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FCC Media Ownership Rules: Issues for Congress

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Charles B. Goldfarb
Specialist in Industrial Organization and Telecommunications Policy
Resources, Science, and Industry Division

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Summary

The Federal Communications Commission adopted an order on June 2, 2003 that modified five of its media ownership rules and retained two others. The new rules were scheduled to go into effect on September 4, 2003, but on September 3, 2003 the U.S. Court of Appeals for the Third Circuit stayed implementation of the new rules pending adjudication of claims that the rules are unlawful. Oral argument in that case is scheduled for February 11, 2004. The FCC action was taken to meet the requirement in the 1996 Telecommunications Act to perform a biennial review and to be responsive to Court rulings that the Commission had failed to provide sufficient justification for specific thresholds incorporated in two of the rules. The modified media ownership rules are as follows:

- A broadcast network can now own and operate local broadcast stations that reach, in total, up to 45% of U.S. television households (National Television Ownership Rule). The old limit was 35%.
- Both newspaper-broadcast cross-ownership and television-radio cross-ownership are: unrestricted in markets with nine or more television stations; allowed subject to certain restrictions in markets with between four and eight television stations; and prohibited in markets with three or fewer television stations.
- A company can own three television stations in markets with 18 or more television stations, and two television stations in markets with five or more television stations, but in either case only one of the two stations can be among the top four in ratings at time of purchase.
- The number of radio stations that a company can own in a local market, which varies according to the total number of stations in the market, remains the same, but the market is now defined in terms of the Arbitron geographic market and non-commercial stations are included in the station count.

Subsequently, Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199), Sec. 629 of which instructs the FCC to modify its National Television Ownership rule by setting a 39% cap, requires entities that exceed the 39% cap to divest as needed to come into compliance within two years, prohibits the FCC from forbearing on application of the 39% cap, requires the FCC to review its rules every four years instead of two years, and excludes the 39% cap from that periodic review. A number of other bills and resolutions have been introduced in the 108th Congress that reflect a range of positions on many of these rules. The Senate passed a resolution of disapproval, S.J.Res. 17, which would repeal all the new rules adopted by the FCC, leaving the prior rules in effect. S. 1046 would reverse the June 2, 2003 FCC actions on the national television ownership cap and cross-ownership rules and give the FCC explicit authority to re-regulate as well as deregulate. S. 1264 would eliminate the UHF discount for license transfers occurring after June 2, 2003, sunset the UHF discount in 2008, give the FCC the authority to re-regulate, and require the FCC to review its ownership rules every four years. This report will be updated as events warrant.

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FCC Media Ownership Rules: Issues for Congress

The Federal Communications Commission adopted an order on June 2, 2003 that modified five of its media ownership rules and retained two others.¹ The new rules were scheduled to go into effect on September 4, 2003, but the U.S. Court of Appeals for the Third Circuit stayed implementation of the new rules pending adjudication of claims that the rules are unlawful. (*Prometheus Radio Project v. FCC*, 3rd Cir., No 03-3388, stay issued 9/3/03). Oral argument in that case is scheduled for February 11, 2004. Because of the potential that changes in these rules – which set limits on national television ownership, newspaper-broadcast and radio-television cross-ownership in a market, and ownership of multiple television or radio stations in a market – could have far-reaching effects, a number of bills have been introduced in the 108th Congress that reflect a range of positions on these issues. Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199, 118 Stat. 3 et. seq.), Sec. 629 of which instructs the FCC to modify its National Television Ownership rule by setting a 39% cap, requires entities that exceed the 39% cap to divest as needed to come into compliance within two years, prohibits the FCC from forbearing on application of the 39% cap, requires the FCC to review its rules every four years instead of two years, and excludes the 39% cap from that periodic review. This report analyzes each of the areas that have changed as a result of the FCC action or may change as a result of congressional action. The various positions in the debate also are summarized.

Background

The Commission had to revisit several of its broadcast ownership rules as a result of Court rulings that the Commission had failed to provide sufficient justification for specific thresholds incorporated into the rules. In addition, pursuant

¹ Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277; *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket 01-235; *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket 01-317; *Definition of Radio Markets*, MM Docket 00-244; *Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, MB Docket 03-130, adopted June 2, 2003 and released July 2, 2003. [Hereinafter, “Report and Order”] The Report and Order was adopted in a three to two vote. All five commissioners released statements on June 2, 2003, the day that the Commission voted to adopt the item, and also released statements that accompanied the July 2, 2003 release of the Report and Order. The Report and Order was published in the *Federal Register* on September 5, 2003, at 68 FR 46285.

to Section 202(h) of the Telecommunication Act of 1996,² the FCC had to conduct a biennial review of all of its broadcast ownership rules and repeal or modify any regulation it determined to be no longer in the public interest.

