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FCC Media Ownership Rules: Current Status and Issues for Congress

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Summary

The Federal Communications Commission ("FCC") adopted an order on June 2, 2003 that modified five of its media ownership rules. The new rules have never gone into effect. 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 to allow a broadcast network to own and operate local broadcast stations that reach, in total, at most 39% of U.S. television households. On June 24, 2004, the United States Court of Appeals for the Third Circuit ("Third Circuit"), in *Prometheus Radio Project vs. Federal Communications Commission*, found the FCC did not provide reasoned analysis to support its specific local ownership limits and therefore remanded portions of the new local ownership rules back to the FCC and extended its stay of those rules. Until the FCC crafts new rules approved by the Third Circuit:

- common ownership of a full-service broadcast station and a daily newspaper is prohibited when the broadcast station's service contour encompasses the newspaper's city of publication. Combinations that pre-date 1975 are grandfathered.
- radio-television cross ownership is allowed subject to specific thresholds established in 1999; the number of jointly owned stations increases as the size of the market increases.
- a company can own two television stations in the same Designated Market Area if their Grade B contours do not overlap *or* if only one is among the top four in the market and there are at least eight independent television stations in the market.
- the number of radio stations that a company can own in a local market is incorporated in the Telecommunications Act of 1996 and varies according to the total number of stations in the market.

The Third Circuit concluded that the standard set by the 1996 Telecommunications Act for reviewing the media ownership rules does not include a presumption in favor of deregulation. Although the Third Circuit remanded the FCC's specific local ownership rules, it upheld many of the FCC's findings. It did not question the FCC's conceptual approach of implementing rules that use bright line tests with limits on the number of outlets that any company can own in a market, without regard to the company's post-merger market share, rather than rules that require a case-by-case market share analysis.

The Senate passed a resolution of disapproval, S.J.Res. 17, which would repeal all the rules the FCC adopted on June 2, 2003, leaving the prior rules in effect. The Senate passed S. 2400, the Defense Department Authorization bill, with similar language (S.Amdt. 3465). The Senate Commerce Committee has marked up four bills with relevant provisions — S. 2056, S. 1046, S. 1264, and S. 2505 (dealing with low power FM). Other related legislation introduced in the 108th Congress include H.J.Res. 72 (resolution of disapproval), H.R. 1035, H.R. 1763, H.R. 2052, H.R. 2212, H.R. 2462, H.R. 4026, H.R. 4069, and S. 221. This report will be updated as events warrant.

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FCC Media Ownership Rules: Current Status and Issues for Congress

Overview of Current Status

The Federal Communications Commission ("FCC" or "Commission") adopted an order on June 2, 2003 that modified five of its media ownership rules and retained two others.[1] The new rules have never gone into effect. Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199), Sec. 629 of which instructs the FCC to modify one of the rules — the National Television Ownership rule. On June 24, 2004, the United State Court of Appeals for the Third Circuit ("Third Circuit"), in *Prometheus Radio Project vs. Federal Communications Commission*, found:

> The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the Commission to justify or modify its approach to setting numerical limits.... The stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction.[2]

The current status of the rules is as follows:

- **National Television Ownership:** a broadcast network may own and operate local broadcast stations that reach, in total, up to 39% of U.S. television households; entities that exceed the 39% cap must divest as needed to come into compliance within two years; the FCC may not forbear on applying the 39% cap; and the FCC is prohibited

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[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 ("Report and Order" or "June 2, 2003 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.

[2] *Prometheus Radio Project v. Federal Communications Commission*, 2004 U.S. App. LEXIS 12720 ("*Prometheus*"), Slip op. at 124-125.

from performing the quadrennial review of the 39% cap.[3] In calculating a network's reach, UHF stations continue to be treated as if they reach only 50% of the households in the market.[4]

- Until the FCC crafts new rules approved by the Third Circuit, the ownership rules in effect prior to June 2, 2003 remain in effect:[5]

  - **Local Television Multiple Ownership:** a company can own two television stations in the same Designated Market Area ("DMA")[6] if the stations' Grade B contours[7] do not overlap *or* if only one is among the four highest-ranked (in terms of audience) in the market and at least eight independent television stations would remain in the market after the proposed combination.[8] An existing licensee of a failed, failing, or unbuilt television station can seek a waiver of the rule if it can demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.[9]

  - **Local Radio Multiple Ownership:** the number of radio stations that a company can own in a local market varies according to the total number of stations in the market, as follows: in a radio market with 45 or more commercial radio

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[3] This is required by the FY2004 Consolidated Appropriations Act (P.L. 108-109, 118 Stat. 3 et. seq.), Section 629.

[4] The Third Circuit concluded that challenges to the FCC's decision to retain the 50% UHF "discount" were moot "because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit ... [which] would undermine Congress's specification of a precise 39% cap." (*Prometheus*, Slip op. at 44-45).

[5] "The stay currently in effect will continue pending our review of the Commission's action on remand, over which the panel retains jurisdiction." (*Prometheus*, Slip op. at 124-125.)

[6] Designated Market Areas are geographic designations developed by Nielsen Media Research. A DMA is made up of all the counties that get the preponderance of their broadcast programming from a given television market. The Nielsen DMAs are both complete (all counties in the United States are in a DMA) and exclusive (DMAs do not overlap).

[7] Grade B is a measure of signal intensity associated with acceptable reception. The FCC's rules define this contour, often a circle drawn around the transmitter site of a television station, in such a way that 50 percent of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90 per cent of the time. Although a station's predicted signal strength increases as one gets closer to the transmitter, there will still be some locations within the predicted Grade B contour that do not receive a signal of Grade B intensity.

[8] 47 C.F.R. 73.3555(b).

[9] 47 C.F.R. 73.3555 n. 7.

