TELECOMMUNICATIONS

THE FCC MAKES HISTORIC, AND CONTROVERSIAL, CHANGES TO ITS MEDIA OWNERSHIP RULES

*BY R. EDWARD PRICE**

Rarely does an action taken by the Federal Communications Commission (FCC) result in groups as diametrically opposed as the National Organization for Women and the National Rifle Association taking the same side against the FCC (or even taking an interest in the matter). But on June 2, 2003, the Commission took just such a step when it adopted an order (*June 2 Order*) containing several long-anticipated changes to its rules governing media ownership.[1] In deciding to lessen certain restrictions on the ownership of TV, radio and other media outlets, the FCC cited the vast changes that have occurred in the media marketplace since the rules were originally formulated. Once they take effect (most likely in September 2003), the new rules are almost certain to result in some new consolidation in the media industry.

But opponents of the decision, including the FCC's two Democratic commissioners, have vowed to fight the implementation of the changes before the FCC itself, the courts, and Congress. At stake, they say, is maintaining diversity of media ownership and thereby preserving access to the airwaves. This view is consistent with the traditional thinking that broadcast stations have a special ability to attract public attention and therefore to influence public opinion, particularly concerning elections. Under this theory, broadcast stations should be subject to greater levels of ownership restrictions than would otherwise be warranted for reasons of competition.

Changing the FCC's media ownership rules is nothing new. As discussed below, consideration of the rules has bounced back and forth between Congress, the FCC, and the courts for several years, and the bouncing is likely to continue with the latest changes. Indeed, Congress may very well take the unusual step of enacting legislation to counter all or part of the FCC's decision. The House did so in July 2003, and the Senate is likely to take up the issue after the August 2003 recess. Moreover, court appeals from the FCC's order are sure to be filed by early October 2003.

This article provides some background on media ownership regulations, a discussion of the most recent rule changes, and a description of the actions being taken in Congress and the courts by opponents to try and stop the implementation of the FCC's new rules.

Media Ownership Regulations: A Brief History

In the decades since radio and television were introduced, the FCC and Congress have, over time, set limits on the number of TV and radio stations in which a single entity could hold an "attributable" ownership interest,[2] as well as the extent to which a broadcast station owner may have an ownership interest in other types of media. Specifically, the FCC or Congress has established limitations on the number of TV and radio stations that could be commonly owned in a single market and nationwide; the percentage of TV households that commonly owned stations could reach; and the cross-ownership of TV stations, radio stations, cable TV systems, and local newspapers. The point of these rules was to guard against concentration of ownership in the media industry and thereby help ensure competition, a diversity of viewpoints and programming outlets, and attention by broadcasters to issues of local importance. But with the advent of multi-channel cable and satellite television systems, as well as the Internet, Congress decided to do away with certain of these ownership limitations in the Telecommunications Act of 1996 (1996 Act)[3] and to require the FCC to review the remaining ownership limits every two years to ensure they continue to be "necessary in the public interest."[4]

During its first biennial review of the rules in 1998, the FCC decided that the remaining ownership limits still served the public interest and that they should not be changed or eliminated.[5] However, this decision was appealed to the U.S. Court of Appeals for the District of Columbia Circuit. In two separate cases, *Fox Television Stations, Inc. v. FCC*[6] and *Sinclair Broadcast Group, Inc. v. FCC*,[7] the court determined that the 1996 Act established "a presumption in favor of repealing or modifying the ownership rules"[8] and remanded the matter back to the FCC either to more fully justify its decision to keep the rules or, if it could not do that, to eliminate the rules.[9] Along with the remand, consideration of all of the FCC's ownership rules was consolidated into the proceeding that led to the *July 2 Order*.

Changes to the FCC's Rules

As a central justification for the modifications to its ownership rules made in the *June 2 Order*, the FCC said the following:

> Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds

of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic. . . . Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers. . . .[10]

The new ownership rules, and the way the *June 2 Order* altered the prior rules, are summarized as follows:

