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COMMUNICATIONS/BROADCAST

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FCC Releases Text of New Broadcast Multiple Ownership Rules

Late on July 2, the FCC released the long-awaited text of its decision on the revision of the broadcast multiple ownership rules. While the 396-page document, which includes 1,388 footnotes, did not contain any surprises that radically changed the conclusions outlined in the FCC's previous *Public Notice*, and described in **Special Bulletin to Broadcasters**, SB No. 03-03 (June 2, 2003), it did help to clarify the procedures that the FCC will employ in evaluating applications filed under the new rules. However, readers should be cautioned that the text leaves many tough questions unanswered, which will no doubt be clarified on reconsideration or by subsequent case law precedent.

Furthermore, while these rules are scheduled to become effective 30 days after their publication in the *Federal Register* which, as of this date has not yet occurred, there are significant efforts on Capitol Hill to roll back some or all of these rules. Anyone affected by these rules should pay careful attention to the outcome of these activities. The details of the Commission's decision are set forth below.

National Television Ownership Limitation

On the national caps, the Commission raised the limitation on audience share that one company may own from 35% to 45%. The Commission determined that the current 35% limitation on national reach was not necessary to preserve the ability of local affiliates not owned by their network to negotiate with the network, nor was it necessary to preserve localism in television broadcasting. However, the Commission was unwilling to totally eliminate the national cap, fearing that, at some level, the network-affiliate relationship would be jeopardized. Thus, it concluded that the cap should be raised to 45%.

The Commission did leave in place the "UHF discount." In computing the national cap, the attributable audience for a UHF station remains half that of a VHF station in the same market. The Commission found that UHF stations had significantly smaller audience coverage in their markets, and thus the discount continued to be warranted. The Commission also concluded that the discount encouraged the development of emerging networks, such as Univision and Paxson, which have grown principally through owned and operated UHF stations. The Commission found that growth of new networks furthered the public interest.

However, the Commission recognized that the reasons for the UHF discount will be eliminated by the digital transition. Thus, the UHF discount will remain in place until the digital transition has been completed in a given market. At that time, the discount will terminate for the affiliates of Top 4 networks (ABC, CBS, NBC and Fox). There is no discussion in the *Report and Order* as to whether holdings which exceed the cap when the discount is eliminated will be grandfathered. In future biennial reviews of the digital transition, the Commission will consider whether the discount should also terminate at that time for stations not affiliated with the Top 4 networks.

Based on these rulings, both Viacom and Fox, which already have temporary waivers allowing them to own stations with cumulative audience shares above the current 35% cap will be able to retain those stations. Other large groups near the 35% threshold may now be able to expand their holdings.

Note: The increase of the national audience cap for television from 35% to 45% has been the subject of the greatest Congressional concern, and proposed legislation has been passed by committees in both the House and Senate which would roll back this change. It is unclear whether these provisions will be adopted by Congress or survive a possible Presidential veto.

Local Television Ownership

The FCC revised its local television ownership rules to generally permit the common ownership of two television stations except that the combination of two of the top four rated stations ("Top 4") in any market remains prohibited. For purposes of determining which are the Top 4 rated stations in a market, ratings from 9:00 a.m. to midnight will be considered. Thus, before a combination will be routinely permitted, there must be at least 5 television stations in that market.

In the largest of television markets as determined by Nielsen, those that have a total of at least 18 commercial and noncommercial television stations, companies will be able to own up to three television stations, again with the prohibition that no more than one of the stations to be combined is in the Top 4 in that market. It is anticipated that this will happen only in the largest of television markets, and not even in all of them. The Commission estimated that 8 or 9 markets will fall into this category.

The Commission has left open the possibility that in DMAs where it can be shown that the merger of top 4 stations could serve the public interest, that prohibition can be waived. This may permit some duopolies between two affiliates of the major television networks, even in the smallest markets. The Commission's current waiver standards, which permit the acquisition of a failed or failing station by another local owner, can justify such a waiver, and the requirements for these exceptions have been modified so that the acquiring owner need no long demonstrate that there is no other willing buyer from outside the market before the acquisition is allowed.

