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Legal Challenge to the FCC's Media Ownership Rules: An Overview of *Prometheus Radio v. FCC*

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Summary

On June 2, 2003, the FCC adopted a set of comprehensive rules addressing six different aspects of media ownership, including cross-ownership of broadcast and print media, local televison and radio ownership, and national television ownership. On June 24, 2004, the United States Court of Appeals for the Third Circuit, in *Prometheus Radio v. FCC*, remanded several of these rules back to the Commission for further consideration finding that the Commission failed to adequately justify the numerical limitations used in the rules. This report provides an overview of the Commission's 2002 Biennial Review from which the 2003 rules originated and the *Prometheus* case, and addresses the status of the Commission's regulations. It will be updated as events warrant.

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Introduction

The Telecommunications Act of 1996 sought to create a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[1] Among other things, the act eliminated limits on national radio ownership, raised the cap on the percentage of the national audience that a single station owner may reach, set new limits for local radio ownership, and directed the Federal Communications Commission to conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate the local television ownership limitations.[2] The act also directed the Commission to review its broadcast ownership rules every two years to "determine whether any of such rules are necessary in the public interest as the result of competition."[3]

The Commission initiated its 2002 Biennial Review in September of 2002 with a Notice of Proposed Rulemaking announcing that it would review four of its broadcast ownership rules: the national audience reach limit; the local television rule; the radio/television cross-ownership ("one-to-a-market") rule; and the dual network ownership rule.[4] The Commission had previously initiated proceedings regarding the local radio ownership rule and the newspaper/broadcast cross-ownership rule.[5] Those proceedings were incorporated into the Biennial Review.

On June 2, 2003, the Commission adopted a Report and Order modifying its ownership rules.[6] In the Order, the Commission concluded that "neither an absolute

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[1] S.Rept. 104-230, p. 1 -2 (1996).

[2] Telecommunications Act of 1996, P.L. 104-104 (1996).

[3] P.L. 104-104, Sec. 202(h).

[4] *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 FCC Rcd 18503 (2002).

[5] *See* 16 FCC Rcd 19861 (2001) and 16 FCC Rcd 17283 (2001).

[6] *In the Matter of 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003). Hereinafter, cited as Report and Order. For more information on the Commission's media ownership rules, see CRS Report (continued...)

prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the "newspaper/broadcast cross-ownership rule") nor a cross-service restriction on common ownership of radio and television outlets in the same market (the "radio-television cross-ownership rule") [remained] necessary in the public interest."[7] The Commission found that "the ends sought can be achieved with more precision and with greater deference to First Amendment interests through [its] modified Cross Media Limits ("CML")."[8] The Commission also revised the market definition and the way it counted stations for purposes of the local radio rule, revised the local television multiple ownership rule to permit the common ownership of up to three stations in large markets, modified the national television ownership cap to raise the national audience reach limit to 45%, and retained the dual network rule.

Following the publication of the Commission's Order, several organizations filed petitions for review of the new rules. The petitions for review were consolidated and heard by the United States Court of Appeals for the Third Circuit. After an initial hearing on September 3, 2003, the court entered a stay for the effective date of the proposed rules, preventing their enforcement, and ordered that the prior ownership rules remain in effect pending resolution of the proceedings.[9] On February 14, 2004, the court heard oral arguments and issued its opinion on June 24, 2004.[10]

2002 Biennial Review

As noted above, on June 2, 2003, the Commission approved a Report and Order modifying its media ownership rules to provide a "new, comprehensive framework for broadcast ownership regulation."[11] The Commission determined that new technologies necessitated new rules and that the prior rules "inadequately [accounted] for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and [lacked] any sound basis for a national audience reach cap."[12] According to the Commission, the newly adopted rules were "not blind to the world around them, but reflective of it," and "necessary in the public interest."[13]

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[6] (...continued)
RL31925, *FCC Media Ownership Rules: Issues for Congress*, by Charles B. Goldfarb.

[7] *Id* at ¶ 2.

[8] *Id*.

[9] *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3rd Cir. 2003).