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 market with between 30 and 44 (inclusive) commercial 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; in a 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; and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to five commercial radio stations, not more than three of which are in the same service, except that a party may not own, operate, or control more than 50% of the stations in any market.[10]

- **Broadcast-Newspaper Cross Ownership:** common ownership of a full-service broadcast station and a daily newspaper is prohibited when the broadcast station's service contour encompasses the newspaper's city of publication. Combinations that pre-date 1975 are grandfathered.[11]

- **Television-Radio Cross Ownership:** An entity may own up to 2 television stations (provided it is permitted under the Local Television Multiple Ownership rule) and up to 6 radio stations (provided it is permitted under the Local Radio Multiple Ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. Where entities may own a combination of 2 television stations and 6 radio stations, the rule allows an entity alternatively to own 1 television station and 7 radio stations. An entity may own up to 2 television stations (as permitted under the Local Television Multiple Ownership rule) and up to 4 radio stations (as permitted under the Local Radio Multiple Ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. A combination of 1 television station and 1 radio station is allowed regardless of the number of voices remaining in the market.[12]

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[10] 47 C.F.R. 73.3555(a), which codifies the Telecommunications Act of 1996, P.L. 104-104, § 202(b). The statutory language and FCC rule also provide an exception to these ownership limits whereby the FCC may permit a person or entity to own, operate, or control, or have a cognizable interest in radio broadcast stations that exceed the limit if that will result in an increase in the number of radio broadcast stations in operation.

[11] 47 C.F.R. 73.3555(d) as it existed prior to the FCC's June 2, 2003 Order.

[12] 47 C.F.R. 73.3555(c) as it existed prior to the FCC's June 2, 2003 Order. For this rule, media "voices" include independently owned and operating full-power broadcast television stations, broadcast radio stations, English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny,

(continued...)

Although the Third Circuit remanded the FCC's specific cross-media ownership, local television multiple ownership, and local radio multiple ownership rules, and extended the stay, it upheld many of the FCC's findings, including:

- not to retain a ban on newspaper-broadcast cross ownership;[13]
- to retain some limits on common ownership of different-type media outlets;[14]
- to retain the restriction on owning more than one top-four television station in a market;[15]
- the Commission's new definition of local radio markets;[16]
- to include non-commercial stations in determining the size of local radio markets;[17]
- the Commission's restriction on the transfer of radio stations;[18]
- to count radio stations brokered under a Joint Sales Agreement toward the brokering station's permissible ownership totals;[19] and
- to use numerical limits in its ownership rules (though not the specific numerical limits adopted by the Commission).[20]

The FCC reportedly is considering appealing the Third Circuit decision to the Supreme Court, although the two commissioners who dissented from the FCC order have offered a plan for the Commission to hold hearings and town meetings on the media ownership rules within 30 days and to seek public comment on the Diversity Index as part of a new rulemaking proceeding.[21] FCC Media Bureau chief Kenneth Ferree reportedly has stated that the Commission will consider waiver requests from media companies that wish to do transactions that do not meet the rules currently in place.[22] Even if the Commission will consider waiver requests from parties proposing mergers that would not meet the media ownership rules now in effect, however, the Third Circuit's remand and extended stay of the FCC rules is widely

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[12] (...continued)
plus any independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron.

[13] *Prometheus*, Slip op. at 48-52.

[14] Id., Slip op. at 52-57.

[15] Id., Slip op. at 86-90.

[16] Id., Slip op. at 99-106.

[17] Id., Slip op. at 106-107

[18] Id., Slip op. at 107-112.

[19] Id., Slip op. at 112-115.

[20] Id., Slip op. at 117-119.

[21] "Ferree Sees Issues That Could Interest the Supreme Court," *Communications Daily*, July 1, 2004, at pp. 1-3.

[22] Id. at p. 3.

expected to retard merger activity in the media sector until all parties' appeal opportunities have been exhausted and final rules are approved by the courts.

Because of the potential that changes in these rules 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.

Many other related bills have been introduced during the 108th Congress. These bills have progressed by varying degrees through the legislative process and are described in the relevant rule-specific sections of this report. The report analyzes each of the areas that have changed as a result of the FCC action and Court decisions or may change as a result of congressional action. The various positions in the debate also are summarized.

Underlying Issues: Standard of Review and Bright Line Tests

In 2001-2003, the Commission had to revisit several of its broadcast ownership rules as a result of rulings by the U.S. Circuit Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") that the Commission had failed to provide sufficient justification for specific thresholds incorporated into its National Television Ownership and Local Television Multiple Ownership rules.[23] In addition, pursuant to Section 202(h) of the Telecommunication Act of 1996, 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.[24]

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[23] *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1044 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d (D.C. Cir. 2002) ("*Fox Television Re-Hearing*") (addressing the National Television Ownership rule) and *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F.3d 148 (D.C. Circuit) ("*Sinclair*") (addressing the Local Television Ownership rule).

[24] Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56, § 202(h), as in effect at the time the FCC undertook its rulemaking, stated: "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." Subsequently, Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199), Sec. 29 of which changes the biennial review to a quadrennial review.

The FCC's 2002 Biennial Review was initiated on September 12, 2002;[25] review of the Commission's broadcast-newspaper cross-ownership rule and waiver policy was initiated on September 13, 2001;[26] and review of the Commission's local radio ownership rule and radio market definition rule was initiated on November 8, 2001.[27] 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.[28]

In its rulemaking, the Commission raised two fundamental administrative issues that have potentially significant policy implications. First, what is the relevant standard for reviewing existing ownership rules? And second, what are the advantages and disadvantages of using bright line tests vs. case-by-case evaluations when reviewing proposed ownership transactions that would increase media concentration?

Standard of Review

There has been some controversy surrounding the standard to be used in reaching a public interest determination about the existing rules. The D.C. Circuit, in *Fox Television*, stated "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[29] Further, in response to petitions for rehearing, the D.C. Circuit 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."[30] But in the same decision, the D.C. Circuit 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.'"[31]

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[25] 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.

[26] 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.

[27] 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.

[28] See, e.g., 67 FR 65751, ¶ 75.

[29] 280 F.3d at 1048.

[30] 293 F.3d 539.

[31] 293 F.3d 540.

In its June 2, 2003 Order, the Commission majority took this 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 D.C. Circuit 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 D.C. Circuit's interpretation directs the Commission to minimize regulation as competition develops, not to regulate to maximize the number of voices.

At that same hearing, 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.

Subsequently, in its *Prometheus* decision, the Third Circuit found:

> While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act, *see Fox I*, 280 F.3d at 1033; *Sinclair*, 284 F.3d at 159, we do not accept that the "repeal or modify in the public interest" instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both "modify" and the requirement that the Commission act "in the public interest." ...
>
> Rather than "upending" the reasoned analysis requirement that under the APA ordinarily applies to an agency's decision to promulgate new regulations (or modify or repeal existing regulations), *see State Farm*, 463 U.S. at 43, § 202(h) *extends* this requirement to the Commission's decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission's rulemaking authority to contravene "traditional administrative law principles."[32]

Bright Line Tests and the Diversity Index

In its June 2, 2003 Order, the FCC reviewed the advantages and disadvantages of implementing bright line rules that incorporate specific limits on the number of media outlets a company can own in a local market, without regard to the market-specific share of the post-merger company vs. implementing flexible, yet quantifiable rules that would allow for case-by-case reviews that more readily take into account market-specific or company-specific market shares and characteristics.

