

05-1983-CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEIL ELLIS,

PLAINTIFF-APPELLEE

v.

TRIBUNE TELEVISION COMPANY,

DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE**

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

DANIEL M. ARMSTRONG
JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554
(202) 418-1740

TABLE OF CONTENTS

Interest Of The Federal Communications Commission	1
Statement Of The Issues	1
Statement Of Facts	2
A. Regulatory Framework	2
B. The FCC’s Grant Of Tribune’s Application.....	4
C. The District Court Action	6
D. Subsequent FCC Action Granting Tribune’s Waiver Extension Request	8
Summary of Argument.....	10
Argument.....	11
I. The FCC’s 2005 Order Has Mooted This Controversy.	11
II. The District Court Should Have Dismissed The Complaint Under The Doctrine Of Primary Jurisdiction.	14
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Allnet Communications Service, Inc. v. National Exchange Carrier Ass’n</i> , 965 F.2d 1118 (1992).....	17
<i>Alltel Tennessee v. Tennessee Public Service Comm’n</i> , 913 F.2d 305 (6 th Cir. 1990).....	15
<i>American Broadcasting Cos., Inc. v. FCC</i> , 682 F.2d 25 (2 nd Cir. 1982).....	14
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997).....	12
<i>AT&T Corp. v. FCC</i> , 349 F.3d 692 (D.C.Cir. 2003).....	18
<i>British Intern. Ins. Co., Ltd. v. Seguros La Republica, S.A.</i> , 354 F.3d 120 (2 nd Cir. 2003).....	12
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981).....	16
<i>FCC v. WOKO, Inc.</i> , 329 U.S. 223 (1946).....	2
<i>In re Nextwave Personal Communications, Inc.</i> , 200 F.3d 43 (2d Cir. 1999), <i>cert. denied</i> , 531 U.S. 924 (2000).....	2, 15
<i>Knaust v. City of Kingston</i> , 157 F.3d 86 (2 nd Cir. 1998).....	12
<i>Lillbask ex rel. Mauclaire v. State of Conn. Dept. of Educ.</i> , 397 F.3d 77 (2 nd Cir. 2005).....	13
<i>National Communications Ass’n, Inc. v. AT&T</i> , 46 F.3d 220 (2 nd Cir. 1995).....	15
<i>New York City Employees’ Ret. Sys. v. Dole Food Co., Inc.</i> , 969 F.2d 1430 (2d Cir. 1992).....	12
<i>Orloff v. FCC</i> , 352 F.3d 415 (D.C. Cir. 2003).....	18
<i>Prayze FM v. FCC</i> , 214 F.3d 245 (2 nd Cir. 2000).....	14
<i>Prometheus Radio Project v. FCC</i> , 373 F.3d 372 (3 rd Cir. 2004), <i>cert. denied</i> , 125 S.Ct. 2902 (2005).....	4
<i>Russman v. Board of Educ.</i> , 260 F.3d 114 (2 nd Cir. 2001).....	13
<i>Tassy v. Brunswick Hospital Center, Inc.</i> , 296 F.3d 65 (2d Cir. 2002).....	15
<i>Telecommunications Research & Action Center v. FCC</i> , 750 F.2d 70 (D.C.Cir. 1984).....	16
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950).....	12
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968).....	2

Administrative Decisions

<i>Counterpoint Communications, Inc.</i> , 16 FCC Rcd 15044 (2001)	5, 7, 8, 11, 14, 17
<i>Counterpoint Communications, Inc.</i> , 17 FCC Rcd 3243 (2002)	5, 11, 14, 17
<i>Counterpoint Communications, Inc.</i> , 20 FCC Rcd 8582 (2005)	8, 9, 10, 11, 13, 14, 16, 18

Statutes and Regulations

28 U.S.C. 2342(1)	14
47 C.F.R. 1.106(n) (2004)	13
47 C.F.R. 73.1020(a)(16)(ii) (2004)	12
47 C.F.R. 73.3539(a) (2004)	12
47 C.F.R. 73.3555(b)(2) (2002)	4
47 C.F.R. 73.3555(d)(3) (2002)	3
47 U.S.C. 151	2
47 U.S.C. 152(a)	2
47 U.S.C. 307(a)	2
47 U.S.C. 310(d)	3
47 U.S.C. 401(b)	6, 7
47 U.S.C. 402(a)	14
47 U.S.C. 405(a)	13

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 05-1983

NEIL ELLIS,

APPELLEE

v.

