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## **Multiple Ownership Review Cranking Up, Again**

*Issues still linger unresolved from 2002, 2006 reviews, but . . .*

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Has it been four years *already*? Time really does fly when you're having fun.

That's right, folks – it's time once again for the FCC's quadrennial review of broadcast multiple ownership rules. Mandated by statute to revisit them every four years, the FCC must begin anew in 2010 a study of the rules that

(a) restrict the number of radio or television stations an entity may own and (b) limit the cross-ownership by owners of broadcast stations and newspapers in the same market.

In gearing up for this round, the FCC has scheduled a series of public workshops for the first week of November (“public” meaning that you can listen but not comment) and has opened a docket for comments (where you *can* comment) designed to help the FCC figure out the appropriate scope, methodology, and analytical framework for the review.

The Commission's announcements provides a tiny bit of insight into the FCC's approach to the new review (in a word: methodical), but what exactly can broadcasters expect from this next round? Or, perhaps more importantly, based on the results of the last few reviews, what's at stake in 2010?

Some historical background on the quadrennial review process may be helpful. In the deregulatory spirit of the 1996 Act, Congress directed the Commission to review broadcast multiple ownership rules periodically (at first it was every two years, later changed to every four) to determine “whether any of such rules are necessary in the public interest as a result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.” As you can see from Congress's language, the subtle suggestion was that ownership limitations were presumptively undesirable and to be discarded unless the FCC could justify them.

Initially, the FCC was cautious in wielding the deregulatory stick – so cautious that it was chastised by the U.S. Court of Appeals for the D.C. Circuit twice in one year (2002) for failing to demonstrate why it hadn't found a need for further liberalization, particularly of the national ownership cap.

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But, as often happens, things changed. Considerable sentiment against Big Media swelled up among various segments of the populace. Suddenly, ownership limitations which had been viewed by many (including, it would appear, Congress) as antiquated shackles unnecessarily impeding the growth of the industry came to be seen as vital tools for safe-guarding the public interest. That set the scene for the upheaval that was the 2002 Biennial Review.

Then-Chairman Powell determined that the 2002 Biennial Review would be a comprehensive overhaul of the ownership rules. After conducting public hearings across the country and receiving countless written comments, the Commission adopted a largely deregulatory approach which was loudly criticized both before and after its adoption. Among other changes, the national television station ownership limit was raised from 35% to 45% audience reach. Local television ownership was relaxed to permit ownership of more than one station, so long as only one of the stations owned was among the top four in that market. And the prior ban on cross-ownership of newspapers and broadcast stations in single markets was pretty much thrown out.

It is true understatement to say that there was an uproar in response to the new rules and the anticipated onslaught of media consolidation they would invite. This outcry should not have come as much of a surprise to the FCC, since it had received over a million comments (most of which were in opposition to one aspect or another) during the rulemaking proceeding leading to the adoption of the rules. Demonstrating how dramatically the prevailing political winds had shifted, Congress – so accommodatingly deregulatory in 1996 – was so annoyed it managed a rare bipartisan act to legislatively reduce the nationwide television audience cap to 39%.

A coalition of opponents of the new rules brought a challenge in the U.S. Court of Appeals for the Third Circuit – and won on a number of points. The court's ultimate decision was expected by many, since the court had already issued a preliminary stay of the rules in September 2003. (Such judicial stays are highly unusual, and require that those challenging the agency's new rules demonstrate a substantial likelihood that their appeal will succeed.)

And sure enough, in its 2004 opinion in *Prometheus Radio Project v. FCC*, the court – noting that federal law requires agencies to demonstrate review of sufficient data and to provide reasoned analysis in repealing or modifying regulations – sent nearly all of the revised ownership rules back to give the Commission a chance to come up with better justifications for the changes it made. (The changes to methods in determining local radio ownership limits were upheld, but the court did question the FCC's justification for the particular limits it had chosen to impose.) The court also left its earlier stay in place,

although elements of that stay were later lifted.

Since the 2004 *Prometheus* decision, little has changed in the landscape of broadcast multiple ownership. In 2008, the FCC released an order (the result of the 2006 Quadrennial Review) modestly loosening the newspaper-broadcast cross-ownership rules. But that too was challenged in the Third Circuit and stayed (in consolidation with the court's previous stay order) pending further Commission deliberations.

Those further deliberations haven't happened yet, though – possibly because the issue of media ownership is such a hot potato, but also possibly because the FCC has been distracted and deconstructed in the meantime. After all, 2008-2009 was DTV Transition time, when the Commission had little time for anything but DTV-related activities (which included Commissioners criss-crossing the nation to give the public the DTV equivalent of the “stop-drop-roll” lecture on how to survive the transition). Also, there was an election toward the end of 2008, which led to a temporary reduction-in-force on the Eighth Floor which left only three Commissioners (one of them, Jonathan Adelstein, an admitted lame duck) in place for the first half of 2009.

The Third Circuit may be getting a little tired of the FCC dragging its feet: in May it asked the parties to show cause why the stay on the newspaper-broadcast cross-ownership rule changes should not be lifted. Lifting of the stay would allow the Commission to implement at least some of the ownership rules which had been challenged – so ordinarily you might expect the Commission to greet the Court's request warmly. Not this time. With only a temporary three-man Commission in place (and the arrival of a total of three new Commissioners, appointed by the new administration, on the near horizon), the FCC asked the court to leave the stay in place. It explained to the court that the revised cross-ownership rules did not necessarily reflect the views of a majority of then-sitting Commissioners. The court agreed to continue the stay in effect, but ordered status reports to be submitted periodically. In October, the FCC asked the court to leave the stay in place at least long enough to allow the newly-constituted Commission to undertake its mandated 2010 review and to reach a decision on an administrative challenge to the 2008 order.

Which brings us back to the opening of the 2010 quadrennial review. With a new Commission which has already demonstrated its sympathy for the issues and the organizations so prominent in the challenges to the agency's 2003 and 2008 ownership decisions, we can expect a substantially different approach this time around. And sure enough, the public notice detailing the agenda of the kick-off “workshops” to be held in early November reflects the Commission's interest in engaging in a top-to-bottom review not only of the rules themselves, but also of various regulatory assumptions and definitions which are fundamental to the way the rules operate.

For example, the Commission intends to explore how the concepts of “competition” and “diversity” are to be defined, measured and factored into its ownership rules and policies. Perhaps more significantly, the FCC plans to delve into the issue of “localism” as well. The workshops will include discussion of how localism should be defined and measured, and how it should be connected to the “structure of media ownership”.

This inquiry into “localism” is particularly interesting in view of the fact that the Commission already has an on-going proceeding addressing “localism” – commenced in 2003 (under Chairman Powell) and ratcheted up dramatically in 2007 (under Chairman Martin). It would seem unlikely – if not downright nonsensical – for the Commission to adopt new “localism” rules in that 2003 localism proceeding while it is admittedly still trying to define exactly what localism is (and, once it is defined, how it is to be measured) in the 2009 ownership proceeding. How the Commission plans to resolve that particular conundrum remains to be seen.

It is not yet clear what the Genachowski Commission’s intentions are, though the Chairman himself has been known to favor competition with a nudge by government (read: broadband). What *is* known is that it will be a long and tedious process as broadcasters, interest groups, and the public all have a stake in the outcome and will demand to be heard.