its judgment for that of the expert agency. At the same time, what the agency does has to be rational, supported by the evidence in the record, and consistent with the policies articulated by the agency. If an agency says that it's going to promote diversity, the rules it promulgates actually have to do that.

One of the ways that we attacked the FCC rules was by emphasizing that we were not contesting where the FCC drew the line. If the question was whether a market should have six or eight stations, the determination of the right number was a question within the FCC's discretion. The question is this case, however, was not about where the FCC drew the line; it was that the FCC hadn't focused on the right issues in the first place. If the inputs to an analysis are wrong, then the outputs by definition are incorrect.

Our second effort was to help guide the judges through the labyrinth of the complex, arcane, acronym laden record, which included lots of pseudoscientific studies. In part, the job was easier because both sides thought that the FCC's analytical approach was fundamentally flawed. Because of the flaws, the industry argued there shouldn't be any rules. Because of the flaws, I counter argued, the FCC's changes to the rules had to be thrown out and the FCC had to go back to the drawing board. I won.

Editor: What aspects of the FCC's media-ownership rules will be addressed on remand following the appellate court's decision?

Manishin: The FCC will set the agenda as to what, if anything, can be done to repair the evidentiary holes identified in the appellate court's opinion. It's unlikely that anything will occur before the election both for political and timing reasons. If the FCC seeks review by the Supreme Court, the remand proceeding could be put off by a year or more. In the meantime, the old rules remain in place under the appellate court's stay.

Editor: How does Kelley Drye's work in this landmark appeal reflect the firm's dedication to public service?

Manishin: Most of our pro bono cases are small, but nonetheless very, very important to the lives of those we represent. Even though of different magnitude than helping a widow receive a Social Security check or the loved one of a 9/11 victim receive survivor benefits, our representation of the consumer groups in this landmark appeal epitomizes our firm's commitment to public service. It represents our willingness as a firm collectively to devote resources to do good for the public, which is the literal translation of pro bono publico.