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[32] *Prometheus*, Slip op. at 41-42 (emphasis in original).

The Commission chose the bright line approach, in large part because it identified regulatory certainty as an important policy goal in addition to the three traditional goals of diversity, competition, and localism.[33] The Commission stated:

> 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. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.[34]

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:

> 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.[35]

Once it determined that a bright line test is preferable to case-by-case review, the Commission created bright line tests for its media cross ownership and local ownership rules by constructing a "Diversity Index" that it used as the basis for setting the threshold ownership limits in its new rules.[36] The Diversity Index is intended to measure "viewpoint concentration" and thereby identify "at risk" markets where limits on media ownership should be retained. It is constructed by

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[33] Report and Order at ¶ 80-85. In the section on Policy Goals, there are four subsections — Diversity, Competition, Localism, and Regulatory Certainty.

[34] Id. at ¶ 83, footnote omitted.

[35] Id. at ¶ 453, fn. 980.

[36] Id. at ¶¶ 391-481.

- identifying all the local media voices in a market.

- assigning a diversity "market share" to each of those voices by first assigning different weights to each of the media categories based on an Arbitron study of the sources consumers use for local news and information — television, 33.8%; radio, 24.9%; newspapers, 28.8%, and Internet, 12.5% — and then assigning each media outlet within a media category the same weight (so that, for example, if there were three radio stations in a market each one would be assigned a market share of 8.3%). If a single entity owns more than one media outlet in a market, for example if it owns both a television station and a radio station, then its diversity market share would be the sum of the two individual market shares.

- adding up the sum of the squares of each of the diversity market shares to yield a Diversity Index value.

A larger Diversity Index value denotes greater viewpoint concentration (less diversity of viewpoints). The Commission calculated the Diversity Index for a sample of large, medium, and small markets, as well as the Diversity Index for those markets if certain mergers were allowed to occur (for example, a television station purchasing a newspaper or a television station purchasing a radio station) to determine which markets were "at risk" for significant loss of diversity if particular ownership combinations were allowed. It concluded that in markets with three or fewer television stations there was significant danger of loss of viewpoint diversity if a television station were allowed to combine with a newspaper or a radio station and therefore maintained the cross ownership ban in those markets. It also concluded that certain combinations would unduly harm viewpoint diversity in markets with four to eight television stations and therefore set certain cross ownership restrictions in those markets as well.[37] The Commission also used the Diversity Index as the basis for setting its limits on local television multiple ownership.[38]

The Commission stated that its Diversity Index was "inspired by" the Herfindahl-Hirschmann Index ("HHI")[39] used by the Department of Justice and Federal Trade Commission to identify those proposed mergers that, based on historical merger experience, might have a deleterious effect on competition in the affected markets and therefore merit additional scrutiny. (Proposed mergers that would result in markets exceeding the HHI threshold levels automatically trigger further review.) Analogously, the Diversity Index is intended to identify those markets in which additional concentration in media ownership might have a deleterious effect on viewpoint diversity in the affected market. The Diversity Index, like the HHI, is calculated by squaring the market shares of each market participant. But there are three significant differences between these two indices and how they are applied.

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[37] These limits are discussed in the sections on the specific rules below.

[38] See Report and Order at ¶¶ 192 ff.

[39] Id. at ¶ 396.

First, the HHI is calculated using the actual market shares of the providers in the market under consideration. If one or more providers have large market shares, the HHI is very large because that market share figure is squared. In contrast, the Diversity Index is calculated using the assumption that every provider within a media category (for example, newspapers or television stations) has equal diversity market share. Thus, in the New York City market the New York Times and the Nowy Dziennik-Polish Daily News are accorded the same weight; the local CBS television station and the Dutchess Community College television station (in suburban New York) are accorded the same weight. On a purely mathematical basis, the assumption of equal diversity impact minimizes the sum of the squared market shares, thus minimizing the size of the Diversity Index and providing the lowest possible estimate of viewpoint concentration.

Second, the antitrust agencies apply the HHI directly to the proposed merger, on a case-by-case basis, to determine if further scrutiny is merited. The actual market shares of each of the market participants are calculated — and squared — and the resulting HHI is compared to threshold levels to determine if additional scrutiny is required. In contrast, the FCC does not intend to apply the Diversity Index to any specific proposed change in media ownership. Rather, it used the Diversity Index (calculated for sample markets by assuming that each media outlet within the same media category, for example, television stations, has the same "diversity market share") as the basis for setting the maximum number (or combination) of media outlets that *any* provider could own in a market. A proposed media merger then would be approved or disapproved based on the number (or combination) of media outlets the post-merger company would have in the market, regardless of its actual post-merger diversity market share.[40]

Third, 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 and a body of economic literature about the relationship between market structure and market conduct. The FCC used those HHI trigger points as the starting point for scrutinizing viewpoint concentration, but without a historical record or body of literature demonstrating that the same trigger points for economic concentration are applicable to viewpoint concentration.

In *Prometheus*, the Third Circuit did not question the concept of a Diversity Index or of bright line rules. It did

> not object in principle to the Commission's reliance on the Department of Justice and Federal Trade Commission's antitrust formula, the Herfindahl-Hirschmann Index ("HHI"), as its starting point for measuring diversity in local markets.[41]

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[40] As indicated above (at pp. 8 and in footnote 38), although the Commission maintained processes for firms that would not meet a bright line test to seek a waiver and for interested parties that wanted to challenge a merger that met a bright line test to file a petition to deny a license transfer, it stated that it would not look favorably upon some petitions.

[41] *Prometheus*, Slip Op. at 58.

Moreover, the Third Circuit found that the Commission's decision to retain a numerical limits approach to radio station ownership regulation is "rational and in the public interest."[42] (In the case of the Commission's Local Cross Ownership and Local Television Multiple Ownership rules, it did not explicitly conclude that the numerical limits approach was rational and in the public interest, but did frame its remand of the numerical limits adopted in terms of the specific limits chosen, not of the concept of numerical limits.)

