

Multiple Ownership – Yet Again

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At the FCC's meeting on Wednesday, June 21, 2006, the Commission reopened the debate over its multiple ownership rules – a subject with which it has struggled long and hard almost continuously for the last 15 years, and one fraught with controversy – by adopting a Further Notice of Proposed Rulemaking to examine broadcast ownership issues. At the meeting, the three Republican Commissioners voted in favor of initiating the rule making proceeding. The two Democrats dissented in part, arguing that the Notice of Proposed Rulemaking did not adequately address the procedures that the Commission will follow in examining the issues raised in the proceeding, including specifically how the Commission would integrate into the decision on multiple ownership conclusions drawn from the Localism proceeding that was begun several years ago. The Localism proceeding, which was begun back in 2003, included several field hearings and thousands of public comments, but has never reached any resolution.

While the full text of the Commission's Further Notice has not yet been released, we know generally the issues on which the Commission has focused from the comments made at the meeting and from the FCC's Public Notice summarizing the action. The starting place for the Further Notice are the issues raised by the Third Circuit Court of Appeals when it sent the ownership rules back to the FCC for further consideration following its review of FCC's July 2003 multiple ownership Order. The Third Circuit decision put most of the FCC's July 2003 Order on hold while the Commission reconsidered the basis for its decision. Specifically, the Court sent the 2003 Order back to the Commission for further consideration on issues regarding media cross-ownership (newspaper-broadcast ownership as well as TV-radio cross ownership) and local television ownership. While many may have thought that the local radio ownership rules were largely resolved by the Third Circuit's decision to allow Arbitron markets to be substituted for markets defined by station contours, in fact the Court raised several new issues about the local radio ownership rules that the Commission will now attempt to address in this new proceeding. In addition to the issues raised by the Court's remand, the FCC is under Congressional mandate to review its entire set of media ownership rules once every four years, and that periodic review will be folded into the proceeding begun on Wednesday. Also, there were a number of petitions for reconsideration of the FCC's July 2003 Order that were not considered by the Court, and those issues will be considered in this proceeding as well. Finally, there are two additional outstanding rulemaking proceedings, one regarding whether TV joint sales agreements should be counted in a multiple ownership analysis, and the other addressing the issue of determining geographical markets for radio local ownership considerations outside of the Arbitron metros, that may be considered in the context of this new ownership review. Clearly, the rules that will be established as a result of this proceeding (a process that could take years) will have a profound impact on the media landscape.

With the advent of audio and video competition from satellites, iPods, the Internet, and even cell phones, many in the industry question whether the remaining ownership restrictions still make sense in today's media world. However, as witnessed by the Democrats' reaction to the proposed proceeding, others feel that limits on big media are necessary to preserve diversity and localism. The process of considering these issues is likely to be very contentious both in Washington and around the country. When the FCC last visited this subject, in the summer of 2003, the Democratic Commissioners barnstormed the country, raising issues about the Commission's proposals for more ownership deregulation. It appears that, with the coming of summer, we are looking at a rerun of that tour, with the Democrats' first stop being a town hall meeting in Asheville, North Carolina only one week after the meeting on Wednesday. Commissioner Cops indicated that this will be the first of many stops that he intends to make around the country.

Public interest groups and editorial pages are already buzzing about the issues. So the battle lines are being drawn for what the Commission's own staff recognizes will likely be a long process, as the schedule for Commission-initiated studies and public hearings has not even been discussed as of yet.

With this likely controversy about to engage the broadcast industry, here are some of the specific issues about which the FCC will be seeking public comment in this new proceeding.