In addition to the failed and failing station exceptions, the Commission will look at other factors in determining whether a waiver may be permissible to permit the ownership of two Top 4 stations. Waivers which will allow for the closing of a gap between combining stations and the dominant station in a market may be permitted. In that case, the parties must provide ratings for the four most recent ratings periods to justify the combination. Mergers which enhance the ability of a station to complete the digital transition will also be viewed favorably. Other public interest benefits, such as the initiation of news on a station that currently does not carry news, or the preservation of news programming on a station that may otherwise be forced to eliminate such programming, may also be used to justify a waiver. The fact that one or both stations are UHF facilities will also be weighed in any waiver evaluation.

The Commission did tighten its local television ownership rules in one way – determining that all television stations in the same Nielsen market typically will be counted against the local limits, even if they do not have overlapping contours. In doing so, the FCC abandoned the notion of independent "voices," and will now count just stations (excluding satellites). The Commission concluded that, as cable carriage is granted on a full market basis, the degree of over-the-air overlap is irrelevant. However, such combinations may be allowed if it can be demonstrated that there is no Grade B overlap and that the stations to be combined have not been carried on the same cable or DBS system in the same geographic area in the prior year.

Where combinations are created based on a waiver, the combination will not be freely transferable. Instead, the party seeking the transfer will be required to demonstrate that circumstances justifying the waiver still exist. While such circumstances may be demonstrable in the case of waivers justified based on preservation of news programming or overcoming UHF disparities, the Commission has offered no guidance as to how continued waivers can be justified if the original acquisition was justified on a failed or failing station basis (as, presumably, after the combination, the acquired station will no longer be failed or failing).

Cross Media Limitations

The Commission's decision found that there was insufficient basis in the record to justify the need for either a flat ban on the creation of local combinations of daily newspapers and broadcast stations or the limitations on the cross ownership of radio and television stations in the same market. Instead of these specific cross-ownership limitations, a general policy limiting cross media combinations in certain smaller markets was adopted.

In DMAs with 9 or more commercial and noncommercial television stations, there will be no limitations on the cross ownership of radio, television, and newspapers. An entity can own a daily newspaper in such a market, along with the full complement of radio and television stations that are permitted under the rules for those services. In markets with from 4 to 8 commercial and noncommercial television stations, one company can own a daily newspaper, a single television station, and up to 50% of the maximum number of radio stations that can be owned by one entity in such a market. If the newspaper owner does not own a television station, it can own the full complement of radio stations allowed under the local radio ownership rules. In such markets, there is no limitation on the ownership of radio and television stations – thus one entity can own two television stations and the maximum permissible number of radio stations if permitted by the rules applicable to that market. In markets with 3 or fewer commercial and noncommercial television stations, no newspaper-television cross ownership, newspaper-radio or television-radio cross-ownership will be permitted.

For purposes of this rule, a television market will be defined by looking at the Nielsen DMA, and determining how many television stations are assigned to that market. Both commercial and noncommercial stations will be considered. Where a station is licensed to a community in one market, but assigned by Nielsen to another DMA, the station will count only in the market to which it is assigned by Nielsen, not in the market where its city of license is located.

However, geographical reach of stations will still be considered in certain instances in determining when these rules apply. For instance, a newspaper owner can own radio stations in any DMA in which it publishes a newspaper unless the community in which it is published is encompassed by a specified contour of a radio station. For AM stations, the rule will be triggered if the 2 mV/m contour of the station encompasses the entire community in which the newspaper is published. For FM, the relevant contour is the 1 mV/m contour. However, television ownership restrictions will apply simply if the newspaper is published within the television station's DMA.

Waivers of the restrictions in smaller markets will be entertained, particularly where the party requesting the waiver can demonstrate that the waiver will allow for an increase in local news available in the market.

If a broadcaster starts a new daily newspaper, none of the cross media restrictions will be enforced in a manner which will prohibit that start-up.

The Commission also clarified one aspect of its rules. Previously, a newspaper had to be published in the English language to count under the rules. Now, a paper published in a language other than English will be counted under the rules if it is published in a community where the language in which the paper is published is the dominant language in that market.

The Commission estimated that approximately 70 television markets have 9 or more television stations, 109 markets have from 4 to 8, and 31 markets have 3 or fewer television stations.