There has been some controversy surrounding the standard to be used in reaching this public interest determination. The United States Court of Appeals for the District of Columbia Circuit, in *Fox Television Stations, Inc., v. Federal Communications Commission*, stated “Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”³ Further, in response to petitions for rehearing, the Court stated “[T]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”⁴ But in the same decision, the Court stated that “[t]he Court’s decision did not turn at all upon interpreting ‘necessary in the public interest’ to mean more than ‘in the public interest’” and added “we think it better to leave unresolved precisely what § 202(h) means when it instructs the Commission first to determine whether a rule is ‘necessary in the public interest’ but then to ‘repeal or modify’ the rule if it is simply ‘no longer in the public interest.’”⁵

The Commission majority took this sometimes inconsistent language to mean that the Commission must overcome a high burden to retain any ownership rule. Responding to a question from Senator McCain in the June 4, 2003 Senate Commerce Committee hearing, Chairman Powell stated that the Court interprets the Act to be “biased toward deregulation” and added that for the Commission to be in concert with that interpretation it “cannot re-regulate.” In response to a question from Senator Dorgan, Commissioner Abernathy stated that the Court’s interpretation directs the Commission to minimize regulation as competition develops, not to regulate to maximize the number of voices. In response to another question from Senator McCain, all five commissioners agreed that it would be useful for Congress to provide both the Court and the Commission guidance on the standard to use for reviewing ownership rules and on whether the Act allows the Commission to re-regulate broadcast ownership.

The FCC’s 2002 Biennial Review was initiated on September 12, 2002;⁶ review of the Commission’s broadcast-newspaper cross-ownership rule and waiver policy

² Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56, § 202(h) states: “The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.”

³ 280 F.3d at 1048.

⁴ 293 F.3d 539.

⁵ 293 F.3d 540.

⁶ Notice of Proposed Rule Making, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, released September 23, 2002.

was initiated on September 13, 2001;⁷ and review of the Commission's local radio ownership rule and radio market definition rule was initiated on November 8, 2001.⁸ The FCC sought comment on whether each specific rule continued to serve the Commission's goals of diversity, competition, and localism – and if the rule served some purposes while disserving others, whether the balance of the effects argued for maintaining, modifying, or eliminating the rule.⁹

Partly as a result of the court remands, the FCC reviewed the advantages and disadvantages of implementing rules that incorporate specific market share or number of competitor threshold levels that are applicable across the board to all entities vs. implementing some sort of flexible, yet quantifiable “diversity index” that would allow for case-by-case reviews that more readily take into account market-specific or company-specific characteristics. The Commission ultimately chose to adopt a hybrid of the two approaches. It constructed a “diversity index” that it used as the basis for setting the threshold levels in its new rules, but does not plan to use as the basis for case-by-case reviews of proposed mergers. Unlike the Herfindahl-Hirschmann Index (HHI), which the antitrust agencies apply to the actual market shares of specific companies to make an initial determination of whether a proposed merger merits further scrutiny, the Commission's diversity index is not based on the actual market shares of companies, but rather on the assumption that each television station in a market provides the same diversity impact, and the same for each newspaper, each radio station, etc.¹⁰ The Commission justified not using actual market shares by arguing that it would be impossible to determine what portion of a television station's viewers, a radio station's listeners, or a newspaper's readers was actually using that media outlet as a source of local news. Also, the threshold levels of the HHI that trigger antitrust agency scrutiny were based on many years of Department of Justice and Federal Trade Commission experience reviewing mergers; the FCC incorporated the HHI threshold levels into its diversity index without any empirical basis for those levels.

In the section of the order on policy goals, the Commission added a fourth policy goal – regulatory certainty – to the three traditional goals of diversity, competition, and localism.¹¹ The Commission stated:¹²

⁷ Order and Notice of Proposed Rule Making, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235 and *Newspaper/Radio Cross-Ownership Waiver Policy*, MB Docket No. 96-197, released September 20, 2001.

⁸ Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Market*, MM Docket No. 01-317 and *Definition of Radio Markets*, MM Docket No. 00-244, released November 9, 2001.

⁹ See, e.g., 67 FR 65751, ¶ 75.

¹⁰ On a purely mathematical basis, the assumption of equal diversity impact minimizes the size of the diversity index and thus provides the highest estimate of the level of diversity.

¹¹ Report and Order at ¶ 80-85.

¹² *Id.* at ¶ 83.

The bright line rules we establish in this *Order* will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry.

It concluded that the adoption of bright line rules rather than case-by-case analysis provides certainty to outcomes, conserves resources, reduces administrative delays, lowers transactions costs, increases transparency of process, and ensures consistency in decisions, all of which foster capital investment in broadcasting. The Commission conceded that bright line rules preclude a certain amount of flexibility. It is not clear how the Commission would weigh the goal of regulatory certainty vis-a-vis the traditional goals of diversity, competition, and localism, if the former were to be in conflict with one or more of the latter. On one hand, the Commission stated that it would continue to have discretion to review particular cases, and would have an obligation to take a hard look both at waiver requests (where a bright line ownership limit would proscribe a particular transaction) and at petitions to deny a license transfer (where a bright line ownership limit would allow a particular transaction). At the same time, however, it suggested it would not look favorably upon some petitions.¹³

Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.

Because most of the rule modifications relax ownership restrictions, they are widely expected to lead to substantial merger activity in the media sector.¹⁴

As explained below, several bills and resolutions have been introduced relating to a number of these ownership rules.

¹³ *Id.* at ¶ 453, fn. 980.

¹⁴ See, e.g., Yochi J. Dreazen and Joe Flint, “FCC Eases Media-Ownership Caps, Clearing the Way for New Mergers,” *Wall Street Journal*, June 3, 2003, p. A1; Alec Klein and David A. Vise, “Media Giants Hint That They Might Be Expanding,” *Washington Post*, June 3, 2003, p. A6; Frank Ahrens, “FCC Eases Media Ownership Rules,” *Washington Post*, June 3, 2003, p. A1; David Lieberman, Paul Davidson, and Michael McCarthy, “TV station will be bought, but probably not quickly,” *USA Today*, June 3, 2003, p. 1B; David Lieberman and Paul Davidson, “Five ways FCC altered the media landscape,” *USA Today*, June 3, 2003, p. 3B.

