United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 19, 2001

No. 00-1094

MD/DC/DE Broadcasters Association, et al.,
Petitioners

v.

Federal Communications Commission and
United States of America,
Respondents

Minority Media and Telecommunications
Council, et al.,
Intervenors

Consolidated with
00-1198

On Petitions for Rehearing

Before: Ginsburg, Sentelle and Henderson, Circuit Judges.

Opinion for the court filed by Circuit Judge Ginsburg.

Ginsburg, Circuit Judge: The respondents in this case, the Federal Communications Commission and the United States; one of the petitioners, the United Church of Christ; and the intervenors, the National Organization for Women and the Minority Media and Telecommunications Council, have each petitioned for rehearing. All but MMTC seek rehearing of the court's decision not to sever Option B from the Commission's EEO rule after holding that only that aspect of the challenged rule was unconstitutional. The NOW seeks rehearing of the court's decision not to sever all references in the rule to minorities and thereby leave the rule intact with respect to women. Only the UCC and the Intervenors seek rehearing of the court's underlying conclusion that Option B is unconstitutional.[1]

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[1] Our dissenting colleague argues that the constitutional question, too, merits reconsideration, despite the Commission's decision not to seek rehearing on that issue. In so arguing, the dissent repeatedly claims the Commission's only goal is "broad outreach." As explained in the panel opinion, however, if the Commission's goal were truly broad outreach, then it could measure

The only issue about which the various petitions raise any points that were not fully considered in our prior opinion is the severability of Option B. For the reasons set forth below, we adhere to our original conclusion that Option B is not severable and hence deny the petitions for rehearing.

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Before arguing that the panel erred in vacating the entire EEO rule rather than vacating Option B alone, the Commission acknowledges that severance is proper in a case where, as here, the agency has "state[d] its intent [that an unconstitutional portion of a regulation be severed]," only "when such intent is rational, i.e., ... when 'the remainder of the regulation could function sensibly without the stricken provision.' " FCC Pet. for Rehearing at 1 (quoting MD/DC/DE Broadcasters, 236 F.3d at 22); see also K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988).[2] In this case, the court recognized that in the rulemaking proceeding the Commission had expressed its intent as a general preference for severance. See MD/DC/DE Broadcasters, 236 F.3d at 22 (citing Report & Order, 15 F.C.C.R. 2329, p 232 (2000) (R&O) ("If any provision of the rules ... [is] held to be unlawful, the remaining portions of the rules ... shall remain in effect"). The court concluded, however, that the rule could not, without Option B, sensibly serve the goals for which it was designed.

The Commission marshals three reasons that, in its view, undermine our conclusion. First, citing paragraph 113 of the decision under review, the Commission argues that it "clearly stated that Option A was sufficient by itself to achieve the Commission's goals." See FCC Pet. for Rehearing at 10-11 (emphasis supplied). That, however, is not quite so.

The Commission had two goals in adopting its EEO rule: It sought to "ensur[e] broad outreach [in recruitment] while affording broadcasters flexibility in designing their EEO programs." R&O at p 78. In paragraph 113 of the Report and Order, in which the Commission now claims that it "clearly stated" that Option A alone could accomplish both its goals, the Commission actually said this:

> We believe that our goal of ensuring that broadcasters engage in broad outreach so that all qualified job candidates are informed of employment opportunities in the industry can be accomplished through compliance with [Option A], without requiring the collection or reporting to the Commission of applicant pool data....

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compliance by looking at a broadcaster's outreach efforts rather than -- as it does -- by collecting data on the race and sex of applicants and investigating any broadcaster producing "few or no" women and minorities in its applicant pools. See Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 F.C.C.R. 2329, p 120 (2000) (R&O). On remand, of course, the Commission is free to revise its EEO rule to make broad outreach rather than the race and sex of applicants the measure of compliance.

[2] The dissent questions the panel's interpretation of K-Mart and produces a passel of arguments. We address here all the arguments raised in the petitions.

> However, if a broadcaster wishes to avail itself of the option of dispensing with the supplemental recruitment measures [prescribed in Option A] and designing its own program [pursuant to Option B], we do not think that it is unreasonable to require it to collect applicant pool data demonstrating that its outreach efforts are inclusive.