Note: Commissioner Adelstein recently identified an "apparent blunder" in this methodology. He noted that all noncommercial television stations owned by a statewide broadcasting system which are physically located in a geographically large DMA are counted even if they broadcast identical programming. In contrast to commercial stations, these noncommercial stations normally have not been classified as satellite stations in the past because the multiple ownership rules did not apply to noncommercial stations. Thus, Minot, North Dakota, would be considered as having more stations than Detroit, Michigan. This issue is likely to be dealt with on reconsideration, and could affect the processing of applications in the interim if those applications involve markets where counting such noncommercial stations would make a difference in whether or not a proposal was permissible.

Local Radio Ownership

Only the local radio ownership restrictions bucked the trend of deregulation. The Commission actually has tightened the rules, prohibiting certain combinations that are permissible under the rules as they now stand.

Under the Communications Act, the number of radio stations that one entity can own in an area is determined by the number of stations that compete in the market in question. The more stations that are in a market, the more stations one entity can own in that market. While the Commission did not change the numerical limitations on how many stations one party can own within a market, it did change the way in which markets are determined. Under the current rules, markets are defined by coverage contours – every station that has a city grade contour that overlaps the city grade contour of any station in the proposed combination is considered a potential competitor.

Under the new rules, the number of stations is determined by looking to the number of stations in the Arbitron Metro market to which the stations are assigned. The assignment of stations to a Metro will be determined by a combination of the stations that are listed "above the line" (*i.e.*, they are a "home" station) in Arbitron ratings books, and those stations licensed to a community within the counties which make up the Arbitron Metro. The principal source of which stations are considered to be in a market will be a computer database, Media Access Pro, which was developed and is maintained and marketed by the consulting firm BIA. If BIA's Media Access Pro considers a station to be in a market, it will be considered in that market. If a party owns one station with a city of license in an Arbitron Metro, all stations owned by that party and assigned by BIA to that market will be considered in a duopoly analysis.

The Commission also concluded that noncommercial radio stations are marketplace competitors, and will be counted in determining how many stations are in a market.

In non-Arbitron markets, the Commission has not come up with new rules that will apply, but has instead opened a new proceeding to determine how those markets will be defined. A temporary processing policy will be used in the interim, continuing to apply the existing contour overlap methodology, but excluding from the count of stations in a market any station with a transmitter site more than 58 miles from the perimeter of the overlap area of the stations that are being combined. Also excluded from the count of stations in the market are stations under the same common ownership and control as those that are part of the proposed combination, but not part of that combination. Such stations overlap the city grade signals of some, but not all of the stations in the proposed combination, and therefore are not considered as part of the combination. Usually, in such situations, these stations will be counted in a separate contour-generated "market" which will also be evaluated in assessing the permissibility of the proposed combination.

When the contour methodology and when the Arbitron Metro station count are implicated is not totally clear from the *Report and Order*. The *Report and Order* clearly states that a party should use the contour methodology when proposing a combination of stations that includes a station licensed to a community outside of the boundaries of an Arbitron market. This is true even if the station that is outside of the market is listed as "home" in an Arbitron market by BIA. The Commission states that "in all cases, parties must demonstrate – using the standards for Arbitron Metros described above – that they comply with those limits in each Metro implicated by the proposed transaction." Thus, it appears that combinations of stations in an Arbitron Metro with ones licensed to nearby communities must meet both the contour methodology and the Arbitron methodology. This matter will no doubt be further clarified on reconsideration.

Given that Arbitron market assignments can change from time to time, the Commission is concerned that licensees not use such changes to manipulate the process. Thus, no change in an Arbitron market which would be beneficial to a proposed combination will be considered until two years after that change has been made. Such changes would include both the enlargement of a market (thus including more stations in the market) and the shrinking or splitting of a market (thus separating commonly owned stations into separate markets). The addition of new stations as "home" to a Metro also will not be given effect for a period of two years, unless such stations are licensed to communities within the Metro counties.

