

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives

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COMMITTEE ON ENERGY AND COMMERCE

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Majority (202) 225-2927
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October 22, 2019

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

On September 23, 2019, the United States Court of Appeals for the Third Circuit (Court) rejected the Federal Communications Commission's (FCC) attempt to deregulate the broadcast market by eliminating protections that would prohibit greater consolidation.¹ The Court made clear that the FCC had not adequately considered the effects the elimination of those necessary protections would have on ownership diversity. Despite the clear rebuke, the very next day, the FCC's Media Bureau disregarded the Court's decision and blessed further television consolidation in the Sioux Falls, South Dakota market.² Given the Court's ruling, we have concerns about whether the Order violates the FCC's Rules.

As you are aware, Gray Television is the licensee of KSFY-TV, the second-rated station in the Sioux Falls market, and Red River Broadcast Company is the licensee of KDLT-TV, the third-rated station in that market. Prior to the FCC's roll back of the media consolidation protections at issue, this combination would be a clear violation of the "Top Four" rule, which prohibits one entity from owning two of the top four stations in a given market. Now that the roll back has been struck down, the FCC has an obligation to reexamine its media ownership rules.

In allowing this transaction to go forward, the FCC undermines the rule of law and the decision of the Third Circuit. While the FCC acknowledged the Court overturned its attempts at deregulating the broadcast market, it nonetheless reviewed the license transfer as if the Court had

¹ *Prometheus Radio Project v. FCC*, No. 17-1107 et al., slip op. (3rd Cir. Sept. 23, 2019) (Prometheus Decision).

² *Application of Red River Broadcast (Assignor) and Gray Television Licensee, LLC (Assignee)*, Memorandum Opinion and Order, DA 19-943 (Sept. 24, 2019).

not struck down its roll back of media protections. The FCC argued that it does not have to comply with the Court's decision because, while the Court issued its decision, the Court's mandate has not yet been issued. The FCC's technical arguments about why it does not have to comply with the Court's decision seem highly suspect, at best, and an intentional flouting of the rule of law at worst.

In light of the FCC's ignoring of the Court's decision and this Committee's commitment to ensuring a diverse marketplace, we seek answers to the questions below.

1. Will the FCC reconsider Gray Television's acquisition of KDLT-TV once the Court's mandate has been issued?
2. Did the FCC seek the opinion of the Court, or the Office of General Counsel, regarding the legality of relying on the FCC rules that have been struck down by the *Prometheus Radio Project v. FCC* Decision? If so, please provide all written communications to that effect in the FCC's possession.
3. Is the FCC currently reviewing transactions that are seeking waivers of the broadcast ownership rules? If so, please provide the Committee the details of those transactions.
4. Is the FCC currently reviewing transactions that would require a waiver to comply with the broadcast ownership rules in place either prior to or after the *Prometheus Radio Project v. FCC* Decision? If so, please provide the Committee the details of those transactions.

We appreciate your attention to this important matter. Please provide your responses to the questions above by November 12, 2019. Should you have any questions, please contact Gerald Leverich of the Committee staff at (202) 225-3641.

Sincerely,



Frank Pallone, Jr.
Chairman



Mike Doyle
Chairman
Subcommittee on Communications
and Technology

Responding to Document Requests from the Committee on Energy and Commerce

In responding to the document request from the Committee on Energy and Commerce, please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents in your possession, custody, or control.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual denoted in the request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.
4. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
5. Documents produced in electronic format should also be organized, identified, and indexed electronically. Documents produced in an electronic format should also be produced in a searchable format.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. When you produce documents, you should identify the paragraph or clause in the Committee's request to which the documents respond.
8. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.
9. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph or clause of the request to which the documents are responsive, should be provided in an accompanying index.
10. It is not a proper basis to refuse to produce a document because another person or entity possesses a nonidentical or identical copy of the same document.
11. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (8) and (9) above.

12. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2017 to the present.
16. This request is continuing in nature and applies to any newly discovered document. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
17. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
18. All documents should be bates-stamped sequentially and produced sequentially.
19. Two sets of documents should be delivered, one set to the majority staff and one set to the minority staff. The majority set should be delivered to the majority staff in Room 316 of the Ford House Office Building, and the minority set should be delivered to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee staff regarding the method of delivery prior to sending any materials.
20. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee or identified in a privilege log provided to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto). The term also means any graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "documents in your possession, custody, or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that you have placed in the temporary possession, custody, or control of any third party.
3. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, email (desktop or mobile device), text message, instant message, MMS or SMS message, or otherwise.
4. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of the request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
5. The terms "person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures,

proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
7. The terms "referring" or "relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.
8. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.