However, the Third Circuit found that the FCC's methodology for converting the HHI to a measure for diversity in local markets was irrational and inconsistent. Specifically, the Third Circuit found

> [the Commission's] decision to count the Internet as a course of viewpoint diversity, while discounting cable, was not rational.[43]

The Commission's decision to assign equal market shares to outlets within a media type does not jibe with the Commission's decision to assign relative weights to the different media type themselves, about which it said "we have no reason to believe that all media are of equal importance." *Order* ¶ 409; *see also id.* ¶ 445 ("Not all voices, however, speak with the same volume.") It also negates the Commission's proffered rationale for using the HHI formula in the first place — to allow it to measure the actual loss of diversity from consolidation by taking into account the actual "diversity importance" of the merging parties, something it could not do with a simple "voices" test. *Id.* ¶ 396.[44]

> Although the Commission is entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets' Diversity Index scores, we do not affirm the seemingly inconsistent manner in which the line was drawn.... [T]he Cross-Media Limits allow some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed.[45]

In remanding the rules, the Court has given the Commission the opportunity "to justify or modify its approach to setting numerical limits."[46]

FCC chairman Michael Powell reportedly stated in an interview after the Court decision was released,

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[42] Id., Slip Op. at 118.

[43] Id., Slip Op. at 62. The Court found it inconsistent that the FCC chose not to include cable television as an alternative local news and information voice because most of that news was actually provided by the local television broadcast stations carried on the cable systems and yet chose to include the Internet as a significant alternative local news and information voice despite the fact that most local news and information found on the Internet is on the websites of the local television stations and newspapers. (Id. at pp. 62-64.)

[44] Id. at pp. 69-70.

[45] Id. at pp. 74-75.

[46] Id. at p. 124.

> It may not be possible to line-draw. Part of me says maybe the best answer is to evaluate on a case-by-case basis. The commission may end up getting more pushed in that direction.[47]

Given that the Third Circuit did not challenge the concept of using a Diversity Index to set specific numerical limits, however, it is not apparent that the Third Circuit has indicated any preference for a case-by-case approach rather than a bright line rule.

The task of implementing bright line rules that can withstand court review may be challenging, but that may have more to do with the inherent complexity and ambiguity of measuring viewpoint diversity consistently across heterogeneous geographic markets than in constraints placed by the courts. As indicated above, the Third Circuit identified three problems with the existing rules: (1) the inconsistent treatment of cable television and the Internet; (2) the assignment of equal weight to all media outlets within a media category rather than actual market shares; and (3) allowing some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed. In remand, the Commission should be able to modify its Diversity Index to treat cable television and the Internet the same or to provide empirical evidence for why they should be treated differently. Similarly, the Commission should be able to construct a Diversity Index using actual market share data (though admittedly that would be a more difficult task and might generate challenges to the market share figures). It may prove to be difficult, however, to construct bright line media ownership limits — in terms of the specific number of media outlets that a single entity could own in a market — that all are based on a consistent application of the Diversity Index (the Third Circuit's third concern).

The Commission potentially could get around this problem in several ways, though these might be construed as case-by-case solutions. For example, the Commission could set its bright line rules in terms of specific Diversity Index levels (prohibiting any consolidation that would result in a Diversity Index that exceeded a particular level) rather than using the Diversity Index to identify media ownership levels that are bright lines. Alternatively, the Commission could use the Diversity Index to identify media ownership limits that are bright lines in the sense that they trigger further scrutiny, but also explicitly identify further criteria that would be used to evaluate proposed consolidations that yield Diversity Index levels within a range of "potential concern." For example, it might construct a multi-part rule that would allow all proposed license transfers that would result in a market-wide Diversity Index below 1000 and an increase in the Diversity Index of less than 200; trigger further scrutiny (of explicitly identified diversity criteria) for any proposed license transfer that would result in a Diversity Index between 1000 and 1800 or result in an increase in the Diversity Index of between 200 and 400; and prohibit any proposed license transfer that would result in a Diversity Index that exceeded 1800 or that increased by more than 400.[48]

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[47] Frank Ahrens, "Powell Calls Rejection of Media Rules a Disappointment," *Washington Post*, June 29, 2004, at pp. E1 and E5.

[48] The Diversity Index levels used in this example are intended to be descriptive only and (continued...)

Specific Media Ownership Rules

National Television Ownership (% Cap)

Current Status.

In practice, the National Television Ownership 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. Section 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199, 118 Stat. 3 et. seq.) instructs the FCC to modify its National Television Ownership rule by setting a 39% cap,[49] 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,[50] requires the FCC to review its rules every four years instead of two years, and excludes the 39% cap from that periodic review.

When calculating the total audience reached by an entity's stations, the so-called "UHF discount" is applied — audiences of UHF stations are given only half-weight. For example, 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.

The National Television Ownership rule and the UHF discount were not immediately affected by the appeal of the FCC's June 2, 2003 Order. In deciding that appeal in *Prometheus*, the Third Circuit found that

> Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% are moot.[51]

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[48] (...continued)
should not be construed as endorsement by CRS of any particular approach. If it were to choose to construct a rule of this sort, the FCC would have to provide an empirical basis for the threshold levels in its rules.

[49] 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.

[50] 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.

[51] *Prometheus*, Op. Slip at 44.

> Although the 2004 Consolidated Appropriations Act did not expressly mention the UHF discount, challenges to the Commission's decision to retain it are likewise moot.[52]

But the UHF discount portion of the FCC's June 2, 2003 National Television Ownership rule included a section stating that when the transition to digital television is complete, the UHF discount would be eliminated for those stations owned by the four largest broadcast networks.[53] This section presumably would be moot, based on the following language in the *Prometheus* decision requiring the rules adopted in the FCC's biennial review proceeding to adhere to the 39% cap mandated by Congress:

> because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.[54]

At the same time, the Third Circuit, aware that the FCC has sought public comment on its authority going forward to modify or eliminate the UHF discount through a proceeding that is outside the proscribed quadrennial review,[55] stated that

> we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount outside the context of Section 202(h) [the mandatory quadrennial review of ownership rules that Congress has prohibited the FCC from performing on the National Television Ownership rule].[56]

Recent History.

The FCC has limited the national ownership reach of television broadcast stations since 1941, modifying its rules several times since then. In 1984, the Commission repealed its rule, and instituted a six-year transitional ownership limit of 12 television stations nationwide. In 1985, on reconsideration, the Commission affirmed its conclusion, but eliminated the sunset provision, retaining the 12-station limit and, in addition, prohibiting an entity from reaching more than 25% of the country's television households through the stations it owned.[57]

In 1996, the Commission adopted a 35% cap in response to the directive in the 1996 Telecommunications Act to raise the cap from 25% to 35% and to eliminate the

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[52] Id., Op. Slip at 44.

