

61 Fed Reg 10689
3/8/96

FCC 96-90

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Sections 202(a))
and 202(b)(1) of the)
Telecommunications Act of 1996)
(Broadcast Radio Ownership))
)
47 C.F.R. Section 73.3555)

ORDER

Adopted: March 7, 1996;

Released: March 8, 1996

By the Commission:

1. On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 ("Telecom Act").¹ Sections 202(a) and 202(b)(1) of the Telecom Act direct the Commission to revise Section 73.3555 of our Rules (47 C.F.R. §73.3555) regarding the national multiple radio ownership rule and the local radio ownership ("radio contour overlap") rule. With this Order, we conform our rules to these particular provisions of the Telecom Act.

National Radio Station Ownership

2. Section 73.3555(e)(1)(i) of the Commission's Rules generally limits commercial radio ownership on a nationwide basis to no more than 20 AM stations and no more than 20 FM stations. The rule further provides that an entity may have an attributable but noncontrolling interest in an additional 3 AM and 3 FM stations that are small business controlled or minority-controlled. Section 202(a) of the Telecom Act directs the Commission to "modify Section 73.3555 of its regulations . . . by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally." Accordingly, Section 73.3555(e)(1)(i) will be deleted and the remainder of the rule will be modified, to reflect the changes directed by this section of the Telecom Act. The provision of the Rules concerning small and minority-controlled businesses will by

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

necessity be eliminated, given that the Telecom Act requires the Commission to eliminate its limitations on national radio station ownership.

Local Radio Station Ownership

3. The local radio ownership ("radio contour overlap") rule, 47 C.F.R. § 73.3555(a)(1), defines the limits of local commercial radio ownership by a single entity. Section 73.3555(a)(1) permits ownership of up to three commercial radio stations, no more than two of which may be in the same service, in radio markets with 14 or fewer stations, provided that the owned stations, if other than a single AM and FM station combination, represent less than 50 percent of the stations in the market; in markets with 15 or more commercial radio stations, ownership of up to two AM and two FM commercial radio stations is generally permitted if the combined audience share of the commonly owned stations does not exceed 25 percent in the market. Section 202(b)(1) of the Telecom Act requires the Commission to "revise section 73.3555(a) of its regulations . . . to provide that -

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market."

Accordingly, Sections 73.3555(a)(1) and 73.3555(a)(3)(iii) of the Commission's Rules will be revised to reflect the changes directed by Section 202(b)(1) of the Telecom Act, as set forth in the Appendix. The revision of the latter rule, Section 73.3555(a)(3)(iii), will eliminate the definition of a radio station's "audience share" for multiple radio ownership under the current rules.

Other Matters

4. This Order is limited to revising our rules as directed by Sections 202(a) and 202(b)(1) of the Telecom Act.² The following aspects of our radio ownership rules, as set forth in previous Commission decisions, are unaffected by the Telecom Act and will remain in effect: (1) We will continue to define the relevant radio market as the area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations)³ of the mutually overlapping stations proposing to have common ownership.⁴ (2) The number of stations in the market will continue to be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations.⁵ (3) The stations that will be included within the market will continue to be: operating commercial full-power stations, including daytimers and foreign stations.⁶ We will continue to exclude non-commercial stations, translators and stations that are not operational.⁷ However, the principal community contours of any non-operational commercial stations that are part of a transaction or that are commonly-owned by a party to the transaction will continue to be used to define the radio market and to count the number of stations in the radio market. *See Second Memorandum Opinion and Order*, 9 FCC Rcd 7183, 7193 (1994). We also note that time brokerage

² Section 202(b)(2) of the Telecom Act provides that notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation. The implementation of this particular provision will be addressed in a subsequent Notice of Proposed Rule Making. Of course, entities are not precluded from asking the Commission to apply this statutory exception in a particular case before any rule changes.

³ The principal community contour defines the minimum level of service, in signal strength terms, that a station must provide to its community of license.

⁴ *See Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6395 (1992).

⁵ *See* 47 C.F.R. §73.3555(a)(3)(ii).

⁶ A daytimer station is an AM station authorized to operate between local sunrise and local sunset. A foreign station is a station operating in a foreign country.

⁷ Non-operational stations are stations for which construction permits have been authorized but that are not yet on the air and stations that have gone off the air and have been silent for more than six months. *See Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6395 (1992).

agreements between two stations in the same market that involve more than 15 percent of the brokered station's programming per week will continue to be treated as if the brokered station is owned by the brokering station for purposes of the radio local ownership rules. See 47 C.F.R. §73.3555(a)(2)(i).

Administrative Matters

5. We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the Telecom 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 ("APA").⁸ 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 Telecom Act that direct the Commission to revise its rules according to specific terms set forth in the legislation.

Ordering Clause

6. Accordingly, IT IS ORDERED that pursuant to Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996, and to Section 4(i) and 303(r) of the 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 rules will become effective upon publication of this Order in the Federal Register.⁹ We note that Section 73.3555(e) is also being amended in the Order implementing certain of the Telecom Act's broadcast television ownership provisions that is being released simultaneously with this Order.¹⁰ For clarity, the amendments to Section 73.3555(e) are being set forth only in that proceeding.

⁸ 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").

⁹ See *id.* at §553(d) (rules that relieve a restriction may be effective less than 30 days after publication in the Federal Register).

¹⁰ Order, FCC 96-91 (released March 8, 1996).

7. For additional information regarding this proceeding, contact Alan Aronowitz, Mass Media Bureau, Policy and Rules Division, Legal Branch, (202) 418-2130, or via the Internet at aaronowi@fcc.gov.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Rule Changes

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

PART 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334.

2. Section 73.3555 is amended by revising paragraph (a) to read as follows:

§ 73.3555 Multiple Ownership.

(a)(1) *Radio contour overlap rule.* No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(3)(i) Where the principal community contours of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraph (a)(1) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(ii) Every time brokerage agreement of the type described in paragraph (a)(3)(i) of this section shall be undertaken only pursuant to a signed written agreement that shall contain a

certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraph (a) of this section.

(4) For purposes of this paragraph:

(i) The "principal community contour" for AM stations is the predicted or measured 5 mV/m groundwave contour computed in accordance with § 73.183 or § 73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with § 73.313.

(ii) The number of stations in a radio market is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

(iii) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

* * * * *