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Telecommunications Law Update

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FCC Substantially Relaxes Broadcast Ownership Rules

On June 2, 2003, in a controversial 3-2 decision divided along party lines, the FCC announced the results of its comprehensive review of its broadcast ownership rules. The changes will permit ownership of two television stations in many more local markets; ownership of three television stations in the largest markets; cross-ownership of television, radio, and newspaper outlets in all but the smallest markets; and more extensive television holdings nationwide. While tightening up the geographic definition of local radio markets to exclude peripheral stations, the new rules also eliminate the Commission's policy of "flagging" for further review those radio mergers resulting in large revenue shares held by one or two firms. The FCC's relaxation of these rules is premised on the increase in news and information sources since they were promulgated or last revisited, not only through additional broadcast outlets but also from the introduction of DBS and cable competition and availability of Internet content. The changes do not alter the Commission's "attribution" rules, which generally apply its ownership restrictions to all officers, directors, and 5% or greater voting shareholders of broadcast licensees.

The relaxed rules will not become effective until the FCC is able to revise its application forms for broadcast mergers and acquisitions and obtain OMB approval for them, a process that generally takes two or three months. They will undoubtedly lead to petitions for reconsideration, although such petitions typically do not lead to a stay of effectiveness in the interim. Here, however, the rules have sparked a bitter debate both within and outside the FCC. This is in part because the majority did not formulate the precise nature of its changes (or its "diversity index" in support of them) until the very end of the process. But it is primarily because of the substantial consolidation — characterized by the Democratic minority as "Clear Channelization" — that resulted from a similar relaxation of the radio ownership rules in 1996. Congressional sensitivity about the prospect of concentrated ownership in the television news business has already led to legislative proposals to repeal the new changes, which will also certainly be challenged in court. The relaxed rules will also make premerger review by the antitrust agencies more important and could cause opponents of mergers and acquisitions in the television industry to focus more on antitrust issues.

The precise scope of the new rules will not become clear until the text of the decision is released, probably within the next week or two. Based on the news release, however, the general contours of the changes are as follows:

- The FCC increased the cap under the national television ownership rule, enabling one firm to own TV stations whose coverage totals up to 45% of U.S. TV households (rather than the present 35%). The Commission will retain for now the "UHF discount," under which for these purposes UHF stations (which generally have more limited reach) are considered to cover only 50% of the households in a market. That discount will be eliminated for ABC, CBS, Fox, and NBC (and possibly for others) after the transition to digital television.

- The FCC retained its dual network rule, which prohibits any merger among these top four TV networks.

- The FCC substantially relaxed the television duopoly rule. This rule currently permits ownership of two television stations in a local market only if there are at least 8 separately owned television stations remaining in the market (including public stations), and if the 4 top-rated stations remain separately owned. The new rules change the 8-station test to a 5-station one, allowing duopolies in 162 out of 210 markets representing over 95% of the U.S. population. They also now permit ownership of "triopolies" (three television stations) in those 6 of the largest markets with 18 or more stations, and adopt a waiver process permitting mergers of 2 top-four stations in markets with 11 or fewer stations on a case-by-case basis. According to Commissioner Abernathy's separate statement, however, commonly owned TV stations in a local market must air different programs to satisfy their children's educational and informational programming obligations.

- The FCC eliminated its current policy of requiring greater scrutiny of radio acquisitions by which one party obtains 50% or more of the radio revenue share in a market, or two parties are left with more than 70%. It did tighten the local radio ownership limits in one respect, by altering the methodology for defining the geographic scope of radio markets. Under the Telecommunications Act of 1996, a single firm may generally own 8 radio stations (including 5 AMs or FMs) in markets with at least 45 radio stations; 7 (including 4 AMs or FMs), in markets with at least 30 stations; 6 (including 4 AMs or FMs), in markets with at least 15 stations; and 5 (including 3 AMs or FMs), in all other markets. However, the Commission abandoned its complex signal contour method for defining how many radio stations are within a given market, in favor of a market definition similar to that for TV. The Commission will now define radio markets by reference to Arbitron ratings markets, and conduct a further rulemaking to provide a similar geographic definition for markets too small to be Arbitron-rated.

- The FCC grandfathered owners of radio stations that are barred by this new method of calculating the size of radio markets. It will allow sales of these grandfathered combinations to small businesses, in an effort to promote minority and female ownership of broadcast outlets in a way that does not run afoul of constitutional limitations. However, the Democratic minority has criticized this approach for permitting small businesses to divest themselves of their acquisitions within a short period of time.

