The FCC's New Media Ownership Rules: What's All the Controversy About?

By Stephen T. Yelverton

On July 2, 2003, the Federal Communications Commission adopted new rules to govern the ownership of broadcast stations. This rulemaking was mandated by the 1996 Telecommunications Act which requires that the FCC review its broadcast ownership rules every two years to determine whether the rules that are currently in force are still necessary "as a result of competition" in the marketplace.

The U.S. Court of Appeals for the D.C. Circuit in *Fox v. FCC*, moreover, questioned the validity of any limits on concentration of broadcast ownership. It directed the FCC to develop a "solid factual record" based upon changes in the media marketplace in order to justify such limits on concentration of ownership.

In response to these directives from Congress and the D.C. Circuit, the FCC initiated a rulemaking that in a period of almost two years considered some 520,000 comments from members of the public. This included "town hall" meetings in various cities around the country that were hosted by FCC Commissioners.

When the new broadcast ownership rules were adopted on June 2nd, a torrent of criticism and controversy erupted. Many liberal and conservative advocacy groups were united in their opposition to the FCC's loosening of restrictions on the concentration of ownership. The House Republicans broke ranks with the GOP-controlled FCC and voted almost unanimously to repeal certain aspects of the FCC's new rules. The Senate is expected to follow suit, even though President Bush has threatened a veto of a Congressional repeal of the FCC rulemaking.

So, what did the FCC do to provoke such controversy? What are in these rules that not only could unite liberals and conservatives, but divide Republicans?

National TV Ownership Limits

The most controversial of the FCC's new rules, and the subject of the Congressional repeal efforts, is the rule as to "National TV Ownership Limits." Previously, no one company could own TV stations reaching any more than 35% of TV households in the U.S. The new limit is 45% of TV households. This share is calculated by adding the number of TV households in each market where a company owns a station, regardless of the station's ratings and includes all potential viewers in the market. The number of TV households reached by a UHF station, however, will still be discounted by 50%, because UHF stations are considered to be qualitatively inferior to VHF stations in the same market.

There were 1,340 commercial TV stations in the U.S. as of March 31, 2003, of which the four major networks owned less than ten percent. Viacom (CBS) owns 39 TV stations; Fox owns 37; NBC owns 29; and ABC owns 10. Under the new media ownership rules, the FCC left intact its "Dual Network Ownership Prohibition," which prohibits a merger of any of the top four national television networks.

By increasing the limit on television station ownership to a 45% share of TV households, the new rules enable Viacom, Fox, NBC, and ABC to acquire ownership of several stations in major markets where they previously owned no stations, but potentially many more stations in other markets. This rule change has no direct effect on their network affiliation agreements with independently owned television stations. The major networks will still be allowed to have affiliation agreements with independently owned stations in any markets in the U.S. and thus to distribute their network programming to 100% of all TV households.

Local TV Multiple Ownership Rules

Less controversial, but potentially diminishing or causing unfair competition, is the loosening on the prohibition of owning more than one television station in the same market. Under the new rules, a company may own two stations in a market with more than five television stations, but only one of these stations can be among the top four in ratings. In markets with eighteen or more stations, a company can own three stations, but only one of these can be among the top four in ratings. In markets with eleven or fewer stations, a waiver process was adopted where two top-four stations seek to merge. In determining the number of stations in the market, both commercial and non-commercial stations are counted.

As noted by one of the FCC Commissioners who dissented from the new ownership rules, counting non-commercial stations in determining market size, especially where these non-commercial stations all broadcast the identical signal (as is the case in many, small rural markets) has anomalous results. Thus, a TV market in a small community with many state-owned non-commercial stations, such as Minot, North Dakota, is considered under the new rules as large a market as Detroit, Michigan, and thus subject to the less restrictive ownership provisions for major markets.

Another concern is that a company with two television stations in a single market (of any size) will be in an inherently better competitive position than its single-station rivals in the same market. This may impel the FCC to utilize its waiver process to allow every company to own at least two

stations in the same market in order to minimize any competitive imbalance resulting from the rule changes. In markets with an odd number of stations, where the FCC grants duopoly waivers to all incumbents, the Commission might feel obliged to allow the single-station owner to merge with an in-market duopoloy to create a "triopoly," which would put that entity in a better competitive posture relative to its duopoly challengers.

The new local TV ownership rule, when considered with the 45% limit on national TV ownership, may encourage the major television networks to acquire a second or third station in markets where they already have an ownership presence. Because the national TV ownership limit counts only TV households covered, acquiring a second or third station in a market where a network is already a station owner has no ramifications in terms of breaching (or complying) with the 45% limit.

Under the new rules, a major national network will have substantial leverage over an independently-owned television station it seeks to acquire if the station is affiliated with the prospective acquirer's network. In this situation, if the independent either rebuffed the purchase overtures or attempted to negotiate a higher sales price, the network could threaten to refuse to renew the network affiliation agreement. Without a network affiliation, the value of the station will decrease significantly. The new rules thus bestow on the networks a unique bargaining advantage when attempting to purchase their own affiliates.

