

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Section 629 of the
Consolidated Appropriations Act, 2004
(National Broadcast Television Ownership)

ORDER

Adopted: August 10, 2006

Released: March 1, 2007

By the Commission:

1. On January 22, 2004, President Bush signed into law the Consolidated Appropriations Act, 2004, H.R. 2673 ("the Appropriations Act"). Section 629(1) of the Appropriations Act amends Section 202(c) of the Telecommunications Act of 1996 ("Telecommunications Act") to direct the Commission to modify the national television ownership limit, contained in Section 73.3555 of the Commission's rules, to specify 39 percent as the maximum aggregate national audience reach of any single television station owner. The Appropriations Act also adds to the Telecommunications Act a new Section 202(c)(3), which states:

(3) DIVESTITURE - A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent

1 Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §. 629, 118 Stat. 3 (2004).

2 47 C.F.R. § 73.3555.

3 47 U.S.C. § 202(c)(1). Prior to passage of the Appropriations Act, Section 202(c)(1) of the Telecommunications Act established a national television ownership reach limit of 35 percent, which was incorporated in Section 73.3555(e) of our rules. In the 2002 biennial ownership proceeding, the Commission raised the national television ownership limit from 35 percent to 45 percent. 2002 Biennial Regulatory Review, 18 FCC Rcd 13620, 13814-47 (2003) ("2002 Biennial Report and Order"), aff'd in part, remanded in part, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) ("Prometheus Order"), cert.denied, 13 U.S.L.W. 3466 (June 13, 2005). The rule changes adopted in the biennial ownership proceeding were stayed, however, by the U.S. Court of Appeals for the Third Circuit and, except for a partial lifting of the stay with respect to the local radio ownership rules, remain stayed pending further judicial action. Prometheus Radio Project, et al. v. FCC, No. 03-3388 (3d Cir. Sept. 3, 2003) (order granting stay); Prometheus Radio Project v. FCC, No. 03-3388 (3d Cir. Sept. 3, 2004) (order partially lifting stay).

national audience reach limitation through population growth.⁴

With this Order, we conform our rules to these provisions. Section 73.3555(d) will be redesignated as Section 73.3555(e), Section 73.3555(e)(1) is revised to reflect the changes directed by Section 202(c)(1) of the Telecommunications Act, as amended by the Appropriations Act, and a new Section 73.3555(e)(3) is added to reflect Section 202(c)(3).⁵ These changes are set forth in the Appendix.⁶

2. We are revising our rules without providing prior public notice and an opportunity for comment because the rule modifications are mandated by the applicable provisions of the Appropriations Act and Telecommunications Act. We find that notice and comment procedures are unnecessary, and that this action therefore falls within the “good cause” exception of the Administrative Procedure Act.⁷ The rule changes adopted in this Order do not involve discretionary action on the part of the Commission. Rather, they simply implement provisions of the Appropriations Act, as it amends the Telecommunications Act, which directs the Commission to revise its rules according to specific terms set forth in those laws.

3. Accordingly, IT IS ORDERED that pursuant to Section 629 of the Consolidated Appropriations Act, 2004, and Section 202(c)(1) of the Telecommunications Act of 1996, as amended, and Sections 4(i) and 303(r) of the Communications Act of 1934 Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), Part 73 of the Commission’s Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in the Appendix. The rule change will become effective thirty days after publication of this Order in the Federal Register.⁸

4. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

5. For additional information regarding this proceeding, contact Debra Sabourin, Media Bureau, Industry Analysis Division, (202) 418-0976, or via the Internet at Debra.Sabourin@fcc.gov.

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⁴ 47 U.S.C. § 202(c)(3).

⁵ In 2003, the Commission’s *2002 Biennial Report and Order* eliminated the radio-television cross-ownership rule, formerly found at 47 C.F.R. § 73.3555(c). As a result, the national television ownership rule was renumbered from 47 C.F.R. § 73.3555(e)(1) to 47 C.F.R. § 73.3555(d)(1). As noted above, however, the rules adopted in the *2002 Biennial Report and Order*, and published in the C.F.R., were stayed by a court and did not go into effect. However, after the stay was applied, the new 39 percent cap was promulgated pursuant to the Appropriations Act.

⁶ The current broadcast attribution rules set forth in the notes to Section 73.3555 would continue to apply to the national television ownership rule as Congress did not indicate any intent that we alter them in this proceeding. The statute directs the Commission to change the audience reach limit to 39 percent and add the new divestiture provision. Neither the statute nor the legislative history indicate that Congress intended that we make any other changes to the national television ownership rule in this proceeding.

⁷ *See* 5 U.S.C. § 553(b)(B) (notice requirements inapplicable “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”); *Metzenbaum v. Federal Energy Regulatory Commission*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (agency orders that were nondiscretionary ministerial actions issued in conformity with statute were properly issued without notice and comment).

⁸ *See* 5 U.S.C. § 553(d).

Marlene H. Dortch
Secretary

APPENDIX

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 73 RADIO BROADCAST SERVICES

1. The authority citations for part 73 continue to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303, 334, and 336.

Section 73.3555 is amended by redesignating paragraphs (d) and (e) as (e) and (f) respectively, by reserving paragraph (d), by revising paragraph (e)(1), and by adding Section 73.3555(e)(3) to read as follows:

§ 73.3555(e) National television multiple ownership rule. (1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.