TRIBUNE TELEVISION COMPANY,

APPELLANT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. 151, *et seq.* In particular, the Commission has exclusive authority to issue licenses under that Act for the operation of television broadcast stations and to regulate the manner of use of those stations. Accordingly, it has an interest in ensuring that the Communications Act is properly applied to those licenses.

STATEMENT OF THE ISSUES

1. Whether the District Court's ruling should be vacated because it has been mooted by a subsequent order of the Federal Communications Commission.

2. Whether the doctrine of primary jurisdiction required the District Court to dismiss the case, or hold it in abeyance, pending final action by the FCC on issues pending before it concerning Tribune's continuing ownership of the *Hartford Courant* and a television station licensed to a community in the same market.

STATEMENT OF FACTS

A. Regulatory Framework

Congress assigned to the Federal Communications Commission exclusive authority to grant licenses under the Communications Act for the operation of television broadcast stations. *See, e.g.*, 47 U.S.C. 151, 152(a), 307(a); *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43, 53 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000). “The FCC was ‘expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio.’” *Id.*, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968).

The “FCC’s exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use” *In re Nextwave*, 200 F.3d at 54. Moreover, under the Communications Act, “it is the FCC and not the courts that ‘must be satisfied that the public interest will be served by . . . the license.’” *Id.*, quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

Specific statutory provisions and administrative regulations, administered exclusively by the FCC, govern the licensing of television broadcast stations. Of relevance to this case, the Communications Act requires the FCC’s consent to the assignment of a broadcast television station license or the transfer of control of the

licensee. Section 310(d) of the Act, 47 U.S.C. 310(d), provides that “[n]o ... station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner ... except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”

The Commission’s rules also impose limits on common ownership of television stations in the same market and on cross-ownership of television stations and daily newspapers serving the same area. In particular, the agency’s rules provide that “no license for [a] ... TV broadcast station shall be granted to any party ... if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in” the station’s signal “encompassing the entire community in which the newspaper is published” 47 C.F.R. 73.3555(d)(3)(2002).

The FCC modified its media ownership rules in 2003. The revised rules eliminated the prior newspaper-broadcast cross-ownership and adopted new rules that would have permitted common ownership of television stations and newspapers in certain larger markets. Implementation of those rule changes, however, was stayed by the Third Circuit. Although that court in 2004 agreed with the Commission’s decision to eliminate its across-the-board ban on newspaper-broadcast cross-ownership, the court remanded the Commission’s revised rules for further justification and therefore continued its stay. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 382, 398-99 (3rd Cir. 2004), *cert. denied*, 125 S.Ct. 2902 (2005).

B. The FCC's Grant of Tribune's Application

In November 1999 Tribune Television Co., which was then the licensee of television station WTIC-TV in Hartford, Connecticut, filed an application to acquire control of the licensee of another television station, WTXX(TV), which is licensed to Waterbury, Connecticut, but located in the same Hartford market. The Commission's rules prohibited common ownership of two television stations in the circumstances here, and Tribune accompanied its application with a request for a permanent waiver of the applicable rules. That application was not opposed.¹

While its application to acquire WTXX was pending, Tribune acquired the Times Mirror Co., the owner of the *Hartford Courant*, a daily newspaper operating in the same market as WTIC and WTXX. Because the Commission's rules precluded common ownership of WTXX and the *Courant*, Tribune sought a temporary waiver of the applicable rule.² That request also was unopposed.