I. Cross Media Limits

The issue getting the most attention lately, due at least partially to issues raised in arguments about the future of the Tribune Company, is newspaper-broadcast cross-ownership. For years, newspaper companies have been trying to get the FCC to change its rules to allow them to get back into the broadcasting business in their own markets – which newspapers have been prohibited from doing for over 30 years. In its 2003 Order, the Commission permitted newspaper-broadcast cross-ownership in all but the smallest markets (those with fewer than four full-power television stations). The Third Circuit stated that it agreed that newspapers should be allowed to own local broadcast stations, but determined that the methodology that the Commission used to determine in which markets that ownership could occur was faulty. A relaxation of the radio-television cross-ownership rules was also stayed by the Court as it relied on the same methodology. Thus, the following issues must be considered by the FCC in the upcoming proceeding:

A. Justification of the Reliance on Numerical Limits

In many contexts, the Third Circuit questioned the FCC's assumption throughout its media ownership rules that all stations were created equal. In other words, the Court asked the FCC to justify its conclusion that the combination of a television station and a newspaper would be permissible anytime that the four television station test was met. For example, would a combination of the largest newspaper and highest-rated TV station in a market have the same public interest impact as the combination of a suburban daily paper with a low-rated independent television station on the edge of the market? One question to be addressed in the present proceeding is whether competition in a particular market should be analyzed individually, or whether, once some numerical threshold of the number of stations in a market has been reached, a combination should be allowed automatically.

B. Evaluation Methodology

In July 2003, the FCC justified its liberalization of cross-media ownership based on a tool of its own creation - the Diversity Index. For a number of reasons, the Court found that the Index was flawed. The Court's concerns included the fact that the Index weighed all stations and newspapers equally, and the reliance of the Index on the Internet as a source of local media competition (to a degree which the Court considered to be excessive). From comments made at the meeting, the Commission seems to have agreed that the Diversity Index was flawed, and has asked for public comment on a better methodology for it to employ in analyzing where to draw the lines in the cross-ownership analysis. While it remains to be seen once the text of the Notice is released, it does not appear that the Commission has offered its own substitute for the much-maligned Diversity Index.

II. Local TV Ownership

In 2003, the FCC determined that one owner could hold two television stations in a market, as long as the stations were not among the top four ranked television stations in market. In addition, in markets where there are at least 18 television stations, one owner could hold up to three licenses (again, as long as no two were in the top four in the market). The Court remanded this decision back to the FCC for further consideration, and the issue will now be included as part of this rulemaking. Specific issues to be addressed include the following:

A. Justification of Numerical Limits

The Court, as with the cross-media limits, raised questions about whether combinations should always be permitted between two stations as long as the top four requirement is met, and if combinations of multiple stations should be limited based purely on the number of stations in a market. The Court asked, for instance, if the combination of stations ranked 11, 12, and 13 in a market should be allowed if their combined market share was less than that of one of the top four stations. Or, should the combination of the top-ranked station with the fifth-ranked station always be permitted? Questions about how much ratings really varied over time will also need to be addressed in this context – i.e. is it really reasonable to assume that the lowest-ranked station has the potential to acquire an audience similar to a station that has historically been rated very high in a market?

B. Failed Station Waivers and Out-of-Market Buyers

In the July 2003 Order, the FCC allowed for combinations even among the top four stations in a market based on a set of presumptions that have been used to justify waivers in the past. Prior to 2003, the presumption was that if a station has failed economically (e.g. it is in bankruptcy) or is in the process of failing, a waiver to allow its acquisition by an in-market buyer would be granted if it could be shown that there was no other realistic out-of-market buyer for the station. In 2003, the FCC did away with the requirement that you show there was no willing and capable out-of-market buyer, given the delay caused by that requirement and the difficulty of establishing the negative – that there was no other potential buyer anywhere in the country who might buy the failing station. The Court questioned the abolition of this requirement, specifically asking if it contradicted a Congressional requirement that the FCC look to ways of encouraging minority ownership of broadcast properties. The Court reasoned that these distressed properties might be a good vehicle for the entry of minority owners that might be thwarted if the station never had to be offered to anyone but an in-market buyer. This question will be reviewed by the FCC in this proceeding.

C. Joint Sales Agreements

While not specifically addressed at the meeting or in the Public Notice, there is an outstanding FCC rulemaking proceeding that asks whether Joint Sales Agreements should be considered to be attributable interests for purposes of the television ownership rules. We would expect that this issue will be considered in this proceeding.