Id. at p 113 (emphasis added). As can readily be seen, the Commission, despite its present argument to the contrary, did not state -- "clearly" or otherwise -- that it could achieve both its goals with Option A alone; at most, it stated that it believed it could achieve one of its two goals, namely ensuring broad outreach. It said nothing about the sufficiency of Option A in achieving the Commission's other goal, namely "affording broadcasters flexibility."

Second, the Commission argues that in a footnote appended to an order denying reconsideration of the rule it implicitly indicated that Option A could function alone. See Reconsideration Order, 15 FCC Rcd. at 22555 n. 19. In that footnote the Commission stated that if the court should hold the data collection requirement in Option B unconstitutional, then only that option should be invalidated. The conclusory statement in the Reconsideration Order, however, says barely more on this issue than does the Report and Order under review. Again, for the Commission to say that it intends that the court sever Option B if necessary is not to say that the court's decision to do so would leave a sensible regulation in place. As we discuss further below, it would not.

Third, counsel for the Commission argues that, even if the Commission did not previously make clear that in its view Option A could function sensibly as a freestanding EEO rule, it has done so now in its petition for rehearing. In that petition, Commission counsel unequivocally states that "the Commission would have adopted the remainder of the EEO rule even without Option B." The Federal Communications Commission is a collegial body, however; it speaks through its orders, not through counsel's filings. The dissent points to a press release issued by a single Commissioner in which she refers to the petition for rehearing as an action of "the Commission." The same press release, however, cautions that "Release of the full text of a Commission order constitutes official action." Yet counsel points to no order taking the view espoused in the petition for rehearing. Furthermore, counsel's claim is facially implausible.

Recall that in the decision under review, the Commission told us that it had two goals -- ensuring broad outreach and affording flexibility. It told us that Option A could satisfy the goal of achieving broad outreach. And it told us that Option B was added in order to afford broadcasters flexibility. For example, in announcing that it would not exempt stations in small markets from EEO obligations, the Commission explained:

> While we believe that small market stations should be granted some relief from EEO requirements ... we believe that such relief is already built into the new broadcast EEO Rule, which affords flexibility to tailor EEO programs to a station's particular circumstances, including market size. For instance, stations in small markets may find that they need fewer recruitment sources to

> achieve broad outreach than might be the case in larger markets. Also, because stations in smaller markets are likely to attract fewer applicants, they may find [Option B] a less burdensome method of assessing the effectiveness of their outreach.

R&O at p 126; see also id. at p 104.

Throughout the Report and Order, the Commission repeatedly considered various proposals and evaluated them with respect both to their benefits in promoting outreach and to the effect they would have upon broadcasters' flexibility. See, e.g., R&O at p 88 (permitting broadcasters to engage in joint recruiting and noting "there is considerable value in allowing individual broadcasters flexibility"); id. at p 95 (rejecting proposal to send notice of openings to all potential sources of job applicants); id. at p 97 (granting broadcasters flexibility in selecting form of notice); id. at p 110 (expressing desire to "minimize burdens on broadcasters, especially smaller broadcasters"); id. at p 121 (same); id. at p 126 (rejecting proposal for relief in light of flexibility afforded to broadcasters, and emphasizing role of Option B to this end); id. at p 131 (rejecting proposal for relief in light of flexibility afforded under rule). Thus, Option B played an integral part in the Commission's evaluation of the rule as a whole; indeed, in the entire Report and Order the Commission never once considered the implications of promulgating an EEO rule without Option B -- except insofar as it implied that without Option B broadcasters would not have sufficient flexibility.[3]

Finally, Commission counsel argues that vacating the rule in its entirety will, by forcing the Commission to repromulgate Option A as a new rule, simply cause the Commission expense and delay. Under the Administrative Procedure Act, however, we cannot consider that a drawback. As explained above, in the decision under review the Commission described its two goals and the role that the two options played in effectuating them. In light of that decision, it is clear that severing one of the two options and thereby making the other mandatory would create a rule that the Commission did not consider and which, according to the Commission's own analysis in the course of rulemaking, would not have accomplished the Commission's two goals as it described them. In a renewed rulemaking effort the Commission may adopt other measures to accommodate the concerns it expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular. Or the Commission may change its goals. Upon the record as it stands, however, retaining Option A without further consideration -- and presumably further notice and comment -- would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious. Accordingly, the petition for rehearing is

Denied.

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[3] The dissent does not address the Commission's reliance, in denying various exemptions, upon the flexibility provided in the rule as a whole and in particular by Option B.