The Commission granted Tribune's application as well as both of its waiver requests. *Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001) ("2001 Order"). With respect to the television/newspaper cross-ownership rule, the

¹ The Commission's then-applicable rules permitted ownership of two television stations in the same market so long as, when the application is filed, one of the stations is not ranked among the top four station in audience rankings and at least 8 independently owned stations would remain in the market after the acquisition. *See* 47 C.F.R. 73.3555(b)(2) (2002). Tribune's acquisition of WTXX would have violated the latter provision.

² The FCC has construed its rules to permit an existing television station licensee, if it should acquire a daily newspaper in the same market, to retain both the station and the newspaper until the end of the station's license term. *See* 2001 Order, 16 FCC Rcd at 15045 n.2. The license term for WTIC expires April 1, 2007.

Commission found that granting a temporary waiver and permitting a compliance period was consistent with the agency's actions in similar cases in the past and was in the public interest. *Id.* at ¶¶7-10. Concluding that "Tribune should also be accorded a reasonable time to bring its Hartford media assets into compliance with our rules," the Commission gave Tribune six months within which to come into compliance with the newspaper-broadcast cross-ownership rule. *Id.* at ¶¶9, 13.

Prior to the February 6, 2002 expiration date of the rule waiver, Tribune sought an extension of time to achieve compliance with the rule. It asserted that it had been unable to arrange for a sale of station WTXX within the six-month waiver period. In a February 19, 2002 order, the Commission, in response to Tribune's waiver request, noted Tribune's efforts to sell WTXX, as well as Tribune's significant financial commitment to improving the station's equipment and local programming. The Commission found that Tribune had "exercised its best efforts to achieve compliance with the ... rules" and granted its request for extension of the waiver until August 19, 2002. *Counterpoint Communications, Inc.*, 17 FCC Rcd 3243 (2002)("2002 Waiver Extension Order").

On August 6, 2002, Tribune sought a further extension of time to comply with the newspaper-broadcast cross-ownership rule. The Commission did not act on that request until April 2005, as discussed at pp. 8-9 below. However, on September 5, 2003, the Chief of the FCC's Media Bureau had issued a letter stating that Tribune was considered "to be, and to have been in full compliance" with the Commission's rules and orders, including the *2001 Order*. See Letter from

W. Kenneth Ferree, Chief, FCC Media Bureau to Tribune Television Co. (Sept. 5, 2003)(“*Ferree Letter*”).

C. The District Court Action

In May 2003, Plaintiff-Appellee Neil Ellis filed a complaint in the District of Connecticut alleging that Tribune had failed to comply with the Commission’s orders. Ellis claimed that he was a resident of the Hartford area and that he had been injured “by the lack of diversity and competition ... which is the direct result” of Tribune’s alleged disobedience of the *2001 Order*. Ellis based his action on Section 401(b) of the Communications Act, 47 U.S.C. 401(b), which provides for district court enforcement of “any order of the Commission other than for the payment of money” upon application by the Attorney General or by “any party injured” by a failure to obey the Commission order.³ The complaint alleged that the *2001 Order* required Tribune to divest WTXN in order to comply with the news-

³ The complete language of 47 U.S.C. 401(b) provides:

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after a hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

paper-broadcast cross-ownership rule and argued that Tribune's failure to do so constituted a failure to obey the agency's *2001 Order*.

Ellis moved for summary judgment. Tribune moved to dismiss the complaint on a number of grounds, including: (1) that Ellis' claims had been mooted by the Commission's repeal of its newspaper-broadcast cross-ownership rule, (2) that the case was not ripe because Tribune's August 2002 request for further extension of the waiver was still pending before the FCC and (3) that the doctrine of primary jurisdiction required the court to dismiss the complaint.