[53] Report and Order at ¶ 591.

[54] *Prometheus*, Op. slip at p. 45.

[55] "Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap," FCC Media Bureau Public Notice, DA 04-320, MB Docket No. 02-277, February 19, 2004.

[56] *Prometheus*, Op. slip at 46.

[57] Report and Order at ¶ 502.

rule that any entity could not own more than 12 stations nationwide.[58] The Commission subsequently affirmed the 35% cap as part of the 1998 biennial review of media ownership rules.[59] This decision was challenged by several broadcast networks and in 2002 the D.C. Circuit, in *Fox Stations*, remanded the rule to the Commission on the grounds that the Commission had failed to provide a justification for the 35% level.[60]

In its June 2, 2003 Order, the Commission modified its National Television Ownership rule[61] by increasing the maximum aggregate national audience reach of an entity owning multiple television stations from 35% to 45%. In addition to increasing the cap, the Commission retained the UHF discount. 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.[62]

In the Report and Order, the Commission determined that a national television 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.[63] But it determined that a national television 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.[64] It found that the 35% level did not strike the right balance of promoting localism and preserving free over-the-air television 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;[65]

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[58] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations),* 11 FCC Rcd 12374 (1996).

[59] *1998 Biennial Review Report*, 15 FCC Rcd 11072-75 ¶¶ 25-30.

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

[61] 47 C.F.R. 73.3555(d)(1), previously 47 C.F.R. 73.3555(e)(1).

[62] Report and Order at ¶ 586.

[63] Report and Order at ¶ 508-509.

[64] Id. at ¶ 501.

[65] 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.

- 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.[66]

- the public interest is served by regulations that encourage the networks to keep expensive programming, such as sports, on free, over-the-air television.[67]

Opponents of increasing the cap from 35% to 45% had 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 a local sports event, is available or when network programming does not meet community standards);

- if there are fewer independently owned and operated affiliates, they will be under much greater pressure from the networks not to pre-empt 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 Report and 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

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[66] Report and Order at ¶ 575-576.

[67] 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%, 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.)

represented the balancing of competing interests.[68] 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 "inviolate," 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%.[69] The provision in the Balanced Budget Act of 1997 relating to digital television requires all analog television stations, both those on the VHF band and those on the UHF band, to convert to digital transmission by December 31, 2006 unless certain conditions are not met. When the digital transition is complete, both VHF and UHF stations will have the same transmission capabilities and therefore UHF stations will no longer be at a disadvantage with respect to audience reach. 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.[70] It chose to retain the UHF discount in other situations because it believes the discount could foster creation of additional broadcast networks. But as mentioned above, language in the Third Circuit's *Prometheus* decision suggests that the provision relating to the application of the UHF discount to stations owned by the four largest television networks is moot.

Legislation.

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. 17, which would repeal all the new rules adopted by the FCC, including the national television ownership rule, leaving the prior rules in effect. Rep. Hinchey has introduced H.J.Res. 72, a companion resolution of disapproval. The Senate passed S. 2400, the Defense Department Authorization bill, with similar language (S.Amdt. 3465).

The Senate Commerce Committee approved an amendment to S. 2056, the Broadcast Decency Enforcement Act of 2004, that would suspend all the June 2, 2003 FCC media ownership rule changes, including the National Television Ownership rule change, until the Government Accountability Office conducts a study and reports to Congress on the relationship between the consolidation of media ownership and indecency violations, and in the interim would reinstate the FCC media ownership rules in effect prior to June 2, 2003. But in passing its own

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[68] Report and Order at ¶ 501.

[69] 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.

[70] Report and Order at ¶ 591.

broadcast decency enforcement bill, H.R. 3717, the House explicitly ruled a similar amendment not germane.

Sen. Stevens has introduced the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003 (S. 1046), which 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.

The following bills have been introduced but no action has been taken at the committee level. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035), which 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), which 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), which would invalidate the June 2, 2003 FCC rule change raising the national ownership cap to 45% and reinstate the 35% cap. Rep. Hinchey has introduced the Media Ownership Reform Act of 2004 (H.R. 4069), which would set the cap at 35%, explicitly repealing the 39% cap passed in the FY2004 Consolidated Appropriations Act as well as the FCC's June 2, 2003 media ownership rules. It also would explicitly prohibit grandfathering, thus requiring those networks (CBS and FOX) that currently exceed the 35% cap to divest themselves of licenses as needed to meet the cap. In addition, H.R. 4069 would explicitly prohibit the FCC from applying the forbearance clause in Section 10 of the 1996 Telecommunications Act to the National Television Ownership rule, thus requiring the FCC to enforce the cap.

Dual Network Ownership

In its June 2, 2003 Order, the FCC retained the existing Dual Network Ownership rule, which prohibits the four major networks — ABC, CBS, Fox, and NBC — from merging with one another.[71] 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 had 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,

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[71] 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.

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 June 4, 2003 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.

Local Television Multiple Ownership

Current Status.

As a result of the Third Circuit's *Prometheus* decision remanding and extending its stay of the Local Television Multiple Ownership rule that the FCC adopted on June 2, 2003, the rule currently in place is the one the FCC adopted in 1999, sometimes referred to as the "TV duopoly" rule. Under this rule, an entity can own two television stations in the same Designated Market Area (DMA) only if the following requirements are met:

- either the Grade B contours of the stations do not overlap,
- or (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.[72] This second option is sometimes referred to as the "top four ranked/eight voices test."

The rule also includes a standard for approving a waiver of the ownership limits where a proposed combination involves at least one station that is failed, failing, or unbuilt.[73] For each type of waiver, the waiver applicant must demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate

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[72] 47 C.F.R. 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08, ¶ 8.

[73] A "failed" station is one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. Under the standard for "failing" stations, a waiver is presumed to be in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had all-day audience share of 4% or lower; (2) the financial condition of one of the merging stations is poor; (3) and the merger will produce public interest benefits. Under the standard for "unbuilt" stations, a waiver is presumed to be in the public interest if an applicant meets each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. (47 C.F.R. § 73..3555, Note 7 (1) and *Local Television Ownership Report*, 14 FCC Rcd at 12941 ¶ 86.

the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.[74] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets the Local Television Multiple Ownership rule or one of the three waiver standards at the time of transfer.[75]

Recent History.