National Ownership Rules

National Television Ownership (% Cap)

The Commission modified its National Television Ownership Rule¹⁵ by increasing the maximum aggregate national audience reach of an entity owning multiple television stations from 35% to 45%. Subsequently, Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199, 118 Stat. 3 et. seq.), Sec. 629 of which instructs the FCC to modify its National Television Ownership rule by setting a 39% cap,¹⁶ requires entities that exceed the 39% cap to divest as needed to come into compliance within two years, prohibits the FCC from forbearing on application of the 39% cap,¹⁷ requires the FCC to review its rules every four years instead of two years, and excludes the 39% cap from that periodic review.

In practice, this rule applies to the major broadcast networks, limiting them to ownership and operation of local broadcast stations that reach, in total, the prescribed percentage of U.S. television households. The old rule had codified statutory language from the 1996 Telecommunications Act that set the 35% cap.¹⁸ In 2002, the United States Court of Appeals for the District of Columbia Circuit remanded the rule to the Commission on the grounds that the Commission had failed to provide a justification for the 35% level.¹⁹

In addition to increasing the cap, the Commission retained the so-called “UHF discount” applied when calculating the total audience reached by an entity’s stations; audiences of UHF stations are given only half-weight. That is, if an entity owns a UHF station in a market with an audience of two million households, that audience would only be counted as one million households when calculating the entity’s market reach. This discount initially was implemented because UHF signals tend to have a smaller geographic reach than, and are of inferior quality to, VHF signals.

The Commission explicitly retained the UHF discount, finding that UHF stations continue to face a technical and market disadvantage.²⁰

¹⁵ 47 C.F.R. 73.3555(d)(1), previously 47 C.F.R. 73.3555(e)(1).

¹⁶ By setting the cap at 39%, two entities – Viacom (CBS) and News Corp. (FOX) – that had recently acquired stations that gave them total national audience reach of approximately 39% and 38% respectively did not have to divest themselves of any of their stations.

¹⁷ Section 10 of the Communication Act of 1934 (47 U.S.C. 160) allows the FCC to forbear from applying some regulations and provisions to a telecommunications carrier, telecommunications service, or class of telecommunications services under certain conditions. It is unlikely that this section of the Act would apply to broadcast stations, in any case, because broadcasters are not telecommunications carriers and broadcasting is not a telecommunications service.

¹⁸ Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56, § 202(c)(1)(B).

¹⁹ *See Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3rd 1027 (DC Cir. 2002).

²⁰ Report and Order at ¶ 586.

The Commission determined that a national TV ownership rule is not relevant to its competition goal in the three relevant economic markets it investigated: the national television advertising market, the national program acquisition market, and the local video delivery market.²¹ But it determined that a national TV ownership rule is needed to protect localism by allowing a body of network affiliates to negotiate collectively with the broadcast networks on network programming decisions.²² It found that the 35% level did not strike the right balance of promoting localism and preserving free over-the-air TV for several reasons:

- the 35% cap did not have any meaningful effect on the negotiating power between individual networks and their affiliates with respect to program-by-program preemption levels;²³
- the broadcast network owned-and-operated stations served their local communities better with respect to local news production. Network-owned stations aired more local news programming, and higher quality local news programming, than did affiliates.²⁴
- the public interest is served by regulations that encourage the networks to keep expensive programming, such as sports, on free, over-the-air TV.²⁵

Opponents of changing the cap from 35% to 45% argued that:

- locally owned and operated stations are more likely to be responsive to local needs and interests than network owned and operated stations (for example, they are more likely to preempt network programming when non-network programming of special local interest, such as local sports events, is available or when network programming does not meet community standards);

²¹ *Id.* at ¶ 508-509.

²² *Id.* at ¶ 501.

²³ One measure of the relative balance of negotiating strength between networks and affiliates is the rate at which affiliates preempt network programming to show alternative programming. The Commission found that there was no difference in the preemption rates among those network affiliates affiliated to networks whose audience reach was less than the 35 percent cap and those network affiliates affiliated to the two networks whose audience reach exceeded the 35 percent cap. Report and Order at ¶ 558.

²⁴ Report and Order at ¶ 575-576.

²⁵ The broadcast networks had claimed in their comments that broadcast networks are less profitable than local broadcast stations, so to help broadcast networks compete against cable networks for rights to expensive sports programming (and keep such programming free to the public), the networks must be able to own and operate more local broadcast stations. The dissenting FCC commissioners questioned broadcast network needs given the record \$9.4 billion in advertising revenues for the 2003-2004 season, an increase of 13 percent, they contracted for in the four-day “up-front” market in May of this year. (*See* Steve McClellan, “Extraordinary: Fast and furious, network advertisers spend record \$9.4B,” *Broadcasting & Cable*, May 26, 2003.)

- if there are fewer independently owned and operated affiliates, they will be under much greater pressure from the networks not to preempt network programming even if programming of special local interest is available;
- some broadcast networks that also own cable networks have refused to give local cable systems permission to retransmit their local broadcast stations' signals unless they also carried the integrated company's cable networks; if these broadcast networks could own and operate additional local broadcast stations, they could extend this practice to those stations.

