

[US] Senate and Circuit Court of Appeals Block FCC Liberalization of Common Ownership and Cross Ownership Rules

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On 22 and 24 June 2004 respectively, the United States Senate and the federal Court of Appeals for the Third Circuit (Third Circuit) in Philadelphia separately acted to invalidate the liberalization of limitations on both common and cross ownership adopted by the Federal Communications Commission (FCC) on 2 June 2003 (Report and Order, 68 Federal Register 46286 (5 August 2003)). The FCC had increased not only the amount of the US audience which an individual television broadcaster could serve from 35 to 45 percent later limited by Congress to 39 percent but also had allowed local television stations to own radio stations, cable systems, and newspapers.

Senators Dorgan, Reid and Snowe introduced an amendment "suspending" the FCC's June 2003 rules and declaring them to be "invalid and without legal effect". The Senate approved the measure by a 99-1 vote. The action was the result of highly complex and unusual legislative procedures; the senators introduced Senate Amendment 3465, which amended pending Senate Amendment 3235, which in turn amended a Department of Defense appropriations bill. The amendment now must go to the House of Representatives and ultimately to the President for signature. Although the House may pass the measure, presidential approval seems unlikely since the current Administration has gone on record as favouring the relaxation of the limitations.

Senator Dorgan stated that the legislation was necessary to insure that the June 2003 relaxation did not become effective, if the Third Circuit ultimately upheld the FCC.

On 24 June 2004 the Third Circuit clarified the situation by handing down a 218-page decision in *Prometheus Radio Project v. Federal Communications Commission*, invalidating the FCC's June 2003 relaxation of the ownership rules. The court held that the FCC's finding of facts had used "several irrational assumptions and inconsistencies", primarily in its method of measuring current diversity of voices in radio, television, and print outlets. It thus remanded the rules to the FCC, "to justify or modify its approach to setting numerical limits".

Realistically, it seems unlikely that there will be any further action on the rules in the foreseeable future. The full Third Circuit bench probably will not reconsider the decision in banc, since apparently too many judges own stock in the companies primarily affected by the relaxation i.e., Viacom and Fox and already have disqualified themselves from the case. It seems an appeal to the Supreme Court probably would not be granted, since the Court has tried to avoid media ownership controversies for the last two decades. Finally, the FCC itself is unlikely to attempt clarifying the rules. Current Chairman Michael Powell the major supporter of the relaxation is rumoured to be leaving the agency in the near future. Moreover, formulating new rules in line with the court's requirements would require lengthy and substantial factfinding and analysis.

Finally, it should be noted that both the Senate and the Third Circuit action came in the context of Congressional action last year, which by way of compromise set the television station common ownership at 39 percent

just enough to allow Viacom and Fox to keep their present holdings.