In a March 21, 2005 ruling, the District Court granted Ellis' motion for summary judgment and denied Tribune's motion to dismiss. *Ellis v. Tribune Television Co.*, 363 F. Supp.2d 121 (D.Conn. 2005). The District Court held that the FCC's *2001 Order* was a final order that required Tribune to take a particular action and thus was privately enforceable pursuant to the provisions of 47 U.S.C. 401(b). The District Court found "no doubt" that Tribune had violated the *2001 Order*. *Id.* at 135. The Court gave no weight to the conclusion of the Chief of the FCC Mass Media Bureau in his September 2003 letter that Tribune was and had been "in full compliance" with the agency's rules and the *2001 Order*. The District Court found that because "the old cross-ownership rules remain in effect, and the FCC consistently has found that Tribune's ownership of WTXX, WTIC and the *Hartford Courant* violates those rules ...," the *Ferree Letter* "does not counsel in favor of dismissal pursuant to the doctrine of primary jurisdiction." *Id.* at 132 n.11.

The District Court rejected Tribune's argument that it should dismiss the case under the doctrine of primary jurisdiction and allow the FCC to resolve the complaint's allegations concerning Tribune's compliance with the *2001 Order*. The District Court concluded that the primary jurisdiction did not apply because (1) the question presented was "straightforward: whether Tribune is in compliance with the 2001 Order;" (2) "this action is focused on the particular situation faced by Tribune in Connecticut" and thus "there is no substantial danger of inconsistent rulings;" (3) Section 401(b)'s "grant of enforcement power would be eviscerated if district courts always had to defer to the jurisdiction of administrative agencies;" and (4) "at no time did the FCC make a motion to intervene or otherwise participate in this litigation despite its ability to do so." *Ellis*, 363 F.Supp.2d at 131-32.

D. Subsequent FCC Action Granting Tribune's Waiver Extension Request

In an order released April 13, 2005, the FCC granted in part Tribune's August 2002 further request for extension of time to comply with the newspaper-broadcast cross-ownership rule. *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582 (2005) ("2005 FCC Order"). The Commission pointed out that this matter presented "difficult and unique circumstances" and found that "the public interest is better served by extending the waiver of the newspaper-broadcast cross-ownership rules as applied to the *Courant*-WTXX combination This should enhance the likelihood that Tribune can sell one or both of the Stations on commercially reasonable terms, and thus provide the best hope that WTXX will remain on the air

and as a source of news, information, and entertainment for citizens in the Hartford DMA.” *Id.* at ¶4.

The Commission determined that:

[T]he public interest benefits that will result from Tribune’s continued common ownership of WTXX through the Station’s current license term outweigh any potential harm to the underlying goals of the newspaper-broadcast cross-ownership rule. Tribune has a clear record of enhancing and expanding the Station’s service to the public and the record evidences a significant risk that requiring immediate divestiture would severely curtail that service or eliminate it altogether.

2005 FCC Order at ¶6.

The Commission concluded that “requiring a divestiture at this time is likely to result, at best, in a sale at an artificially depressed price, and would pose a substantial risk that the station would cut services or be forced to go dark.” *Id.* at ¶6. “A forced sale of the station,” the Commission stated, “would appear to benefit the public less than allowing the *Courant*-WTXX combination to continue for the temporary period authorized herein.” *Id.* at ¶20. The Commission thus ordered an “extension of its temporary waiver of the newspaper-broadcast cross-ownership rule” previously granted to Tribune “until the Commission’s actions on the [December 2006] renewal application for Station WTXX becomes a final order, subject to Tribune’s continuing its efforts to sell WTXX and its filing of status reports concerning these efforts every 45 days.” *Id.* at ¶24.⁴

⁴ In the *2005 FCC Order*, the Commission, while not disavowing the conclusions in the Media Bureau ruling, made clear that in the future it expected that the Commission itself “will make determinations concerning the compliance or noncompliance of licensees with the terms and conditions of waivers granted by the Commission.” 20 FCC Rcd at 8591 ¶21. The Commission also indicated that

After being informed of the Commission's action extending Tribune's waiver, the District Court, in an April 19, 2005 Order, granted Tribune's motion to stay the judgment pending appeal.

In addition, following issuance of the *2005 FCC Order*, and based in large part on that order, Tribune filed on April 18, 2005, a motion under Rule 60(b) for relief from judgment. The following day, Tribune filed its notice of appeal. Tribune's Rule 60(b) motion remains pending before the District Court.