In its order, the Commission did not provide quantitative analysis in support of adoption of the 45% cap. It explained that the available data demonstrated no difference in behavior between the two networks that reach just under 40% of national television households and the other networks that reach fewer than 35% of national television households. At the same time, the Commission found that preserving a balance of power between the broadcast television networks and their affiliates serves local needs by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities. The 45% cap thus represented the balancing of competing interests.²⁶ At the June 4, 2003 Senate Commerce Committee hearing, Chairman Powell reflected that while the Commission believes its order provides a justification for the 45% cap, given the very high standard set by the Court he could not have total confidence the Commission's rule would survive judicial review and that if Congress believed a specific percentage cap is "inviolable," it should codify that percentage in the Act.

Some parties have called for elimination of the UHF discount. They claim that the UHF discount in effect raises the current cap to as high as 70% and if retained while the cap was increased to 45% would raise the effective cap to as high as 90%.²⁷ The provision in the Balanced Budget Act of 1997 relating to digital television requires all television stations that currently broadcast over the VHF band to migrate to the UHF band by December 31, 2006 unless certain conditions are not met. If those conditions are met, all stations will then be UHF stations. The Commission's decision took this into account by ruling that when the transition to digital television is complete, the UHF discount would be eliminated for the stations owned by the four largest broadcast networks. It chose to retain the UHF discount in other situations because it believes the discount could foster creation of additional broadcast networks.

In addition to the language in the FY2004 Consolidated Appropriations Act, several bills have been introduced in the 108th Congress that address the National Television Ownership Rule. The Senate passed a resolution of disapproval, S.J.Res.

²⁶ Report and Order at ¶ 501.

²⁷ The dissenting FCC commissioners stated that the Commission's new cross-ownership and television ownership rules do not provide a 50% discount for UHF stations and that this inconsistent weighting of UHF in different rules cannot be justified.

17, which would repeal all the new rules adopted by the FCC, including the national television ownership rule, leaving the prior rules in effect. Sen. Stevens has introduced the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003 (S. 1046) that would explicitly re-impose the 35% limitation on the national television household reach of any entity. The bill was amended during markup in the Senate Commerce Committee to also require any entities that currently exceed the 35% limitation to divest themselves of holdings to meet the limitation. The FCC Reauthorization Act of 2003 (S. 1264), as marked up by the Senate Commerce Committee, would eliminate the 50% UHF discount for license transfers that occur after June 2, 2003 and sunset the UHF discount in 2008. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would amend the Telecommunications Act of 1996 by raising the ownership cap to 45% and by incorporating the 50% UHF discount. Rep. Burr has introduced the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003 (H.R. 2052) that would explicitly re-impose the 35% limitation on the national television household reach of any entity. Rep. Sanders has introduced the Protect Diversity in Media Act (H.R. 2462) that would invalidate the June 2, 2003 action raising the national ownership cap to 45% and reinstate the 35% cap.

Dual Network Ownership

The Commission retained the Dual Network Ownership rule, which prohibits the four major networks – ABC, CBS, Fox, and NBC – from merging with one another.²⁸ The Commission found that the rule continues to be necessary to promote competition in the national television advertising and program acquisition markets, and that the rule promotes localism by preserving the balance of negotiating power between networks and affiliates.

In 2001, as part of its previous biennial review of media ownership rules, the FCC modified this rule to allow the four major networks to own, operate, maintain, or control broadcast networks other than the four majors. With this change, Viacom, the owner of CBS, was allowed to purchase UPN, and NBC was able to purchase Telemundo, the second largest Spanish-language network in the U.S.

At the Senate Commerce Committee hearing, Commissioner Adelstein stated that while he supported retention of the prohibition on mergers among the four major broadcast networks, he dissented from the rule because the Commission should have expanded it to provide a similar merger prohibition on Spanish language broadcast networks, which are currently experiencing consolidation.

²⁸ The rule “permits broadcast networks to provide multiple program streams (program networks) simultaneously within local markets, and prohibits only a merger between or among [the four major networks].” 67 FR 65751 at ¶ 156.

Local Ownership Rules

Local Television Multiple Ownership

As modified by the Commission, under this rule:²⁹

- In markets with five or more TV stations, a company may own two TV stations, but only one of these stations can be among the top four in ratings;
- In markets with 18 or more stations, a company may own three TV stations, but only one of these stations can be among the top four in ratings;
- In deciding how many stations are in the market, both commercial and non-commercial TV stations are counted;
- There is an eased waiver process for markets with 11 or fewer TV stations in which two top-four stations seek to merge.³⁰ The FCC will evaluate on a case-by-case basis whether such stations would better serve their local communities together rather than separately.

In the 1996 Telecommunications Act, Congress directed the Commission to “conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same

²⁹ 47 C.F.R. § 73.3555(b).

