

FCC MAIL SECTION

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

JAN 24 1 57 PM '00

In the Matter of)	
)	
Implementation of Section 11(c))	
of the Cable Television Consumer Protection)	
and Competition Act of 1992)	MM Docket No. 92-264
)	
)	
Horizontal Ownership Limits)	

ORDER ON RECONSIDERATION

Adopted: January 12, 2000

Released: January 19, 2000

By the Commission: Commissioners Furchtgott-Roth and Tristani dissenting and issuing separate statements.

1. On our own motion, the Commission hereby reconsiders the conditions under which it will lift its voluntarily-imposed stay of the horizontal ownership rules, 47 C.F.R. § 503. These rules were adopted on October 8, 1999.¹

2. In the *Second Order on Reconsideration* in this proceeding, the Commission continued its stay of the effective date of the horizontal ownership rules pending a decision by the U.S. Court of Appeals for the District of Columbia Circuit on challenges to the horizontal ownership rules and Section 613(f)(1)(A) of the Communications Act, as amended, 47 U.S.C. § 533(f)(1)(A).² The Commission decided that parties exceeding the horizontal limit must come into compliance with the rules within 60 days of a judicial decision upholding the rules and the statute.³

¹ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, FCC 99-289, Third Report and Order (rel. Oct. 20, 1999) (*Third Report and Order*), 64 Fed. Reg. 67198 (Dec. 1, 1999). On January 3, 2000, parties filed a petition for reconsideration of the *Third Report and Order*. Petition for Reconsideration, Consumer Federation of America et al. (filed Jan. 3, 2000). The Commission, on its own motion, may reconsider any action taken in a proceeding while a petition for reconsideration is pending. See *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979).

² Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462, 14492 at para. 75 (rel. June 28, 1998) (*Second Order on Reconsideration*).

³ *Id.* at para. 77.

3. The statute was challenged in the U.S. District Court, and the rules were challenged in the U.S. Court of Appeals for the District of Columbia Circuit.⁴ In 1993, the district court held the statute unconstitutional.⁵ The district court also decided that, because "there is substantial ground for difference of opinion" as to the constitutionality of the underlying statute, it would stay its proceedings and the issuance of any relief to the plaintiffs pending appeal. In August 1996, the D.C. Circuit Court consolidated the appeal of the district court decision and the D.C. Circuit Court challenge.⁶ The D.C. Circuit Court held the consolidated proceedings in abeyance pending the Commission's decision on the petitions for reconsideration of the rules.⁷ Once the Commission issued the *Second Order on Reconsideration*, the D.C. Circuit Court lifted its stay on its consideration of the consolidated proceedings. The appeal is currently pending.

4. In the *Third Report and Order*, the Commission again declined to lift its stay of the horizontal ownership rules. In fact, the Commission, on its own motion, held that the horizontal ownership rules will become effective immediately upon the issuance of a decision upholding the rules and the statute, and that affected parties must come into compliance within 180 days after the court issues its mandate.⁸ The Commission reasoned that 180 days, rather than 60 days, was a more reasonable amount of time for affected parties to dispose of property necessary to come into compliance with the rules.

5. On November 2, 1999, the D.C. Circuit issued an order deconsolidating the challenge to the rules and the statute.⁹ The court allowed the challenge to the statute to proceed, but held the challenge to the rules in abeyance.

6. The Commission originally stayed its rules in deference to the district court's decision and to give the D.C. Circuit Court an opportunity to review that decision.¹⁰ Now that the challenge to the rules has been separated from the challenge to statute, it is no longer necessary to maintain the stay while the challenge to the rules remains in abeyance or otherwise under consideration by the court. Instead, the Commission holds that the horizontal ownership rules will become effective upon the issuance of a decision upholding the statute. Affected parties must come into compliance with the rules within 180 days following the issuance of that decision.

7. We have decided to use the date on which the court decision issues, not the date on which the mandate issues, as the triggering event for affected parties to come into compliance with the rules. Thus, affected parties are expected to come into compliance with these rules within 180 days after the

⁴ See *Time Warner Entertainment Co., L.P. v. FCC*, No. 94-1035 (D.C. Cir. 1994) and *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *aff'd in part, rev'd in part*, *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

⁵ *Daniels Cablevision*, 835 F. Supp. at 10.

⁶ *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979-80 (D.C. Cir. 1996).

⁷ *Id.*

⁸ *Third Report and Order* at paras. 6, 65, 73, 92.