SUMMARY OF ARGUMENT

The mootness doctrine requires that a live case or controversy exist through all stages of a federal judicial proceeding. The *2005 FCC Order*, which was issued by the Commission following the District Court's ruling and superseded the *2001 Order* and the *2002 Waiver Extension Order*, has mooted this matter by eliminating any controversy that might exist as to whether Tribune's ownership of WTXX and the *Hartford Courant* complies with those earlier orders.

Under established criteria, the District Court erred in refusing to dismiss the complaint pursuant to the doctrine of primary jurisdiction. The issues raised in the complaint, involving a television station license and the conditions for its use, were plainly a matter within the FCC's expertise and discretion – Congress has delegated exclusive jurisdiction to the FCC to grant such licenses and adopt conditions for their use. Moreover, the matter remained pending before the FCC as a result of Tribune's 2002 waiver extension request. Tribune's pending request raised a

it did “not intend to continue the practice of allowing waivers to remain in force through inaction for long periods of time.” *Id.*

substantial danger of inconsistent rulings. The District Court's failure to dismiss the complaint, or hold further proceedings in abeyance, on primary jurisdiction grounds led unnecessarily to the conflict between its ruling and the *2005 FCC Order*.

ARGUMENT

I. THE FCC'S 2005 ORDER HAS MOOTED THIS CONTROVERSY.

The FCC's April 2005 action extending Tribune's waiver has mooted this matter. There is no longer a live controversy as to whether Tribune's ownership of WTXX and the *Hartford Courant* complies with the agency's earlier orders. The Commission's decision in the *2005 FCC Order* "that the public interest is better served by extending the waiver of the newspaper-broadcast cross-ownership rule" (20 FCC Rcd at 8584 ¶4), has removed any question about Tribune's compliance with the *2001 Order* and the *2002 Waiver Extension Order*. Instead, the Commission has found that the public interest is better served by granting Tribune's request for an extension of its waiver of the newspaper-broadcast cross-ownership rule until such time as the Commission's action on station WTXX's renewal application becomes a final order.⁵

"When a civil case becomes moot pending appellate adjudication, 'the established practice ... in the federal system ... is to reverse or vacate the judgment

⁵ WTXX's current license term expires on April 1, 2007. 47 C.F.R. 73.1020(a)(16)(ii)(2004). Tribune must file a renewal application for that license by December 1, 2006. 47 C.F.R. 73.3539(a)(2004).

below and remand with a direction to dismiss.”” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)), accord *New York City Employees’ Ret. Sys. v. Dole Food Co., Inc.*, 969 F.2d 1430, 1433 (2d Cir. 1992) (a case which becomes moot during the pendency of an appeal must be dismissed as moot).

The District Court itself recognized that the mootness doctrine requires that a live case or controversy ““subsist[] through all stages of federal judicial proceedings, trial and appellate.”” 363 F.Supp.2d at 127, quoting, *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2nd Cir. 1998); see also *British Intern. Ins. Co., Ltd. v. Seguros La Republica, S.A.*, 354 F.3d 120, 122-23 (2nd Cir. 2003). The 2005 FCC Order, which was issued by the Commission following the District Court’s grant of summary judgment, has mooted this proceeding. Ellis retains no cognizable interest in enforcing the terms of the license granted to Tribune as set forth in the FCC’s superseded orders even if District Court were found to possess jurisdiction to do so. The District Court’s action should be vacated and the matter remanded with directions to dismiss the complaint as moot.

The exception to the general rule requiring dismissal of cases that have become moot for matters that are “capable of repetition yet evading review” does not call for a different result here. That exception applies only where “there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Lillbask ex rel. Mauclair v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 84-85 (2nd Cir. 2005). That Ellis could in the future be in a position to allege that he had been injured by Tribune’s failure to comply with an order of the

FCC regarding ownership of these media properties does not suffice, since it is at most a “theoretical[] possib[ility].” *Russman v. Board of Educ.*, 260 F.3d 114, 120 (2nd Cir. 2001).