The FCC adopted a rule prohibiting common ownership of two television stations with intersecting Grade B contours in 1964. 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 television market."[76] In 1999, the Commission performed a review and modified the rule, creating the television duopoly rule that is in effect today. In 2002, that local ownership rule was remanded to the Commission by the D.C. Circuit,[77] which ruled that the Commission failed to justify why it only included TV stations among the voices in the voice test, excluding other media.

The FCC modified the rule in its June 2, 2003 Order, to set the following ownership limits:[78]

- 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.[79] The FCC

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[74] 47 C.F.R. 73.3555, Note 7.

[75] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

[76] 1996 Act, § 202(c)(2).

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

[78] 47 C.F.R. § 73.3555(b).

[79] 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; (continued...)

will evaluate on a case-by-case basis whether such stations would better serve their local communities together rather than separately.

- 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." The standard is liberalized 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 its June 2, 2003 Order, the Commission determined that the 1999 Television Duopoly rule could not be justified based on diversity or competition grounds.[80] 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 markets[81] and to facilitate the transition to digital television[82] 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.[83] 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

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[79] (...continued)
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 reportedly 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.

[80] Report and Order at ¶ 133.

[81] *Id.* at ¶ 147.

[82] *Id.* at ¶ 148.

[83] *Id.* at ¶ 196-200.

television news. They also claimed that the rule protected against a combination attaining market power in the local television advertising market.

Proponents of replacing the old rule with a rule requiring a case-by-case review of proposed mergers claimed that only such an approach could accurately weigh 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 a case-by-case approach claimed it would not allow firms to plan mergers with regulatory certainty.

Many aspects of the FCC's 2003 Local Television Multiple Ownership rule were appealed. In its *Prometheus* decision, the Third Circuit found:

- limiting local television station ownership is not duplicative of antitrust regulation;[84]
- media other than broadcast television may contribute to viewpoint diversity in local markets;[85]
- consolidation can improve local programming;[86] and
- the Commission's decision to retain the restriction on owning more than one of the top-four television stations in a market is supported by record evidence.[87]

But the Third Circuit remanded:

- the specific numerical limits on television station ownership in local markets, because the record evidence does not support reliance on an assumption of all stations having an equal market share and the Commission provided no reasonable explanation for its decision to disregard actual market shares;[88] and
- the repeal of the requirement in its waiver standard that the applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, because the Commission failed to address the original purpose of the requirement — to ensure that qualified minority broadcasters had a

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[84] *Prometheus*, Op. slip at 81-82.

[85] Id., Op. slip at 82-84.

[86] Id., Op. slip at 84-85.

[87] Id., Op. slip at 86-90.

[88] Id., Op. slip at 90-94.

fair chance to learn that certain financially troubled, and consequently more affordable, stations were for sale.[89]

Legislation.

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. Hinchey has introduced H.J.Res. 72, a companion resolution of disapproval. The Senate passed S. 2400, the Defense Department Authorization bill, with similar language (S.Amdt. 3465).

The following bills have been introduced but no action has been taken at the committee level. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035), which 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), which 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. Rep. Hinchey has introduced the Media Ownership Reform Act of 2004 (H.R. 4069) that also would invalidate the Local Television Multiple Ownership rule adopted by the FCC on June 2, 2003 FCC and reinstate the rule in effect prior to that date.

Local Radio Multiple Ownership

Current Status.

The ownership limits currently in place are those that the Commission adopted in 1996 to codify the language in Section 202(b)(1) of the 1996 Telecommunications Act, 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);

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[89] Id., Op. slip at 94-96

- in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to five commercial radio stations, 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.[90]

These numerical limits are applied to geographic markets defined using a complex methodology of overlapping signal contours. If two or more stations involved in the proposed merger have principal community signal contours that overlap one another, then those stations are identified as being part of a market consisting of every commercial radio station whose principal community contour overlaps the principal community contour of at least one of the overlapping stations that are part of the merger.[91]

Also, under current rules, when a "brokering" station has a Joint Sales Agreement ("JSA") with a "brokered" station — typically this authorizes one station acting as a broker to sell advertising time for the brokered station in return for a fee — the brokered stations do not count toward the number of stations the brokering licensee may own in a local market.[92]

In addition, the FCC follows a policy of "flagging" public notices of proposed radio station transactions that, based on an initial analysis by the staff, would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in the market.[93] Flagged transactions are subject to further competitive analysis.[94]

Recent History.

Until 1992, entities were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped. In 1992, the FCC relaxed the Local Radio Multiple Ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market. Under the 1992 rules, an entity could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no

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[90] 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.

[91] The overlapping contour methodology is further explained in the next section.

[92] *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 121.

[93] See *Application of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communication, Inc. (Transferee)*, 15 FCC Rcd 16062, 16066 ¶ 7 n. 10 (2000).

[94] The scope of that analysis is embodied in the interim policy set forth in the FCC's *Local Radio Ownership Notice of Proposed Rulemaking*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market.[95]

In the 1996 Telecommunications Act, Congress directed the Commission to revise those numerical limits to provide the limits that are in place today.[96] The Act also repealed national limits on radio station ownership.[97]

In its June 2, 2003 Order, the Commission retained the numerical limits in the 1996 Act, finding that those numerical ownership limits continue to be needed to promote competition among local radio stations;[98] 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.[99]

- 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.[100]

- It counted stations brokered under a Joint Sales Agreement toward the brokering station's permissible ownership totals as long as (1) the brokering entity owns or has an attributable interest in one or more stations in the local market, and (2) the joint advertising sales amount to more than 15% of the brokered station's advertising time per week.

- It eliminated its policy of (a) "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; (b) conducting further competitive review of the flagged transaction;

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[95] See 47 C.F.R. § 73.3555(a)(1) (1995).

[96] 1996 Act, § 202(b).

[97] Id., § 202(a).

[98] Report and Order at ¶ 239.

[99] 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.

[100] *Id.* at ¶ 239.

and (c) inviting interested parties to file comments addressing the competitive impact of the proposed merger.[101]

- It grandfathered existing radio combinations that would not meet the limits under the new market definitions, but prohibited the future transfer or sale of these grandfathered combinations except to certain "eligible entities" that qualify as small businesses.