³⁰ Under the waiver standard that applies for all markets, the FCC will consider permitting otherwise banned two-station combinations or three-station combinations if one station is “failed, failing, or unbuilt.” In the order, the FCC liberalized that standard by removing the requirement that an applicant for such a waiver “demonstrate that it has tried and failed to secure an out-of-market buyer for the failed station.” In addition, in markets with 11 or fewer stations, the FCC will consider waivers of the “top-four” restriction if the proposed combination meets one or more of the following criteria: reduces a “significant competitive disparity between the merging stations and the dominant station” in the market; facilitates the stations’ transition from analog to digital broadcasting; produces such public interest benefits as more news and local programming; involves a UHF station or two; or the stations’ outer, or “grade B,” signals do not overlap and have not been carried, via direct broadcast satellite or cable, to any of the same geographic areas within the past year. *See* Report and Order at ¶ 221-232. Combinations achieved by waiver of the “top-four” restriction, however, could not be transferred or assigned to another party without obtaining another waiver. LIN Television lobbyist Greg Schmidt criticizes this requirement for a second waiver, claiming that television owners will lose one of the major justifications for expending capital to buy and improve a second station if the return on that investment cannot be recouped by selling the stations as a pair. *See* Bill McConnell, “FCC Does the Waive,” *Broadcasting & Cable*, July 7, 2003, at p. 1.

television market.”³¹ In 1999, the Commission performed a review and modified the rule. In 2002, that local ownership rule was remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit,³² which ruled that the Commission failed to justify why it only included TV stations among the voices in the voice test, excluding other media.

In its order, the Commission determined that its prior local TV ownership rule³³ could not be justified based on diversity or competition grounds.³⁴ It found that Americans rely on a variety of media outlets, not just broadcast television, for news and information. In addition, it determined that the prior rule could not be justified as necessary to promote competition because it failed to reflect the significant competition now faced by local broadcasters from cable and satellite TV services.

The Commission concluded that the new rule permits television combinations that are proven to enhance competition in local markets³⁵ and to facilitate the transition to digital television³⁶ through economic efficiencies. It determined that the new rule’s continued ban on mergers among the top-four stations will have the effect of preserving viewpoint diversity in local markets.³⁷ The record showed that the top four stations each typically produce an independent local newscast. The Commission also concluded that because viewpoint diversity is fostered when there are multiple independently owned media outlets, the rules also advance the goal of promoting the widest dissemination of viewpoints.

The proponents of retaining the old rule argued that the rule safeguarded the number of independent local news voices in the market, given that broadcast television is the primary source of local news for Americans; that cable and satellite companies provide virtually no local news; and that radio news is not a substitute for television news. They also claimed that the rule protected against a combination attaining market power in the local television advertising market.

³¹ 1996 Act, § 202(c)(2).

³² *See Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F.3rd 148 (DC Cir. 2002)

³³ Under this rule, sometimes referred to as the “TV duopoly” rule, an entity could own two television stations in the same Designated Market Area (DMA) only if the following requirements were met: either

- (1) the Grade B contours of the stations do not overlap, or
- (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination were consummated. The latter is sometimes referred to as the “top four ranked/eight voices test.”

³⁴ Report and Order at ¶ 133.

³⁵ *Id.* at ¶ 147.

³⁶ *Id.* at ¶ 148.

³⁷ *Id.* at ¶ 196-200.

Proponents of replacing the old rule with a rule requiring a case-by-case review of proposed mergers based on a diversity index claimed that only such an approach could accurately weight the diversity impact of the individual television stations in a specific market to make informed case-by-case public interest determinations about a proposed merger. But opponents of such a diversity index claimed it would not allow firms to plan mergers with regulatory certainty.

The Senate passed a resolution of disapproval, S.J.Res. 17, which would repeal all the new rules adopted by the FCC, including the local television multiple ownership rule, leaving the prior rules in effect. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would direct the FCC to revise its local television multiple ownership rule to allow an entity to own, operate, or control two TV stations in the same market if the grade B contours of such stations: (1) do not overlap, or (2) do overlap and at least six independent broadcast or cable television voices would remain in the market after transfer of the license of the station in question. Rep. Sanders has introduced the Protect Diversity in Media Act (H.R. 2462) that would invalidate the FCC's June 2, 2003 changes in the Local Television Multiple Ownership rule and reinstate the rule in effect prior to that date. A proposed amendment to the House Commerce-Justice-State-Judiciary Appropriations bill, which would have prohibited the FCC from using any funds to grant, transfer, or assign a license that would result in an entity that would not have met the old Local Television Multiple Ownership rule but would meet the new Local Television Multiple Ownership rule, was defeated in Committee.

Local Radio Ownership and Radio Market Definition

The FCC's current local radio ownership rule³⁸ codifies the language in Section 202(b)(1) of the 1996 Telecommunications Act, entitled "Local Radio Diversity – Applicable Caps," which required the Commission to revise its local radio ownership rules to provide that:

- in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM);
- in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to seven commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to six commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to five commercial radio stations,

³⁸ 47 C.F.R. 73.3555(a).

not more than three 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.³⁹

The Commission found that these *numerical* ownership limits continue to be needed to promote competition among local radio stations;⁴⁰ that competitive radio markets ensure that local stations are responsive to local listener needs and tastes; and that the rule, by guaranteeing a substantial number of independent radio voices, also will promote viewpoint diversity among local radio owners.

The Commission did, however, make several changes to the current rules:

- It replaced its complex signal contour methodology for defining local radio geographic markets with a market-based approach using Arbitron rating boundaries that better identify actual competitors in the marketplace.⁴¹ The signal contour methodology had yielded several anomalous situations with very expansive geographic market definitions that included distant stations and therefore allowed concentration to occur in more narrowly – but also more accurately – defined markets.
- It also modified its market definition methodology to include non-commercial as well as commercial radio stations in its count of stations in a market.⁴²
- It eliminated its policy of “flagging” those radio station transactions that, based on an initial analysis by the staff, would result in one entity controlling 50% or more of the radio advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of such advertising revenues; conducting further competitive review of the flagged transaction; and inviting interested parties to file comments addressing the competitive impact of the proposed merger.⁴³

³⁹ Section 202(b) also provides that the Commission may permit a party to exceed these limits “if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation.” 1996 Act, § 202(b)(2), 110 Stat. at 10-11.