The filing by a third party of a petition for reconsideration of the *2005 FCC Order* does not undermine the mootness conclusion.⁶ The agency’s 2005 order is a final agency order, and the filing of a petition for reconsideration does not “operate in any manner to stay or postpone the enforcement [of such order] without the special order of the Commission.” 47 U.S.C. 405(a); *see also* 47 C.F.R. 1.106(n) (2004). Plaintiff-Appellee Ellis is not a party to the reconsideration petition. No party has sought a stay of the *2005 FCC Order*, and the Commission has issued no stay on its own.

Whatever action the FCC ultimately takes on the pending petition for reconsideration would first be subject to exclusive review in the courts of appeals. 47 U.S.C. 402(a); 28 U.S.C. 2342(1); *see Prayze FM v. FCC*, 214 F.3d 245, 250 (2nd Cir. 2000)(“[The Communications Act] confers on the courts of appeals ‘exclusive jurisdiction ... to determine the validity of ... all final orders of the Federal Communications Commission.’”); *American Broadcasting Cos., Inc. v. FCC*, 682 F.2d 25 (2nd Cir. 1982)(same). Following such review, or if no review is sought, any hypothetical future enforcement action would relate to some future FCC order, and not to the *2001 Order* or the *2002 Waiver Extension Order* that were the sub-

⁶ The Office of Communication of the United Church of Christ filed a petition for reconsideration of the *2005 Waiver Extension Order* on May 13, 2005. The FCC has not yet acted on that petition.

ject of the District Court's action in this case. Those orders have been superseded by the *2005 FCC Order*; there is no longer a live controversy arising from the limitations those orders placed on Tribune's license for WTXX.

***II. THE DISTRICT COURT SHOULD HAVE
REFERRED THE MATTER TO THE FCC UNDER THE
DOCTRINE OF PRIMARY JURISDICTION.***

The District Court should have dismissed the complaint under the doctrine of primary jurisdiction and allowed the FCC to complete its consideration of the matter. Not only was this a subject particularly within the special expertise and discretion of the FCC, but, contrary to the District Court's conclusion, there was a substantial danger of inconsistent rulings because this was an open proceeding before the agency in light of Tribune's pending request for further extension of the waiver. Indeed, the District Court's decision to enforce the *2001 Order* rather than refer the matter to the FCC on primary jurisdiction grounds led unnecessarily to the conflict between the District Court's order and the *2005 FCC Order*.

The doctrine of primary jurisdiction applies "where a claim is originally cognizable in the court, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Tassy v. Brunswick Hospital Center, Inc.*, 296 F.3d 65, 73 (2d Cir. 2002). In such case, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* The principal reasons for the doctrine are (1) to obtain the benefits of the expertise and experience of the responsible administrative agency, and (2) to achieve uniformity, particularly in the specialized areas that have been

committed to agency expertise. *See Alltel Tennessee v. Tennessee Public Service Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990).

Primary jurisdiction analysis centers on four factors: (1) whether the matter involves technical or policy consideration with the agency's particular expertise; (2) whether the question is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether a prior application has been made to the agency. *See National Communications Ass'n, Inc. v. AT&T*, 46 F.3d 220, 222-23 (2nd Cir. 1995). While the District Court acknowledged the applicability of those factors (363 F.Supp.2d at 130-31), it erred in concluding that they did not call for dismissal on primary jurisdiction grounds in this case.

This was plainly a matter within the FCC's expertise and discretion. Congress delegated to the FCC exclusive jurisdiction to grant television station licenses and to adopt conditions for their use. *See In re Nextwave*, 200 F.3d at 54; pp. 2-3 above. The FCC's exercise of its licensing authority "is a task that Congress has delegated to the Commission in the first instance ... with deferential review reserved to the courts of appeals." *Id.* at 55, quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). As the D.C. Circuit has held, "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C.Cir. 1984).