In the local radio ownership context, the Commission agreed to grandfather existing combinations which would not be permissible under the new rules. However, nonconforming combinations cannot be sold in combination unless the sale is to an "eligible entity." An eligible entity is a small business as defined by the Small Business Administration. According to the Commission, a radio company with $6 million or less in annual revenue is a small business. The eligible entity can be the licensee in its own right, or it can be part of another entity as long as it: 1) holds 30% of the equity in the licensee entity and more than 50% of the voting power, (2) holds at least 15% of the equity and more than 50% of the voting power and no other entity holds more than a 25% interest in the licensee, or (3) holds more than 50% of the voting power and the proposed licensee is a publicly traded company. The eligible entity cannot sell to anyone other than another eligible entity unless it first holds the nonconforming combination for at least three years. Eligible entities cannot grant options, rights of first refusal or similar rights to non-eligible companies. This is to prohibit non-eligible companies from establishing "front" companies to acquire stations pursuant to this exception in order to sell them to the larger company at the end of the holding period. The eligible entity also cannot increase the size of the nonconforming combination.

Other Issues

Dual Network Rule. The Commission refused to modify the dual network rule, which prohibits the acquisition of one of the four biggest television networks by another of those networks.

Financial Interest/Syndication Rules. The Commission declined to adopt new rules requiring that networks purchase a percentage of their programming from independent producers.

Small Radio Market Definition Rulemaking. The Commission began a proceeding to determine permanent rules for the definition of a "market" for radio stations outside of Arbitron metros. The *Notice of Proposed Rulemaking* indicates that the Commission wants to adopt fixed markets – similar to Arbitron metros – in areas outside of those metros. Suggestions for those fixed areas range from Metropolitan Areas, as defined by the Office of Management and Budget, to Cellular Market Areas used by the FCC to define markets for purposes of auctioning cellular telephone licenses.

The Commission asks that parties address how any market definition will apply if the definition overlaps an Arbitron defined metro area. Similarly, the Commission asks parties to discuss whether any of these definitions of a market accurately portray the competitive situation in smaller markets. Thus, they ask small market broadcasters to specifically discuss the situations in their markets, and whether any of these market definitions accurately portray the competitive situation there. Comments in this proceeding are due 30 days after publication of the notice in the *Federal Register*. Reply comments are due 15 days later.

Radio Joint Sales Agreements. The Commission also determined that radio Joint Sales Agreements, which allow one company to sell the advertising time on a station that it does not own or program, will result in the attribution of the station being sold to the party doing the selling. This is similar to the attribution of stations that are being programmed pursuant to a Time Brokerage or Local Marketing Agreement. For a station subject to a JSA to be attributable to another party, that party must sell 15% or more of the "advertising time" on the station. Current JSAs, and current LMAs, which would be impermissible under the new rules, will have to be terminated two years after the effective date of these rules.

Television Joint Sales Agreements. The Commission further stated that they will commence a rulemaking proceeding to determine whether Joint Sales Agreements in television will be attributable. As stated above, in this proceeding, the Commission determined that radio stations whose advertising time is sold by another station owner will be attributable to that owner. However, the Commission felt that such a decision could not be reached for television stations, as the question as to whether such a rule should be adopted was never posed in any of the *Notices of Proposed Rulemaking* in this proceeding. Instead, a new proceeding will be commenced at some point in the future. This *Further Notice of Proposed Rulemaking* was not released with the *Report and Order*. Commission sources have indicated that the notice should be released in the next 60 to 90 days.

What impact the rule changes may have on the industry is impossible to predict at this time, particularly since the Commission's decision may well be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Indeed, it is that court that has twice chastised the FCC for keeping rules on the books that no longer can be justified as necessary. The Commission's action, however, although mandated by Congress as part of the "biennial review" process by which the Commission must review the current effect of its ownership rules every two years and determine if such rules are still necessary, could well wind up the subject of new legislation on Capitol Hill.

We have previously reported on this rulemaking proceeding in **Memorandum to Broadcast Clients**, BC No. 02-03 (October 29, 2002) and in **Memorandum to Broadcast Clients**, BC No. 03-01 (February 25, 2003) and in **Special Bulletin to Broadcasters**, SB No. 03-03 (June 2, 2003). The Commission's rule changes will become effective after their publication in the *Federal Register*. For more information on the rule changes and how they may affect your competitive situation, please contact any of the lawyers in the Communications Practice Group.

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