Most observers believe that the overall effect of these changes would be to reduce radio merger opportunities because the impact of the first change would outweigh the combined impact of the other changes.[102]

In the FCC's rulemaking proceeding, 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 — had 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 had led to both horizontal and vertical consolidation (for example, 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 claimed 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.

In its rulemaking proceeding, the Commission found the overlapping signal contour methodology used to define radio markets 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. For example, under the market definition methodology, a single entity was able to own all 6 of the commercial radio stations in Fargo, North Dakota because a long chain of rural stations with overlapping signal

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[101] *Id.* at ¶ 300-301.

[102] 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.

contours were included in the geographic market definition.[103] The FCC therefore chose to replace the overlapping contour methodology with a methodology based on market-driven factors identified by Arbitron.

Many aspects of the FCC's 2003 Local Radio Multiple Ownership rule were appealed, and most were upheld by the Third Circuit. In its *Prometheus* decision, the Third Circuit:

- upheld the Commission's use of market-based Arbitron Metro markets instead of the contour-overlap methodology to define local radio markets;[104]
- upheld the inclusion of non-commercial radio stations when performing the station count in a market;[105]
- found the FCC's transfer restriction is in the public interest;[106]
- affirmed the attribution of Joint Sales Agreements, counting stations brokered under a JSA toward the brokering station's permissible ownership totals; [107] and
- found the FCC's numerical limits approach rational and in the public interest.[108]

But, the Third Circuit

- remanded the specific numerical limits in the rule to the Commission for further justification;[109] and

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[103] Jennifer Lee, "On Minot, N.D., Radio, a Single Corporate Voice," *New York Times*, March 29, 2003. To understand how this occurred, it may be simplest to think of a station's principal community contours as being, as an approximation, a circle around the station's transmitter. Radio stations' transmitters and principal community contours, though concentrated to some extent in urbanized areas, are geographically dispersed. A geographic market defined by overlapping contours can result in a series of contours overlapping one another to create a very extended market — sort of a daisy chain effect. Thus, the contours of stations in Fargo overlapped with stations in several directions outside Fargo, all in an extended chain, resulting in a such a large number of stations being included in the market that a single entity was allowed to own 6 of them, all located in close proximity to one another rather than being spread across the large geographic market created by the overlapping contour methodology.

[104] *Prometheus*, Slip Op. at 100-106.

[105] Id., Slip Op. at 106-107.

[106] Id., Slip Op. at 107-112.

[107] Id., Slip Op. at 112-115.

[108] Id., Slip Op. at 117-118.

[109] Id., Slip Op. at 115-123.

- found the Commission did not justify its decision to retain "sub-caps" on the number of AM and number of FM stations an entity could own in a local market .[110]

In particular, the Third Circuit found that the Commission failed to provide a justification for basing its bright line numerical benchmark on the use of a Diversity Index based on the assumption of five equal-sized competitors, rather than on actual market shares.[111]

Legislation.

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. Rep. Hinchey has introduced H.J.Res. 72, a companion resolution of disapproval. The Senate passed S. 2400, the Defense Department Authorization bill, with similar language (S.Amdt. 3465). 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 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.

The following bills have been introduced but no action has been taken at the committee level. Sen. Feingold has introduced the Competition in Radio and Concert Industries Act of 2003 (S. 221), which, 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 an 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). Rep. Sanders has introduced the Protect Diversity in Media Act (H.R. 2462), which 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. Rep. Hinchey has introduced the Media Ownership Reform Act of 2004 (H.R. 4069), which would delete the language in Section 202(b)(1) of the 1996 Telecommunications Act that prescribes the current local

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[110] Id., Slip op. at 124.

[111] Id., Slip op. at 122.

ownership limitations and instruct the FCC to adopt more restrictive limitations.[112] H.R. 4069 would explicitly prohibit grandfathering, thus requiring those networks that currently exceed the proposed ownership limits to divest themselves of licenses as needed to meet those limits. In addition, H.R. 4069 would explicitly prohibit the FCC from applying the forbearance clause in Section 10 of the 1996 Telecommunications Act to these national and local radio ownership rules, thus requiring the FCC to enforce the limits.

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

Current Status.

As a result of the Third Circuit's *Prometheus* decision remanding and extending its stay of the Cross-Media rule that the FCC adopted on June 2, 2003, the Newspaper-Broadcast Cross Ownership rule and the Television-Radio Cross Ownership rule that were in force on June 2, 2003 remain in place.

- **Newspaper-Broadcast Cross Ownership**: common ownership of a full-service broadcast station and a daily newspaper is prohibited 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

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[112] These restrictions are as follows: the number of AM or FM broadcast stations that may be owned or controlled by one entity nationally shall not exceed 5% of the total number of AM and FM broadcast stations; in a radio market with 45 or more 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); in a radio market with between 30 and 44 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; in a radio market with between 15 and 29 commercial radio stations, a party may own, operate, or control up to 4 commercial radio stations, not more than 2 of which are in the same service, except that a party may not own, operate, or control more than 25% of the stations in such market; and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 3 commercial stations, not more than 2 of which are in the same services, except that a party may not own, operate, or control more than 40% of the stations in such a market.

locality; or (4) for whatever reason, the purposes of the rule would be disserved.[113]

- **Television-Radio Cross Ownership:** An entity may own up to 2 television stations (provided it is permitted under the Local Television Multiple Ownership rule) and up to 6 radio stations (provided it is permitted under the Local Radio Multiple Ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. Where entities may own a combination of 2 television stations and 6 radio stations, the rule allows an entity alternatively to own 1 television station and 7 radio stations. An entity may own up to 2 television stations (as permitted under the Local Television Multiple Ownership rule) and up to 4 radio stations (as permitted under the Local Radio Multiple Ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. A combination of 1 television station and 1 radio station is allowed regardless of the number of voices remaining in the market.[114]

Recent History.

The newspaper-broadcast cross ownership ban has been in place since 1975. In 1970, the Commission restricted the combined ownership of radio and television stations in local markets.[115] In 1989 the Commission adopted a liberalized waiver policy for stations in the top 25 markets, and Section 202(d) of the 1996 Telecommunications Act instructed the Commission to extended its liberalized waiver policy to the top 50 markets. In 1999, the Commission modified the television-radio cross ownership rule to its current form.[116]

In its June 2, 2003 Order, the FCC replaced its rules prohibiting newspaper-broadcast cross ownership and limiting television-radio cross ownership within a market with a single rule on cross media limits:[117]

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[113] *Amendment of Sections 73.34, 73.240,and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, *Second Report and Order,* 50 FCC 2d at 1085.