Moreover, as the discussion in the *2005 FCC Order* highlights, the determination whether Tribune's waiver should be extended, a matter that was pending before the FCC when the District Court ruled and effectively preempted the Commission consideration, involved questions of public policy that were "difficult and unique." *2005 FCC Order*, 20 FCC Rcd at 8584 ¶4. These involved questions surrounding the market conditions in the Hartford market and WTXX's relative competitive position, Tribune's efforts to sell the station, public interest factors supporting an extension of the waiver, and whether Tribune's ownership of WTXX has preserved and improved service to viewers. *See id.* at 8586-90. These are not questions that the District Court could or should have considered.

In addition, contrary to the District Court's erroneous statement, there was a "substantial danger of inconsistent rulings." 363 F.Supp.2d at 131. Tribune argued that the language of the *2001 Order* and the *2002 Waiver Extension Order*, along with its then pending August 2002 waiver request, demonstrated that it was not in disobedience of any Commission order – that it could lawfully continue operating the station until the Commission acted on that request. And Tribune's pending request for further waiver extension raised the possibility that it would in fact obtain more time to come into compliance with the Commission's rules.

The District Court also observed that "Tribune has not provided the Court with any correspondence it has had with the FCC since the stay imposed by the Third Circuit became finalized on June 24, 2004." 363 F.Supp.2d at 132 n.11. Since the Third Circuit's 2004 decision retained the stay in effect of the rules applicable here that had been imposed on September 3, 2003, the District Court

had no reason to attach any significance to whether Tribune corresponded with the Commission following the 2004 decision or submitted any correspondence to the District Court. Nor was the Court entitled to dismiss Tribune's primary jurisdiction argument because the FCC had not sought "to intervene or otherwise participate in [the] litigation" 363 F.Supp.2d at 131. The doctrine does not require the agency's participation before it can be raised.

In these circumstances, the District Court should not have concluded that Tribune was in violation of the *2001 Order*. The District Court should have dismissed the complaint, rather than holding further proceedings in abeyance pending FCC action on a primary jurisdiction referral, because the FCC is best suited to make the initial decision on the issue raised in the complaint. *See Allnet Communications Service, Inc. v. National Exchange Carrier Ass'n*, 965 F.2d 1118 (1992) (affirming district court dismissal of complaint based on ground that FCC has primary jurisdiction of matter).

In the alternative, the District Court could have stayed further proceedings on the complaint for a reasonable period pending referral of the matter to the FCC on the ground of primary jurisdiction. *See Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (review of FCC order issued in response to district court primary jurisdiction referral); *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C.Cir. 2003)(same). However, even if it would have been proper for the District Court to have held further proceedings on the complaint in abeyance pending a primary jurisdiction referral to the FCC, no useful purpose would be served by remanding to the District Court for such action now because the *2005 FCC Order* has addressed and resolved the

issues that the District Court should have referred to it. After thorough review of the record, including Tribune's 2002 waiver extension request, the FCC has now concluded that granting Tribune's request and extending the waiver at least until April 2007 is in the public interest. This Court should vacate the District Court's order and remand with directions to dismiss the complaint.

CONCLUSION

For the foregoing reasons, the Court should vacate the order of the District Court and remand with directions that the District Court dismiss the complaint as moot. In the alternative, the Court should vacate the order of the District Court and remand with direction to dismiss the complaint on the ground of primary jurisdiction.

Respectfully submitted,

Samuel L. Feder
Acting General Counsel

Daniel M. Armstrong
Associate General Counsel

Jacob M. Lewis
Associate General Counsel

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
Fax (202) 418-2819

July 18, 2005

**In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NEIL ELLIS,

PLAINTIFF-APPELLEE

v.

TRIBUNE TELEVISION Co.,

DEFENDANT-APPELLANT

)
)
)
)
)
)
)

No. 05-1983

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(5) & (7), I hereby certify that the accompanying “Brief for Federal Communications Commission as Amicus Curiae” in the captioned case has been prepared in a proportionally spaced 14-point font and contains 4669 words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

July 18, 2005