⁴⁰ Report and Order at ¶ 239.

⁴¹ Report and Order at ¶ 239. It also adopted a notice of proposed rule making to determine how to define geographic markets in those small markets for which there are no Arbitron market definitions and adopted procedures to follow during the interim.

⁴² *Id.* at ¶ 239.

⁴³ *Id.* at ¶ 300-301.

Most observers believe that the overall effect of these three changes would be to reduce radio merger opportunities because the impact of the first change would outweigh the combined impact of the other two changes.⁴⁴

The proponents of retaining the old ownership limits as is or eliminating them entirely argued that the rule, and the resultant consolidation in the industry, has turned around the industry financially, from one in which more than half the radio stations were losing money to one that is very profitable and attracting an increasing share of the total advertising market. They also claimed that the number of program formats has increased.

The proponents of modifying the rule to tighten ownership limits claimed that the rule has led to both horizontal and vertical consolidation (e.g., ownership of concert promotion companies, concert venues) that has resulted in anticompetitive behavior by the large vertically integrated companies that has reduced competition in the radio, advertising, music, and concert markets, reduced program format diversity, and reduced local programming. The dissenting FCC commissioners claim that elimination of the “50/70 screen” takes away the opportunity for the Commission to undertake case-by-case reviews of mergers that, though they meet the bright line test, do not meet a market screen that is a good predictor of potential market power in the advertising market.

The Senate passed a resolution of disapproval, S.J.Res. 17, which would repeal all the new rules adopted by the FCC, including the local radio ownership rule, leaving the prior rules in effect. Sen. Feingold has introduced the Competition in Radio and Concert Industries Act of 2003 (S. 221) that, among other things, would (1) prohibit the FCC from loosening the current limitations on multiple ownership of radio stations and exclude these radio ownership rules from the required biennial review; (2) require the Commission to designate for hearing any license application that would result in an entity having as aggregate national radio audience reach exceeding 60%; and (3) require the Commission to prescribe regulations to prohibit the transfer or assignment to operate, or the use of, a local marketing agreement with respect to a commercial radio station if the transfer or assignment, or such agreement, will permit the applicant, or brokers of such agreement, to own, operate, or have an attributable interest in commercial radio stations that are in aggregate more than 35% of the audience of the local market of such radio stations or more than 35% of the radio advertising revenue in the local market of such radio stations. Rep. Weiner has introduced an identical bill (H.R. 1763). The Preservation of Localism, Program Diversity, and Competition in Television Broadcast Services Act of 2003 (S. 1046), as amended in markup in the Senate Commerce Committee, would require entities

⁴⁴ At the July 8, 2003 Senate Commerce Committee hearing on radio consolidation, Lewis Dickey, Jr., Chairman, President, and CEO of Cumulus Broadcasting, Inc., and Alex Kolobielski, President and CEO of First Media Radio, testified that the new methodology for defining radio markets would restrict opportunities for acquisitions and therefore harm competition. Mr. Dickey claimed that it would restrict radio groups from growing as large as market leader Clear Channel was able to grow under the old methodology and thus would deny competitors the opportunity to compete on an equal footing. Mr. Kolobielski claimed that it would not allow small companies to put together clusters of stations in small markets to exploit economies of scale.

that own multiple radio stations that would no longer conform with the FCC ownership limitations once the new geographic market definitions adopted by the FCC on June 2, 2003 were in place to divest themselves of holdings as needed to meet the new limitations. Rep. Sanders has introduced the Protect Diversity in Media Act (H.R. 2462) that would invalidate the FCC's June 2, 2003 actions regarding local radio ownership and market definitions and reinstate the rules in effect prior to that date.

Cross-Media Limits: Newspaper-Broadcast and Television-Radio

The FCC replaced its rules prohibiting newspaper-broadcast cross-ownership⁴⁵ and limiting television-radio cross-ownership⁴⁶ within a market with a single rule on cross-media limits:⁴⁷

⁴⁵ The old newspaper/broadcast cross-ownership rule prohibited common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication. When it adopted the rule in 1975, the Commission not only prohibited future newspaper/broadcast combinations, but also required existing combinations in highly concentrated markets to divest holdings to come into compliance within five years. The Commission grandfathered combinations in less concentrated markets, so long as the parties to the combination remained the same. The Commission adopted a policy of waiving the rule, for existing or future combinations, if

- (1) a combination could not sell a station;
- (2) a combination could not sell a station except at an artificially depressed price;
- (3) separate ownership and operation of a newspaper and a station could not be supported in a locality; or
- (4) for whatever reason, the purposes of the rule would be disserved.

⁴⁶ The old radio/television cross-ownership rule allowed common ownership of at least one television station and one radio station in a market. In larger markets, a single entity could own additional radio stations depending on the number of other voices in the market. The rule generally allowed common ownership of one or two television stations and up to six radio stations in any market where at least twenty independent "voices" would remain post-combination; two television stations and up to four radio stations in a market where at least ten independent "voices" would remain post-combination; and one television and one radio station notwithstanding the number of independent "voices" in the market. For this rule, a "voice" included independently owned and operating same-market, commercial and non-commercial broadcast television, radio stations, independently owned daily newspapers of a certain circulation, and cable systems providing generally available service to television households in a DMA, provided that all cable systems within the DMA are counted as a single voice. The rule was initially implemented in 1970. The Commission adopted a presumptive waiver policy to permit certain radio/television combinations in 1989, and relaxed the rule to its current form in 1999.