III. Local Radio Limits

In 2003, the Commission modified the radio multiple ownership rules, in order to use Arbitron metro markets as the basis for determining how many stations were in a radio “market.” This had the effect of reducing the number of stations in many markets, thus reducing the number of stations that one owner could hold in several of those markets. This was the only modified rule from the Commission’s July 2003 Order that the Third Circuit permitted to go into effect. While many broadcasters may believe that, based on the Court’s decision, there is nothing left to review in the radio ownership world, in fact, the Court instructed the FCC to reexamine a number of aspects of its radio rules. Additionally, there were several petitions for reconsideration of the July 2003 Order that were never considered, and thus will be dealt with now. These include the following issues:

A. Justification of Numerical Limits

As in connection with the other rules, the Court asked the Commission to reconsider whether a strict reliance on numerical limits makes sense from a regulatory perspective. For instance, in a market where one party can own six stations under the rules, and one company owns four full Class C FM stations and a 50 kw AM station in the heart of the market, should the same numerical restrictions prevent another owner of four suburban Class A FMs and a couple of

daytime AMs from buying another station? The FCC will need to address whether these numerical rules, without examination of marketplace realities, can be justified.

B. AM/FM Limitations

Another aspect of the Court's concern with numerical limits was evident when they asked whether the Commission could justify maintaining the rules that prevent a party from acquiring more than a limited number of AM stations. For instance, in a market with between 15 and 29 radio stations, a party can own up to six stations, but no more than four of the stations can be in one service (AM or FM). The Court asked why one party, for example, should not be able to hold five AM stations in such a market. Specifically, the Court asked whether there was some public interest reason for prohibiting such ownership. That issue will be reviewed in this proceeding.

C. Non-Arbitron Markets

The FCC has a separate proceeding that it commenced in 2003 to determine if geographical markets could be drawn for areas in which Arbitron does not operate, so that the numerical ownership limits could be applied in such markets. Depending on how such markets were drawn, consolidation in such markets could be limited, and sales of existing combinations could be prohibited. While not specifically addressed at the meeting or in the Public Notice, we expect that this issue will also be part of this proceeding.

D. Other Issues

There are a variety of other issues pending before the FCC in connection with petitions for reconsideration of the radio rules – issues that will all be folded into this proceeding. These include issues dealing with geographically large radio markets and whether the same ownership caps should apply in markets where it may be necessary for a company to own more than one station to cover the entire market; whether JSAs should have to be divested when grandfathered ownership combinations in the same market and of the same numerical size do not have to be broken up; and to what extent do the grandfathering rules for noncompliant combinations extend to employee-owned companies or stations that are making city of license changes within their current markets. Many other issues have also been raised, and will be dealt with in this proceeding.

IV. Other Matters

A. UHF Discount

The FCC has asked for comment on whether the UHF discount should be retained. This discount allows a UHF station to count only half the market's television households in determining whether the owner is in compliance with the television national ownership limitations, which limit one owner from having an attributable interest in television stations reaching more than 39% of the national TV households.

B. Dual Network Rules

The rules currently prohibit the four major television networks from having an interest in a second national television network (a network being an entity that provides 15 or more hours per week of programming to 25 or more stations – one reason that the newer networks like UPN have limited their programming to less than 15 hours per week). The FCC is asking whether that rule should be maintained.

Conclusion

The text of the Commission's Notice of Proposed Rulemaking is supposed to be released "soon," and should provide more details on the exact questions that the Commission is asking. At the meeting, the FCC made clear that they are looking for empirical data on the effects of proposed consolidation to justify any action that might be taken. Furthermore, the Democratic Commissioners seemed to imply that while the Notice of Proposed Rulemaking will ask for input on a number of issues, it provides little in the way of any actual proposed rules. The Comment period will apparently be 120 days, so parties interested in submitting comments should start considering these filings now. With several studies to be commissioned by the FCC, and several field hearings to be conducted, the record in this case is likely to be developed over a period of many months, and perhaps even longer. It is obviously a very important proceeding, to which broadcasters should pay close attention, and one which will no doubt continue to occupy the attention of the Commission for years to come.

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