- National TV ownership limit. This rule, as modified, prohibits a company from owning TV stations that together have a national audience reach exceeding 45%.[11] The *June 2 Order* raised this limit from 35% because it determined that an increase would not substantially affect the negotiating power of networks vis-à-vis their affiliates and because of competition in the television market from cable and direct broadcast satellite systems.[12] In calculating national audience reach, the FCC considers UHF stations to reach only 50% of the households of the markets they serve.[13] The FCC left this "UHF discount" in place in its *June 2 Order*. but will eliminate it for stations owned by the big four networks once the transition to digital TV is complete (no earlier than 2006).
- Local TV ownership limit. This rule limits the number of TV stations that a company may own within a single local market. In markets with five or more commercial and/or non-commercial TV stations, the modified rule allows a company to own two stations, only one of which may be in the top four in ratings.[14] In markets with 18 or more stations, a company may own three stations, only one of which is in the top four. The FCC may grant a waiver of this rule to allow ownership of two top-four stations in markets with eleven or fewer stations where the combined ownership better serves the local community. Prior to the *June 2 Order*, common ownership of two stations in the same market was only allowed where the Grade B signal contours of the stations did not overlap or where at least one of the two stations was not ranked in the top four and, after the merger, there would be at least eight other independently owned stations.
- Local radio ownership limit. This rule limits the number of radio stations that a company can own within a single local market. In markets with 45 or more radio stations (both commercial and non-commercial), eight stations may be commonly owned (but no more than five may be in the same service — i.e., AM or FM). In markets with 30 to 44 stations, up to seven may be commonly owned (with no more than four in the same service). In markets with 15 to 29 stations, six may be commonly owned (with no more than four in the same service). And in markets with 14 or fewer stations, five may be commonly owned (with no more than three in the same service). The FCC left these numerical limits unchanged in the *June 2 Order*. However, the agency decided to include both commercial and non-commercial stations in the formula, whereas the prior rule only included commercial stations (i.e., previously there had to be 45 *commercial* stations in a market in order for a single entity to own eight stations). The FCC also decided to change the definition of local markets to the geographic areas assigned by Arbitron Inc., an industry rating service.[15] Previously, local markets were defined based on stations' signal contour overlaps.
- Cross-media ownership limits. Prior to the *June 2 Order*, the FCC's rules contained separate limitations on the cross-ownership of TV and radio stations and daily newspapers. Those limitations have now been combined into one provision that prohibits any cross-ownership of TV and radio stations and newspapers in local markets with three or fewer TV stations. In markets with four to eight TV stations, there may be a combination of any one of the following: (a) one daily newspaper, one TV station, and up to half the radio station limit for that market (e.g., three radio stations if the limit for the market under the local radio rule is six); or (b) one daily newspaper, up to the radio station limit, and no TV stations; or (c) two TV stations (if permitted by the local TV rule), up to the radio station limit for the market, and no newspapers. In markets with nine or more TV stations, there is no longer any ban on newspaper-broadcast and TV-radio cross-ownership.
- Dual network ownership prohibition. This rule prohibits a merger between any two of the top four national broadcast networks (ABS, CBC, Fox, and NBC). The FCC in its *June 2 Order* decided to leave this rule unchanged.

How the New Rules Will Be Implemented

The new rules — to the extent they remain in place following any action by Congress or the courts (see below) — will take effect thirty days after they are published in the Federal Register (which is expected in August 2003). The FCC has established a "freeze" on all radio and TV transfer of control and assignment applications until the new rules take effect and the agency revises its broadcast application forms to reflect the new ownership rules. The parties to pending assignment or transfer applications may amend those applications by submitting new ownership showings to demon-

strate compliance with the new rules.

It is possible that a limited number of commonly owned clusters of TV and/or radio stations that were permissible under the old rules now violate the new rules. The FCC has grandfathered such clusters under the new rules, but they may be sold by their current owners as a cluster only to small businesses; sales to entities that do not qualify as small businesses will require appropriate divestitures to ensure compliance with the new rules.[16]

One important fact to bear in mind is that the FCC's rule changes have not changed antitrust laws in the United States. A combination of stations that is permitted under the new FCC rules could very well face scrutiny from the Justice Department's Antitrust Division. Indeed, such scrutiny has become increasingly common since the liberalization of the FCC ownership limits that began with the 1996 Act. For example, in addition to reviewing large media mergers under Hart-Scot-Rodino, Antitrust Division Chief Hewitt Pate has said the Division currently has an open investigation of media giant Clear Channel Communications, Inc.[17]

Challenges to the New Rules

It is clear that the new rules will face protracted challenges in reconsideration proceedings before the FCC and in court appeals. The top four networks and other large broadcasting groups may challenge the remaining rules as being insufficiently deregulatory under the 1996 Act. Certain political advocacy groups also plan to challenge the new rules as going too far in the direction of media consolidation and away from the central goals of diversity, competition, and localism. As of this writing, reconsideration petitions and court appeals have not yet been filed but are expected by September 4 and October 6, respectively.[18]

Congress has also taken a keen interest in this matter, with many members on both sides of the aisle calling for a rollback of some or all of the changes. The House of Representatives, by a lopsided vote of 400-21 as part of a spending bill, passed a measure to change the national TV ownership cap back to 35% from 45%. Attempts in the House to rollback other FCC rule changes were defeated, reportedly due in part to veto threats from the White House. The Senate has yet to take up the House measure, but the Senate Commerce Committee has approved two bills that would reinstate the 35% cap as well as the newspaper-broadcast cross-ownership ban. Additionally, 20 Senators, including Senators Byron Dorgan (D-N.D.), Trent Lott (R-Miss.), and Russ Feingold (D-Wis.), have co-sponsored a "congressional veto" to nullify the FCC's entire June 2 decision. The Senate is not expected to vote on any bills pertaining to media ownership until after the August recess.