Cross-Media Limits

In its June 2nd rulemaking, the FCC replaced existing restrictions on broadcast-newspaper and radio-television cross-ownership with a more liberal rule. The new rule eliminates the ban on newspaper-broadcast cross-ownerships and television-radio cross-ownerships in markets with nine or more television stations. Under this determination of market size, non-commercial television stations count separately towards the nine station benchmark.

In markets with between four and eight television stations, the following combinations of media outlets may be commonly owned: (a) a daily newspaper, one television station, and up to half the limit on commonly-owned radio stations (discussed below) for that market; or (b) a daily newspaper, up to the limit on commonly-owned radio stations for that market, and no television stations; or (c) two television stations (if permissible under the local TV ownership rules), up to the radio limit for that market, and no daily newspapers.

In markets with three or fewer television stations, no cross-ownership is permitted involving television, radio, and newspapers. However, a company may obtain a waiver from the FCC of that ban if it can show that the television station does not serve the area served by the radio station or newspaper to be cross-owned.

This particular rule may have the most wide-reaching effect on competition in the local markets, yet has generated less controversy than other aspects of the rulemaking. The new rule allows major newspaper and media companies such as Gannett, Hearst, the New York Times, or the Washington Post to acquire a television station and multiple radio stations in markets where they currently publish a daily newspaper, an option prohibited since 1975 under the FCC's former newspaper-broadcast cross-ownership rule.

If the Washington Post were to acquire a television station and multiple radio stations in the Washington, D.C. market, the ensuing economies of scale could afford it a substantial competitive advantage. Other TV stations in the market could respond by acquiring a second station of their own or by seeking to be acquired by a print-broadcast conglomerate, such as the New York Times, that could reap its own scale economies from such a move. Under any scenario, the number of owners decreases.

Whether this rule change will result in a greater or lesser diversity of viewpoints is subject to intense debate. Liberals and many social conservatives believe that the new cross-ownership diversity will constrain viewpoint diversity. Economic conservatives believe that it would either have no effect or actually increase diversity, and that, in any event, the enhanced economic efficiency attending a deregulatory rule change such as this one is itself a desirable goal.

Local Radio Ownership Limits

In a surprise move, the FCC tightened its restrictions on the number of radio stations that may be owned in a market by one company. Previously, a radio market was determined by whether the "city-grade" signal contour of a station overlapped that of another station. For many radio stations, the "city-grade" signal contour only extends 7-10 miles from the transmitter, even though the station's audible and protected signal covers a 30 mile radius from the transmitter and, as a result, can be received throughout a metro area. Thus, it was possible under the old rules to acquire multiple stations in a metro area where the stations' "city-grade" signals did not overlap and, as a result, the FCC's local radio ownership restrictions were inapplicable.

The FCC has now changed the definition of a radio market to that of a geographic metro area as determined by Arbitron market surveys (a private company which compiles data on station listenership in every market). Thus, all stations that can be listened to and that are counted in the Washington, D.C. market survey by Arbitron will be considered by the FCC to be a part of the Washington, D.C. radio market, regardless of whether the station is licensed to a community outside of Washington, D.C.

Limits on radio station ownership by market size are as follows: (a) in markets with 45 or more radio stations, a company may own up to eight stations only five of which

may be in one class, AM or FM; (b) in markets with 30-44 stations, a company may own up to seven stations, no more than four of which may be exclusively AM or FM; (c) in markets with 15-29 stations, a company may own up to six stations, no more than four of which may be AM or FM; and (d) in markets with 14 or fewer stations, a company may own up to five stations, no more than three of which may be AM or FM.

Because the new rule as to market definition may result in existing ownership arrangements exceeding the local ownership limits, the FCC "grandfathered" these combinations. At the same time, however, the Commission prohibited sale of these stations as a unit unless there is compelling public policy justification — *e.g.,* avoiding undue hardship to a small business group owner, promoting entry into broadcasting by minority and female-owned small businesses, *etc*.

These potential exceptions to the ban on assignment or sale of "grandfathered" radio station combinations raises issues of regulatory distortion of the marketplace and competitive imbalance. By allowing existing combinations of stations that exceed the new local limits to be sold intact, the Commission could inflict competitive harm on the other station owners in the market who comply with the new limitation. In response, such an owner may seek to acquire its own "grandfathered" combinations in the same market under the minority or female-owned "small business" exceptions that justified the initial transaction. If the Commission were to authorize such a transaction, the competitive disadvantage to the other compliant owners in the market would be exacerbated. The result might force the FCC to consider waivers of its local ownership rules to allow all the companies operating in the same market to achieve competitive balance by owning a comparable number of stations. This, in effect, could eviscerate the new limits the FCC has adopted on local radio ownership.

Conclusions

Under the 1996 Telecommunications Act, the FCC's rules on broadcast ownership must be reviewed and updated on a periodic basis to assure that they reflect marketplace realities. Although its June 2nd rulemaking achieved much needed reforms, the FCC may have unintentionally encouraged situations or circumstances where the new rules may result in unfair competition or competitive imbalance If not rectified by Congress or ultimately by the courts, the FCC should address these matters when considering petitions for reconsideration of its new rules. Fair competition and competitive balance are consistent with economic efficiency. Localism and diversity, which are the pillars of the Communications Act, can best be achieved where there is real competition.