[10] *Prometheus Radio Project v. FCC*, 2004 U.S. App. LEXIS 12720 (3rd Cir. 2004). The court's slip opinion is available at [http://www.ca3.uscourts.gov/opinarch/033388p.pdf]. All citations to the case in this report reference the slip opinion.

[11] Report and Order, ¶ 3.

[12] *Id* at ¶ 4.

[13] *Id* at ¶ 8.

National Ownership Rules

With respect to the ownership of broadcast stations on a nationwide level, the Commission determined that while "a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities," the evidence demonstrated that a 35% cap was not necessary to "preserve that balance" and raised the limit to 45%.[14] Under the new rule, a single entity was prohibited from owning stations that would allow it to reach more than 45% of the national audience. The Commission also elected to retain the "UHF discount," which attributes UHF stations with only 50% of the households in their DMA, despite the fact that many cable operators now carry UHF stations.

While it modified the national television ownership cap, the Commission determined that its dual network rule, which prohibits common ownership of the top four television networks, remained necessary in the public interest and did not attempt to repeal or modify it.[15]

Local Ownership Rules

In the 2002 Biennial Review, the Commission either modified or repealed its local ownership rules. The cross-ownership rules prohibiting the common ownership of a full-service broadcast television station and a daily newspaper in the same community and limiting the ownership of television and radio combinations by a single entity in a given market were both repealed.[16] The Commission determined that neither rule remained necessary in the public interest and replaced both rules with a single set of cross-media limits based on market size. In large markets, defined as those with more than eight television stations, cross-ownership was unrestricted.

The Commission combined an earlier remand from the D.C. Circuit Court of Appeals[17] of its modified "duopoly rule" with the 2002 Biennial Review and adopted

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[14] *Id* at ¶ 507.

[15] *Id* at ¶ 592.

[16] *Id* at ¶ 327.

[17] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Telecommunications Act of 1996 directed the FCC to determine whether to "retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a congnizable interest in, within the same television market." Pub. L. 104-104, Sec. 202(c)(2). In response to this directive, the Commission modified its rules in 2000 to allow an entity to own two television stations in a DMA (designated market area), provided that (1) the Grade B field strength contours of the stations do not overlap; and (2) at least one of the stations is not ranked among the top four highest-ranked stations in the DMA, and at least eight "independent voices" would remain in the DMA after the proposed combination. The United States Court of Appeals for the D.C. Circuit reviewed this rule, and remanded it to the Commission to justify its definition of "voices," which included only broadcast television stations and not other types of non-

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a new rule that would permit common ownership of two commercial television stations in markets that have seventeen or fewer full-power commercial and noncommercial stations, and common ownership of three commercial stations in markets that have eighteen or more stations.[18] These limitations are subject to a further restriction on the common ownership of stations that are ranked among the market's largest four stations based on audience share. The Commission also elected to repeal the "Failed Station Solicitation Rule" related to the sale of failed, failing, or unbuilt stations, which required notice of the sale to be provided to out-of-market buyers.

With respect to local radio ownership, the FCC modified its prior rule by adopting a new method for determining the size of a local market, but retaining the rule's prior numerical limits on station ownership.[19] The Commission's prior regulations defined the local market by using the "contour-overlap methodology,"[20] which the Commission abandoned in favor of the "geography-based market definition used by Arbitron, a private entity that measures local radio audiences for its customer stations."[21] The Arbitron markets include both commercial and noncommercial stations. While it changed the definition of local market, the Commission retained its numerical limits, which allow a single entity to own as many as eight radio stations in markets of forty-five or more commercial stations.[22]

An additional modification to the local radio ownership rule created a new system for the attribution of joint sales agreements (JSAs).[23] Generally, a JSA authorizes a broker to sell advertising time for the brokered station in return for a fee paid to the licensee. The Commission noted that because the broker station normally

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[17] (...continued)
broadcast media. The Commission consolidated the *Sinclair* remand with its 2002 Biennial Review leading to this challenge.

[18] Report and Order, ¶ 186.