Despite the possible passage of a roll-back measure in the Senate, the FCC still has powerful allies in the House. House Majority Leader Tom Delay (R-Tex.) and House Energy and Commerce Committee Chairman Billy Tauzin (R-La.) both oppose restoring the cap to 35% and will reportedly try to stop attempts to do so during a House/Senate conference. But if legislation rolling back the FCC's changes does pass both houses, it remains to be seen whether President Bush will expend political capital by using a first-ever veto against a measure — rolling back the national TV ownership cap to 35% — that appears to enjoy fairly broad popular support, as well as support among Democrats and many Republicans in Congress. In the meantime, there are rumors that FCC Chairman Michael K. Powell may resign, in part over the response of Congress to the media ownership rule changes. But many at the FCC have denied those rumors, and Chairman Powell continues to stand by the new rules.[19]

*R. Edward Price practices communications law in the Washington, D.C., office of Vinson & Elkins L.L.P.

Footnotes

[1] *See In re 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*, MB Docket No. 02-277, *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127 (adopted June 2, 2003; released July 2, 2003) (*June 2 Order*).

[2] An "attributable" interest is ownership of five percent or more of a corporation's outstanding voting stock or any active interest in a partnership or limited liability company (LLC). Non-voting shareholders, as well as limited partners and LLC members that are not materially involved in the management of the media activities of a partnership or LLC, are not considered to have an "attributable" interest for purposes of the FCC's rules. *See* 47 C.F.R. § 73.3555 Note 2. The FCC did not make any changes to these attribution standards in the *June 2 Order*.

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act repealed statutes prohibiting telephone/cable and cable/broadcast cross-ownership and overrode FCC rules limiting cable/network cross-ownership. It also eliminated FCC regulations of national radio ownership, relaxed local radio ownership restrictions, relaxed the rule against ownership of two TV networks, eliminated the cap on the number of TV stations a single entity can own nationwide, and increased from 25% to 35% the cap on TV households that a single broadcaster may reach.

[4] 47 U.S.C. § 161(a). Any rules that the FCC determines are no longer "necessary in the public interest" must be modified or repealed. 47 U.S.C. § 161(b).

[5] *In re 1998 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*, MM Docket No. 98-35, *Biennial Review Report*, 15 FCC Rcd 11058 (2000). At that time, during the Clinton administration, the FCC was comprised of three Democratic and two Republican commissioners. The FCC is now comprised of three Republican and two Democratic commissioners.

[6] 280 F.3d 1027 (D.C. Cir. 2002) (addressing the national TV ownership rule).

[7] 284 F.3d 148 (D.C. Cir. 2002) (addressing the local TV ownership rule).

[8] *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

[9] In *Fox* the court also vacated the FCC's rule prohibiting cross-ownership of a TV or radio station with a local cable TV system.

[10] *June 2 Order* ¶¶ 3-4.

[11] "National audience reach" is defined as "the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data . . . ." 47 C.F.R. § 73.3555(e)(2)(i). Stations' actual ratings are not relevant to

this calculation.

[12] To put the power of large TV station group owners in some perspective, here are the percentages of TV stations nationwide owned by some of those groups: Viacom owns 2.27% of all TV stations; Fox owns 2.03%; NBC owns 1.69%; and ABC owns 0.581%. *See* Adam Thierer and Clyde Wayne Crews Jr., *Manager's Journal: What Media Monopolies?*, WALL ST. J., July 29, 2003, at B2.

[13] 47 C.F.R. § 73.3555(e)(2)(i). Since UHF stations are generally entitled under the FCC's rules to carriage on local cable systems, many are likely to reach an audience far in excess of 50% of their markets. The "UHF discount" could therefore have the effect of allowing commonly owned groups of stations to reach a national audience in excess of the national TV ownership cap.

[14] Critics have pointed out that, under the modified rule, multiple non-commercial stations that broadcast the same programming are counted individually, rather than as one station. So consolidation may now be permitted in markets that have five or more TV stations, even though two or more of them are non-commercial and broadcast the same programming stream. An example cited in a recent *Wall Street Journal* article is Sioux Falls, S.D., which is considered to have a total of 11 stations, but five of them are non-commercial and broadcast the same public television signal from South Dakota Public Broadcasting. *See* Youchi J. Dreazen, *Shifts for Small TV Markets*, WALL ST. J., July 28, 2003, at B1. FCC staffmembers have said that parties are free to raise this issue before the agency in reconsideration petitions.

[15] The *June 2 Order* contains a Notice of Proposed Rulemaking section where the FCC asks for comment from interested parties concerning how radio markets should be defined in parts of the country that are not part of an Arbitron market. *See June 2 Order* ¶¶ 657-70.

[16] *See June 2 Order* ¶¶ 482-495.

[17] Terry Lane, *DoJ Questioning Clear Channel; FCC Actions Draw Interest of House Judiciary Committee*, COMM. DAILY, July 28, 2003, at 4.

[18] The *June 2 Order* was published in the Federal Register on August 5, 2003. *See* 68 Fed. Reg. 46286 (2003). Reconsideration petitions must be filed with the FCC no later than 30 days after that, *see* 47 C.F.R. §§ 1.4, 1.103, 1.106(f), and petitions for review must be filed with the U.S. Court of Appeals no later than 60 days after that, *see* 28 U.S.C. § 2342(1), 2344.

[19] *See, e.g.*, Michael K. Powell, *New Rules, Old Rhetoric*, N.Y. TIMES, July 28, 2003, at A21.