⁴⁷ 47 C.F.R. 73.3555(c), replacing the old 47 C.F.R. 73.3555(c) and 47 C.F.R. 73.3555(d).

- In markets with three or fewer television stations, no cross-ownership is permitted among television, radio, and newspapers.⁴⁸
- In markets with between four and eight television stations, combinations are limited to one of the following: One daily newspaper, one television station, and up to half of the radio station limit under the local radio ownership rule for that market (e.g., if the radio limit in the market is six, the company can only own three); OR
 One daily newspaper, and up to the radio station limit under the local radio ownership rule for that market (i.e., no television stations); OR
 Two television stations (if permissible under the local television ownership rule) and up to the radio station limit under the local radio ownership rule for that market (i.e., no daily newspapers).
- In markets with nine or more television stations, the FCC eliminated the newspaper-broadcast cross-ownership ban and the television-radio cross-ownership ban.

The Commission determined that neither the newspaper-broadcast prohibition nor the television-radio cross-ownership limitations could be justified for large markets in light of the abundance of sources that citizens rely on for news.⁴⁹ It also found that the old rules did not promote competition because radio, television, and newspapers generally compete in different economic markets.⁵⁰ Moreover, the FCC found that greater participation by newspaper publishers in the television and radio business would improve the quality and quantity of news available to the public.⁵¹

The Commission therefore replaced the old rules with the new cross-media limits intended to protect viewpoint diversity by ensuring that no company, or group of companies, can control an inordinate share of media outlets in a local market. The Commission developed a Diversity Index to measure the availability of key media outlets in markets of various sizes. It concluded that there were three tiers of markets in terms of “viewpoint diversity” concentration, each warranting different regulatory treatment:⁵²

- In the tier of smallest markets (three or fewer television stations), the FCC found that key outlets were sufficiently limited that any cross-ownership among the three leading outlets for local news – broadcast television, radio, and newspapers – would harm diversity viewpoint.

⁴⁸ A company may obtain a waiver of this ban if it can show that the television station does not serve the area served by the cross-owned property.

⁴⁹ Report and Order at ¶ 365.

⁵⁰ *Id.* at ¶ 332.

⁵¹ *Id.* at ¶ 342.

⁵² *Id.* at ¶ 443 ff.

- In the medium-sized tier (four to eight television stations), markets were found to be less concentrated today than in the smallest markets and thus certain media outlet combinations could safely occur without harming viewpoint diversity. Certain other combinations would threaten viewpoint diversity and are thus prohibited.
- In the largest tier of markets (nine or more television stations), the FCC concluded that the large number of media outlets, in combination with ownership limits for local television and radio, were more than sufficient to protect viewpoint diversity.

The arguments of proponents of retaining the old rules included:

- any cross-ownership reduces the number of independent voices in the community, especially in small markets with only a small number of voices;
- the merged entities, facing less competition for local news service and in the name of cost savings, will reduce the total amount of resources going to produce local news in the community;
- satellite and Internet voices are not local and therefore do not contribute to local diversity;
- newspaper-broadcast or television-radio cross-ownership will give the merged company a competitive advantage in the advertising market over its non-cross-owned competitors.

Commissioner Adelstein stated that he could have supported modification of the cross-ownership rules if the new rule employed a diversity index applied on a case-by-case basis by measuring the actual diversity impact of individual media voices in the market under scrutiny.⁵³ But the Commission majority rejected such case-by-case merger review because it would add uncertainty in the market and would impose an administrative burden on the Commission.

These cross-ownership rules represent a situation where economic and diversity goals can be in strong conflict. On one hand, it is in small markets, where resources are limited, that individual broadcasters are most likely to lack the wherewithal to produce local news programming on their own, so that cross-ownership might allow for a broadcast news voice that would not otherwise exist. On the other hand, it is exactly in these small markets that there are very few voices to begin with, so that cross-ownership might reduce what little diversity already exists.

⁵³ Statement of Commissioner Jonathan S. Adelstein Dissenting, FCC News Release, June 2, 2003.

The Senate passed a resolution of disapproval, S.J.Res. 17, which would repeal all the new rules adopted by the FCC, including the cross-media rules, leaving the prior newspaper-broadcast and television-radio cross-ownership rules in effect. The Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003 (S. 1046), as amended in markup in the Senate Commerce Committee, would declare null and void the cross-ownership rules that the Commission adopted on June 2, 2003 and reinstate the cross-ownership rules in effect prior to that date, with the exception that in small markets with a Designated Market Area of 150 or higher, the FCC may grant a waiver of its rules if the public utility commission of a state recommends such a waiver, on a case-by-case basis, based on a finding that the proposed transaction would enhance local news and information, promote the financial stability of a newspaper, radio station, or television station, or otherwise promote the public interest. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would direct the FCC to eliminate its newspaper-broadcasting cross-ownership rule. Rep. Sanders has introduced the Protect Diversity in Media Act (H.R. 2462) that would invalidate the FCC cross-ownership rules adopted on June 2, 2003 and reinstate the cross-ownership rules in effect prior to that date. A proposed amendment to the House Commerce-Justice-State-Judiciary Appropriations bill, which would have prohibited the FCC from using any funds to grant, transfer, or assign a license that would result in an entity that would not have met the old Cross Ownership rules but would meet the new Cross-Media Limits rule, was defeated in Committee.