- The FCC substantially relaxed existing restrictions on broadcast-newspaper and radio-television cross-ownership. In markets with less than 4 TV stations, representing about 27% of the population, the current bans on cross-ownership will still apply. In markets with between 4 and 8 TV stations, however, a single firm may own either (1) a daily newspaper, a TV station, and up to 50% of the above-referenced radio station limit, (2) a daily newspaper, 100% of the radio station limit, and no TV station; or (3) two TV stations, 100% of the radio station limit, and no daily newspaper. In markets with at least 9 TV stations, the FCC has eliminated all cross-media broadcast ownership limits. From the dissenting statements, it appears that the new newspaper ownership limits will apply only to English-language newspapers, unless another language is dominant in the market.

- The new cross-ownership limits appear to be premised on a "diversity index," analogous to the economic concentration index used by the antitrust authorities, but based in part on the relative importance of different kinds of media outlets as news sources and the numbers of such outlets in a given market. This index will serve as an important tool in those aspects of the new rules that call for case-by-case waivers, and may be subject to challenge if it does not permit differentiation of outlets depending upon the extent of their local news content.

The fate of these relaxed rules in court will turn in large part on whether they can be defended as compelled by prior judicial decisions. The three Republican Commissioners defended their deregulatory approach as a response to a mandate from Congress and the courts. The 1996 Act requires that the FCC review all of its broadcast ownership rules every two years to determine whether they are "necessary in the public interest as the result of competition," and to repeal or modify those that are not. In recent decisions, the D.C. Circuit has interpreted this provision as a clear command to deregulate absent empirical evidence of the potential adverse effects of doing so, and it has reversed less extensive efforts at relaxing these rules as inappropriate "wait-and-see" incrementalism. (The diversity index appears to be a way of trying to satisfy this standard.) One of the principal issues on appeal will be the Democratic minority's argument that the majority overstated the court's mandate to justify deregulation, in light of the Commission's long established authority under the "public interest" standard of the Communications Act, and the Supreme Court's interpretation of that standard to uphold the original newspaper-broadcast rule based not on empirical evidence about the future effects of consolidation but rather on the agency's expert "predictive judgment." Indeed, a major theme of Commissioner Copps' dissent is the view that these changes are the final nail in the coffin of that standard, which began with the elimination of program content regulations and other licensee obligations during the 1980s.

Another significant issue on appeal will be the extent to which the First Amendment requires greater record support for restrictions on media ownership, or precludes regulation based upon the owner's market share – *i.e.*, the attractiveness or persuasiveness of its message or its medium to viewers, listeners, or readers. In light of past D.C. Circuit decisions, the appeals will also focus on the question of whether the bright line standards selected by the Commission have a basis in the record in light of the growth in media outlets and news sources over the years, and how the Commission justifies different treatment under different rules (*e.g.*, of the UHF handicap) or similar treatment of large and small outlets. Network affiliates will undoubtedly challenge the determination that the 35% limit on network ownership had no effect in protecting them from pressures to clear network programs. Finally, there will be continued criticism of the Commission for adopting its new rules without additional notice of and opportunity to comment on their actual scope. Chairman Powell took the unusual step in this proceeding of denying the dissenting Commissioners a request to postpone the decision to address this problem, citing the Commission's obligations to complete its biennial review and respond to the D.C. Circuit's criticisms. That decision was undoubtedly based on the wide latitude agencies generally have for adopting rules that are the "logical outgrowth" of prior proposals.

Because of fears about the potentially irreversible effects of media consolidation, the new rules also face the threat of legislative repeal. Within two days after adoption of the rules, the Senate Commerce Committee summoned the FCC Commissioners to a hearing to explain them. Legislation has already been introduced or promised to address some of the changes (such as the 45% cap on national TV coverage), which is scheduled for markup in the Senate on June 19. While the degree of support for such measures remains uncertain, particularly in the House, the key positions certain rule opponents hold on congressional appropriations committees make the use of appropriations riders a possible vehicle for repeal. Several in Congress are also considering use of an obscure parliamentary weapon, a "resolution of disapproval" of agency rules pursuant to the Congressional Review Act of 1996. This provision, which Congress has successfully invoked only on one prior occasion, permits it to repeal an agency rule by joint resolution, although the President retains the right to veto such a resolution. The constitutionality of this procedure for legislative action is an open question, as is its applicability here — since it does not apply to rules promulgated under the 1996 Telecommunications Act.

Congress is also now considering whether to modify the provisions of the 1996 Act that began all this, by requiring greater justification for continued regulation under the "public interest" standard of the Act. This is but another sign that, with likely petitions for reconsideration, appeals, and congressional interest, the story of these changes will be an evolving one. As Commissioner Adelstein put it in his paraphrase of Churchill, "this is not the end, or even the beginning of the end, but just the end of the beginning."

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This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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