[19] *Id* at ¶ 235 *et seq*. For more information, see CRS Report RL31925, *FCC Media Ownership Rules: Issues for Congress*, by Charles B. Goldfarb.

[20] For a description of the "contour-overlap methodology," see *supra* note 6 at Appendix F.

[21] The Telecommunications Act of 1996 did not define local markets using any particular methodology.

[22] The Telecommunications Act of 1996 established the current numerical limits. Under the '96 Act, in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market. Pub. L. 104-104, Sec. 202(b).

[23] Report and Order, ¶ 317.

assumes much of the market risk with respect to the station it brokers, it typically has the authority to make decisions with respect to the sale of advertising time on the station. Under the prior rules, JSAs were not attributable to the brokering entity and were not counted toward the number of stations the brokering licensee may own in a local market. The new rules made the JSAs attributable to the brokering entity for the purpose of determining the brokering entity's compliance with the local ownership limits if the brokering entity owns or has an attributable interest in one or more stations in the local market, and the joint advertising sales amount to more than 15% of the brokered station's advertising time per week.

The Court's Decision

Several organizations filed petitions for review of the new rules upon their publication. The numerous petitions for review were consolidated and the case was heard by the United States Court of Appeals for the Third Circuit in Philadelphia. As noted above, after an initial hearing, the court entered a stay for the effective date of the proposed rules.[24] On February 14, 2004, the court heard oral arguments and issued its opinion on June 24, 2004.[25]

With respect to the national ownership rules, the court did not address the Commission's decision to raise the national audience reach cap from 35% to 45% citing Congress' modification of the rule in the 2004 Consolidated Appropriations Act.[26] Section 629 of the act directed the Commission to modify the rule by setting a 39% cap on national audience reach.[27] The court determined that because the Commission was under "a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45 were moot."[28]

Additional challenges to the UHF discount provisions in the rule were also deemed moot even though the UHF discount rules were not mentioned in the 2004 Consolidated Appropriations Act. The court determined that the UHF discount was intrinsically linked to the 39% national audience reach cap because "reducing or eliminating the discount for UHF stations audiences would effectively raise the audience reach limit."[29] The court also noted with respect to the UHF discount that the 2004 Consolidated Appropriations Act specifically provided that the periodic review provisions set forth in the amendment did not apply to "any rules relating to

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[24] *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3rd Cir. 2003).

[25] *Prometheus Radio Project v. FCC*, 2004 U.S. App. LEXIS 12720 (3rd Cir. 2004).

[26] Pub. L. 108-199, Sec. 629.

[27] Section 629 also amended section 202(h) of the Telecommunications Act of 1996 to change the review period from a biennial review to a quadrennial review, and it exempted the 39% cap on national audience reach from review.

[28] *Prometheus* at 44.

[29] *Id* at 45.

the 39% national audience limitation," and as a rule "relating to" the national audience limitation, Congress intended to insulate the UHF discount from review.

None of the parties bringing the *Prometheus* case challenged the retention of the dual network rule, so this was not addressed by the court.

With respect to the Commission's local ownership rules, the court agreed with the Commission's decision to modify these rules in many respects. However, the court found fault with the numerical limits set by the FCC in each of the local ownership rules. The court stated that "[t]he Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets."[30]

The court determined that the Commission's decision to repeal the ban on broadcast/newspaper cross-ownership was justified and supported by evidence in the record and found that the Commission's decision to retain some limits on common ownership was constitutional and not in violation of the Communications Act.[31] However, the court found that the FCC failed to provide reasoned analysis to support the specific limits that it chose with respect to the new "cross-media" rules, stating that the limits "employ several irrational assumptions and inconsistencies."[32] The court rejected the Commission's use of a "diversity index,"[33] because of what the court saw as the fallacies upon which it was based and because the Commission failed to provide adequate notice of the new methodology in the rulemaking proceedings leading up to the 2002 Order.[34] The court remanded the cross-media limits and advised the Commission to make any "new metric for measuring diversity and competition in a market . . . subject to public notice and comment before it is incorporated into a final rule."[35]

The court in *Prometheus* upheld the restriction on common ownership of the market's top four broadcast television stations, but remanded the numerical limits "for the Commission to harmonize certain inconsistencies and better support its

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[30] *Id* at 124.