Rep. Hinchey has introduced a resolution (H.Res. 218) that it is the sense of the House of Representatives that the FCC should not weaken any current media ownership rules and should allow for extensive public review and comment on any proposed changes to current rules before issuing a final rule. Senator Pryor has introduced a resolution (S.Res. 159) that it is the sense of the Senate that the June 2, 2003 ruling of the FCC weakening the nation's media ownership rules is not in the public interest and should be rescinded.

Transferability of Ownership

If the stay is lifted and the FCC's new television and radio ownership rules are implemented, it may result in a number of situations where current ownership arrangements exceed ownership limits. The FCC grandfathered owners of those clusters, but generally prohibited the sale of such above-cap clusters. The FCC made a limited exception to permit sales of grandfathered combinations to small businesses as defined in the Order. In taking this action, the FCC sought to respect the reasonable expectations of parties that lawfully purchased groups of local radio stations that today, through redefined markets, now exceed the applicable caps. The FCC also attempted to promote competition by permitting station owners to retain any above-cap local radio stations but not transfer them intact unless there is a compelling public policy justification to do so. The FCC found two such justifications: (1) avoiding undue hardships to cluster owners that are small businesses; and (2) promoting the entry into the broadcasting business by small businesses, many of which are minority- or female-owned.

The National Association of Black Owned Broadcasters and other critics of this Commission rule complain that the rule will not foster minority or female ownership

because (1) the large radio groups are unlikely to sell their clusters as long as they receive grandfathered rights, and (2) even if these clusters were placed on sale, they are likely to command such a high price that minority- or female-owned small businesses are unlikely to be able to obtain the financing needed to make the acquisitions.

Legislative Policy Issues

As explained above, a number of bills have been introduced in the 108th Congress that reflect a range of positions on media ownership issues. Other Members of Congress have announced their intentions of introducing legislation related to media ownership.

During the debates in the June 4, 2003 and July 8, 2003 Senate Commerce Commission hearings, Senators, FCC commissioners, and industry representatives raised a number of potential legislative policy issues relating to media ownership rules.

- Noting that it took 20 months for the FCC to complete its biennial review of the ownership rules, Senators Stevens and McCain as well as the commissioners agreed that it might make sense to change the statutory review requirement from every two years to every five years. Subsequently, Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199), Sec. 629 of which requires the Commission to review all of its media ownership rules at least once every four year, instead of the current two years, and also explicitly excludes the 39% national television ownership cap from periodic review. When the FCC Reauthorization Act of 2003 (S. 1264) was marked up in the Senate Commerce Committee, it was amended to require the Commission to review all of its media ownership rules at least once every four years, instead of the current two years.
- Chairman Powell suggested that if Congress views certain ownership rules as inviolate, it might be better for Congress to incorporate those rules in the statute rather than delegating to the Commission the responsibility for constructing rules, since any rules so constructed would be subject to more intensive review by the Courts.⁵⁴ Senator Stevens, among others, supported this approach, but Senator Sununu thought it might be best to leave construction of rules to the specialized expertise of the Commission.
- Chairman Powell stated that many media ownership concerns are not driven by the broadcasters subject to FCC regulation, but rather by

⁵⁴ Similarly, Chairman Powell suggested that if Congress had a particular goal in mind relating to local programming, it might be preferable to impose a rule requiring a certain level or percentage of local programming rather than attempting to foster local programming through structural ownership limits.

ownership concentration among the content providers on pay platforms (cable and satellite) not subject to public interest regulation. Current rules do not address these concerns. In a similar vein, Senator McCain indicated that many concerns are driven by media vertical integration that is not addressed by the current rules. These comments suggest that it may be appropriate for Congress to explore the need for different rules that focus more heavily on vertical relationships.

- As explained above, all five commissioners and several Senators agreed that it would be useful for Congress to provide both the Court and the Commission guidance on the standard to use for reviewing ownership rules and on whether the Act allows the Commission to re-regulate broadcast ownership. In markup of both S. 1046 and S. 1264, amendments were added to clarify that in its periodic review of ownership rules, the FCC is authorized to re-regulate as well as deregulate.
- Senator Boxer and the FCC commissioners who dissented in the June 2, 2003 decision claimed that the Commission did not hold enough public hearings prior to reaching the decision, with the result that industry interests had greater access to commissioners than did the general public. The commissioners who voted for the changes countered that the proceeding generated more than half a million comments, demonstrating that the general public fully participated in the proceeding. In markup in the Senate Commerce Committee, S. 1046 was amended to require the Commission to hold at least five public hearings prior to making any determination involving an ownership rule or requirement.
- At the July 8, 2003 Senate Commerce Committee hearing, two witnesses claimed that the new methodology adopted by the FCC to define radio markets would harm competition – by constraining radio groups from growing to a size that would allow them to compete effectively with the largest radio group (Clear Channel) and by not allowing small station owners in small markets to acquire station clusters and attendant scale economies needed to be efficient. They proposed that the FCC reinstate the old market definition methodology. These arguments suggest further consolidation is beneficial where it strengthens competitors vis-a-vis the strongest market player, but do not address the impact of such consolidation on the diversity of voices in a single market.