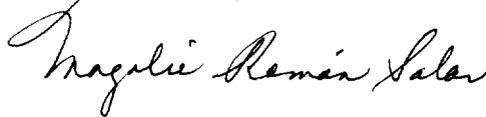
⁹ Order, *Time Warner Entertainment Co., L.P. v. FCC*, No. 92CV02494 (Nov. 2, 1999) (*per curiam*).

¹⁰ *Third Report and Order* at para. 72.

issuance of a court decision upholding the statute. We find that requiring affected parties to come into compliance with our rules within 180 after the issuance of a court decision provides more certainty to the public and affected parties. There is potentially a wide variance between the date a decision issues and the date the mandate issues.¹¹ We find that the issuance date of the court decision is a superior benchmark for lifting the stay and requiring parties to come into compliance with the rules.

8. ACCORDINGLY, IT IS ORDERED that the Commission's horizontal ownership rules are stayed until the U.S. Court of Appeals for the D.C. Circuit issues a decision upholding the constitutionality of Section 613(f)(1)(A) of the Act, as amended, 47 U.S.C. § 533(f)(1)(A). Parties not in compliance with the rules on the date the U.S. Court of Appeals for the D.C. Circuit issues such a decision must come into compliance within 180 days.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

¹¹ D.C. Cir. R. 41.

In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection Act of 1992, Horizontal Ownership Limits, MM Docket No. 92-264, Order on Reconsideration.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

It is one thing to uncouple the statutory and regulatory aspects of our stay in light of the D.C. Circuit's uncoupling of the statutory and regulatory challenges to the horizontal ownership rules. (I must question, however, what will happen if the statute is upheld, the Commission lifts its stay, the regulations go into effect, cable companies move toward compliance, and an adverse decision on the regulations subsequently comes down. This is not unlikely, given that facial challenges generally are harder to win than "as applied" ones. Potentially, the regulations will shift into and out of effect, with companies unwinding and rewinding their interests. The more prudent thing – if we are going to have a voluntary administrative stay in the first place – would be to wait for both cases to be decided before requiring compliance with the limits.)¹

It is quite another thing, however, to do an about-face on the specific triggering event for the lifting of the stay, whether tied to the statutory or the regulatory challenge or both. In the Third Report and Order – the last word on this topic – we unambiguously stated that the event that started the running of the compliance clock was the issuance of a *mandate* by the Court of Appeals, not the issuance of its opinion: "We deny requests to lift the stay of our horizontal ownership rules, and reiterate that all parties must comply with the rules within sixty days after the court issues *its mandate* upholding Section 613 and the rules. Third Report & Order at para. 6.

The selection of the decision over the mandate does not, of course, increase "certainty" for regulated entities and the public, as this Order claims. *See* Order on Reconsideration at para. 7. Both are clearly defined judicial actions from which to measure the deadline for compliance. Instead, what this new selection does is shorten the time to come into compliance. The "certainty" rationale thus does not wash. Indeed, the fact that a court's mandate sometimes lags behind the opinion, *see id.*, has nothing to do with certainty but with the overall length of time that might pass before the stay, if tied to the mandate, is lifted.

If the Commission wants to choose decision dates over mandate dates as the relevant time for implementation of judicial determinations, and can articulate neutral principles for that choice, I might be amenable to the selection of those dates. The Commission seems, however, selectively to base its choice of "decision" versus "mandate" on its political predilections with respect to the specific topic at hand.

Most notably, following the D.C. Circuit's *Lutheran Church* decision striking down equal employment opportunity regulations, the Commission maintained that the Court's decision was not binding until the issuance of a mandate and, accordingly, until the mandate issued the Commission would continue to issue notices of apparent liability based on those (declared-to-be-unconstitutional) rules. *See, e.g.,* In re Applications of Radio Sun Group of Texas, Inc., For Renewal of Licenses, 1998 WL 416073 (July 23, 1998).

¹ I assume without deciding that the Commission retains jurisdiction to reconsider this question. *Cf.* Order on Reconsideration at n. 1.

My point is simply this: we can not have it both ways. This Order certainly provides no neutral principles for preferring the opinion date over the mandate date, either generally or in this case, nor does it explain the seeming contradiction with the Commission's preference in other cases. I accordingly dissent.

DISSENTING STATEMENT OF COMMISSIONER GLORIA TRISTANI

In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and
Competition Act of 1992 – Horizontal Ownership Limits
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While this decision represents a move in the right direction, I would have lifted the voluntary stay
of our horizontal ownership rules immediately for the reasons set forth in my statement of October 8, 1999.