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THE MEDIA BUSINESS; Court Is Urged to Change Media Ownership Rules

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PHILADELPHIA, Feb. 11 -- Broadcasters and public interest groups on Wednesday urged the federal appeals court here to order the Federal Communications Commission to rewrite its new rules that govern the size and reach of the nation's largest media conglomerates. Many of the parties joining the fight against the F.C.C., however, are doing so for diametrically opposed reasons.

The case has enormous implications for the newspaper, television and radio industries. The new rules make it significantly easier for the biggest companies to acquire other companies both in their existing markets and in new ones. The rules have been supported by some media companies, opposed by others, and have been heavily criticized by many civic organizations on the grounds that they could reduce competition and diversity of views on the airwaves, as well as lead to reduced news coverage of local affairs.

At a hearing lasting more than eight hours, public interest groups and some smaller broadcasters urged a three-judge panel of the United States Court of Appeals for the Third Circuit to restore the federal restrictions that had prevented a company from owning a newspaper and a radio or television station in the same market. Asserting that the commission used the wrong standard of review and flawed theoretical models about consumer behavior to create the ownership rules, the opponents also asked the court to reverse rules that would make it easier for a broadcaster to own more television stations in one market.

On the other side, a group of newspapers, television networks and other broadcasters, including Clear Channel Communications, the nation's largest broadcast radio company, argued that the commission had not deregulated the industry enough. They urged the court to return the rules to the commission and order it to apply a higher standard of review in trying to justify all of its media regulations.

Trying to steer a middle course, the commission's general counsel, John A. Rogovin, asserted that the new regulations were grounded in law and competition policy and should be affirmed by the court.

The announcement on Wednesday by Comcast of Philadelphia, the nation's largest cable company, that it was making a $54.1 billion bid for the Walt Disney Company, cast a shadow over the court proceedings, even though that proposed deal is not affected by the rules at issue in the court case. Two years ago, a federal appeals court struck down the restrictions barring a single company from owning a cable operator and a broadcaster in the same community.

But some advocates alluded on Wednesday to the proposed Comcast-Disney deal as evidence that the old ownership rules for newspapers and broadcasters were unfair.

"What we're saying is cable operators can buy any broadcaster, and yet a newspaper in a community cannot," said Carter G. Phillips of Sidley Austin Brown & Wood, which represents the Tribune Company and Media General. "I submit that is an immaterial and unfair distinction."

"The one thing you cannot do is single out newspapers for disparate treatment," he added.

(The New York Times Company has previously filed comments with the commission urging the repeal of the ownership restrictions for newspapers and broadcasters. The Times Company was not a party to the case before the court.)

The commission adopted the new rules in June in a contentious proceeding that was criticized by a broad coalition of civil rights, labor, religious and advocacy groups, including the National Rifle Association. The rules struck down the restriction on one company's owning a newspaper and a television or radio station in the same market. They also gave television networks the ability to grow to reach 45 percent of the national audience with their local affiliate stations from the previous limit of 35 percent.

Last month, Congress attached a provision to a spending bill that lowered that cap to about 39 percent -- the current reach of the two largest networks, Viacom's CBS and the News Corporation's Fox. The legislation, which President Bush signed, eliminated that rule from consideration by the court.

In September, the appeals panel issued a surprise temporary order that prevented the commission from enforcing the rules. It is rare, though not unprecedented, for a court to issue such an order and ultimately approve the rules, although the court made clear at the time that it was not ruling on the merits of the case.

One central issue in the case before the court on Wednesday, Prometheus Radio Project v. Federal Communications Commission, was the appropriate legal standard for adopting the new rules. The Telecommunications Act of 1996 requires the agency to review its media ownership rules every two years to determine whether they are "necessary in the public interest" and to "repeal or modify any regulations it determines to be no longer in the public interest."

The companies arguing for greater deregulation said that language should be interpreted to mean that the F.C.C. had to find any old rules "essential" to maintain them, while the agency concluded it did not need to meet such a stringent standard. The consumer groups said the law did not compel the commission to move toward greater deregulation.

On Wednesday, the members of the panel, Chief Judge Anthony J. Scirica and Judges Thomas L. Ambro and Julio M. Fuentes, aggressively questioned all sides but did not reveal how they might decide. The questions suggested that the judges were troubled by a tool, the "diversity index," that the F.C.C. used to analyze the marketplace when it created the new rules. The index, for example, concluded that a broadcast station run by Dutchess County Community College had greater market reach than The New York Times.

"I understand you tried to draw lines, but in some cases, what is not allowed turns out to be better than what is allowed," Judge Ambro said in a pointed line of questioning to Jacob Lewis, a commission lawyer.

Mr. Lewis tried to diminish the significance of the diversity index, saying it was only one of a number of tools used in market analysis.

"The commission should not be faulted for trying to impose greater analytical rigor rather than simply waving their hands," he said.

But Glenn B. Manishin, a lawyer representing Consumers Union and the Consumer Federation of America, told the court that the analysis "ginned the numbers up" to buttress the conclusions of the three Republican commissioners who supported the new rules.

He said that the polling done by the commission to derive the diversity index had asked the wrong questions and had put too great a weight on information that consumers receive from the Internet.

The judges also indicated that they disagreed with the argument put forward by Miguel A. Estrada, a lawyer representing Clear Channel, that the 1996 Telecommunications Act required the commission to either set aside older restrictions or deregulate them over a period of time. Mr. Estrada, a partner at Gibson, Dunn & Crucher, faced aggressive questioning by the court when he suggested that the law had limited the commission's power to impose tougher regulations on his client.

Among the lawyers defending the commission's move to eliminate in large part the cross-ownership restrictions on newspapers and broadcasters was Richard E. Wiley, who represented the Newspaper Association of America and three media companies.

Mr. Wiley was the chairman of the F.C.C. when it adopted the cross-ownership restrictions in the 1970's. In court, he said that the "multiplicity of voices" in the media market had made them unnecessary. "To call these changes radically deregulatory," he said, "is unduly alarmist."

CAPTIONS: Chart: "Rules Under Review"
The Federal Court of Appeals in Philadelphia heard arguments on the new media ownership rules adopted in June by a divided Federal Communications Commission. The rules will determine whether the nation's largest media conglomerates can expand into new markets and industries. Here are the main rules that are in dispute:

NATIONAL NETWORK CAP -- The commission said that the networks could own television stations reaching 45 percent of the national audience, increasing the limit from 35 percent. Congress has reduced that figure to 39 percent, about the current level of the nation's two largest broadcasters, Fox and Viacom. The court is not considering whether to adjust it further.

UHF DISCOUNT -- Under commission rules, the audiences of UHF stations are counted as half that of VHF stations. Consumer groups say the discount rule should be revised because UHF stations are now largely distributed over cable and have a larger reach than when the rule was written. The F.C.C. says it will adjust the rule over time. Some broadcasters and networks say the issue was made moot by Congress and should not be addressed by the court.

LOCAL TELEVISION OWNERSHIP RULES -- The commission eased the restrictions on the number of television stations a company can own in one market, making it easier for a company to own two or three stations in the largest cities. But it retained a rule that restricts a company from owning two of the top four stations in one city.

NEWSPAPER-BROADCAST CROSS-OWNERSHIP -- The commission repealed the restriction barring one company from owning a newspaper and a broadcast station in most markets. Newspaper publishers support the change.

RADIO OWNERSHIP -- The commission retained the current limits that prohibit one company from owning more than five to eight radio stations in one market, depending on the market's size. Clear Channel, the nation's largest radio conglomerate, has challenged the eight-station cap.