[31] *Id* at 48 - 57.

[32] *Id* at 58.

[33] The Commission's diversity index was not based on the actual market shares of companies, but rather on the assumption that each television station in a market provides the same diversity impact regardless of the actual size of its audience, and the same for each newspaper, each radio station, etc. The court rejected the contention that each outlet provides the same diversity impact, saying that "[a] diversity index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality." *Prometheus* at 70.

[34] *Id* at 76 - 78.

[35] *Id* at 78.

assumptions and rationale."[36] In making its decision, the court found that the Commission had presented evidence in the record to adequately support the "top-four restriction,"[37] while failing to justify the market share assumptions used as the basis for the numerical limits. The court stated that "[n]o evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share."[38] The court also remanded the Commission's repeal of the Failed Station Solicitation Rule, finding that the Commission failed to consider "the effect of its decision on minority television station ownership," and thus failed "'to consider an important aspect of the problem' [amounting] to arbitrary and capricious rulemaking."[39]

In addition to upholding the Commission's restriction on common ownership of a market's top four broadcast television stations, the court upheld the Commission's new definition of local markets with respect to radio finding that the Commission's decision was "in the public interest" and that it was a "rational exercise of rulemaking authority."[40] The court also found that the Commission justified the inclusion of noncommercial stations in the new definition. However, with respect to the numerical limits retained by the Commission, the court concluded that while the numerical limits approach was rational and in the public interest, the Commission failed to support its decision to retain these particular limits with "reasoned analysis."[41] The court rejected the Commission's contention that five equal-sized competitors would ensure that local markets are competitive, and found that even if it were to justify the "five equal-sized competitors" benchmark, that it failed to sufficiently demonstrate that under the existing numerical limits five equal-sized competitors would actually emerge.[42] The court remanded the numerical limits to the Commission "to develop numerical limits that are supported by a rational analysis."[43]

With respect to the new rules providing for the attribution of joint sales agreements, the court affirmed the Commission's decision, finding that the Commission changed its rules as the result of "reasoned decisionmaking," and that such a change was "necessary in the public interest" due to "the potential for brokering entities to influence the brokered stations."[44]

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[36] *Id* at 78.

[37] *Id* at 90.

[38] *Id* at 93.

[39] *Id* at 95 - 96.

[40] *Id* at 106.

[41] *Id* at 119.

[42] *Id* at 121.

[43] *Id* at 123.

[44] *Id* at 113 -114.

Status of Regulations

The stay prohibiting enforcement of the Commission's modified media ownership rules remains in effect pending the Third Circuit's review of the Commission's actions on remand.[45] On September 3, 2004, the Third Circuit granted the Commission's motion requesting a partial lifting of the stay to allow those parts of the rules approved by the court in its June 24 decision to go into effect. Specifically, the stay was lifted with respect to the use of Arbitron metro markets to define local markets, the inclusion of noncommercial stations in determining the size of a market, the attribution of stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and the imposition of a transfer restriction. The stay remains in place with respect to all other aspects of the Biennial Review Order.[46]

On January 27, 2005, the United States Solicitor General and the FCC decided not to appeal the Third Circuit's decision.[47] However, several media companies filed a formal appeal with the Supreme Court asking for a review of the Third Circuit's decision.[48] On June 13, 2005, the Supreme Court denied certiorari in all relevant appeals.[49] The Commission is likely to revise its regulation to comport with the Third Circuit's decision.

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[45] *Id* at 125.

[46] *Prometheus Radio v. FCC*, 03-3388 (3rd Cir., Sept. 3, 2004).

[47] *Feds Leave Broadcasters Alone in FCC Media Ownership Appeal*, Communications Daily, January 28, 2005.

[48] *Media Group Asks Supreme Court to Hear Ownership Case*, Communications Daily, January 31, 2005.

[49] *Media Gen., Inc. v. FCC*, 2005 U.S. LEXIS 4807 (June 13, 2005).