[114] 47 C.F.R. 73.3555(c) as it existed prior to the FCC's June 2, 2003 Order. For this rule, media "voices" include independently owned and operating full-power broadcast television stations, broadcast radio stations, English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny, plus any independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron.

[115] *Amendment of Section 73.35, 73.340, and 73.630 of the Commission's Rule Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 22 F.C.C.2d at 306 ff.

[116] Report and Order at ¶¶ 372-373.

[117] 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.[118]

- 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 (for example, 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 Multiple Ownership rule for that market, but no television stations; OR

— Two television stations (if permissible under the Local Television Multiple Ownership rule) and up to the radio station limit under the Local Radio Multiple Ownership rule for that market, but 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.[119] It also found that the old rules did not promote competition because radio, television, and newspapers generally compete in different economic markets.[120] 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.[121]

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:[122]

- 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 —

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[118] 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.

[119] Report and Order at ¶ 365.

[120] *Id.* at ¶ 332.

[121] *Id.* at ¶ 342.

[122] *Id.* at ¶ 443 ff.

broadcast television, radio, and newspapers — would harm diversity viewpoint.

- 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 had 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.[123] 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.

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[123] Statement of Commissioner Jonathan S. Adelstein Dissenting, FCC News Release, June 2, 2003.

Many aspects of the FCC's 2003 Cross Media Ownership rule were appealed, and while the Third Circuit upheld the conceptual basis for the rule, it remanded and extended the stay of the rule because of it found the Commission did not provide reasoned analysis to support the specific cross media limits that it chose. Specifically, in its *Prometheus* decision, the Third Circuit found that:

- the Commission's decision not to retain a ban on newspaper/ broadcast cross ownership is justified;[124]and
- the Commission's decision to retain some limits on common ownership of different-type media outlets was constitutional and in the public interest;[125] but
- the Commission did not provide reasoned analysis to support the specific cross media limit it chose.[126]

As explained earlier, the Third Circuit identified three problems with the methodology underlying the Commission's bright line rules: (1) the inconsistent treatment of cable television and the Internet; (2) the assignment of equal weight to all media outlets within a media category rather than actual market shares; and (3) allowing some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed.

Legislation.

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. Rep. Hinchey has introduced H.J.Res. 72, a companion resolution of disapproval. The Senate passed S. 2400, the Defense Department Authorization bill, with similar language (S.Amdt. 3465). 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.

The following bills have been introduced but no action has been taken at the committee level. Rep. Stearns has introduced the Broadcast Ownership for the 21st

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[124] *Prometheus*, Slip op. at 48-52.

[125] *Prometheus*, Slip op. at 52-57.

[126] *Prometheus*, Slip op. at 57-78.

Century Act (H.R. 1035), which 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), which would invalidate the FCC cross-ownership rules adopted on June 2, 2003 and reinstate the cross-ownership rules in effect prior to that date. Rep. Hinchey has introduced the Media Ownership Reform Act of 2004 (H.R. 4069), which also would invalidate the cross-media ownership limits adopted by the FCC on June 2, 2003 FCC and reinstate the cross-ownership rules in place prior to that date. In addition, H.R. 4069 would create a broadcast television-cable cross-ownership rule. A licensee of a commercial television broadcast station would be prohibited from owning or controlling a cable television station whose service overlapped any part of the television broadcast station's Grade B contour. The FCC would be prohibited from grandfathering any existing cable-broadcast cross-ownership combinations and also from applying the forbearance clause in Section 10 of the 1996 Telecommunications Act to the proposed cable-broadcast cross-ownership restriction, thus requiring the FCC to enforce the cross-ownership restriction.

Transferability of Ownership

If the stay is lifted and the FCC's new 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 Report and 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.

These transfer restrictions were appealed both by parties that claimed the transfer restrictions were an unconstitutional holding and by parties that claimed the transfers should have been restricted to socially and economically disadvantaged businesses rather than to small businesses. The National Association of Black Owned Broadcasters and other critics of this Commission rule complained 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.

The Third Circuit upheld the transfer restriction set by the FCC as "in the public interest."[127]

Legislative Policy Issues

The FCC's media ownership rules are intended to foster the three major policy goals of competition, diversity, and localism. As explained above, legislation was passed during the 108th Congress directing the FCC to revise its National Television Ownership rule and a number of bills have been introduced that reflect a range of positions on media ownership issues. In addition, ownership issues have been raised in a number of hearings. Since there are other public policies also intended to foster competition, diversity, and localism — for example, utilizing the spectrum more efficiently to create additional voices, fostering the development and deployment of new technologies that may provide additional voices, maintaining public interest obligations on existing broadcast licensees to foster localism — one part of the debate has been how the ownership rules and these other policies can work to reinforce, supplement, or substitute for one another.

At the June 4, 2003 Senate Commerce Committee hearing, members of the committee and all five FCC commissioners discussed the appropriate standard to use for reviewing ownership rules and whether the Act allows the Commission to re-regulate broadcast ownership. All five commissioners stated they would benefit from clarification by Congress. In committee 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. Subsequently, the Third Circuit, in its *Prometheus* decision, explicitly rejected the view that the "repeal or modify" instruction in the 1996 Telecommunications Act requires the Commission to use the review process only to eliminate existing regulations.[128] Given that the language in the *Prometheus* decision differs from that in the earlier *Fox* and *Sinclair* decisions by the D.C. Circuit, the FCC commissioners likely still seek explicit congressional guidance.

Chairman Powell reportedly has stated that, after the *Prometheus* decision, he is not sure if the courts will allow him to continue to pursue a bright line approach to media ownership rules rather than a case-by-case approach.[129] As discussed earlier, the Third Circuit did not reject the concept of bright line rules, only the way the FCC constructed its bright line rules. But it is possible that a bright line rule might not address some of the ownership issues that have been of concern to Congress. In the June 4, 2003 Senate Commerce Committee hearing, Chairman Michael Powell stated that many media ownership concerns are not driven by the broadcasters subject to FCC regulation, but rather by ownership concentration among the content providers on pay platforms (cable and satellite) not subject to public

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[127] Id., Slip op. at 107-112.

[128] Id., Slip op. at 41-42.

[129] Frank Ahrens, "Powell Calls Rejection of Media Rules a Disappointment," *Washington Post*, June 29, 2004, at pp. E1 and E5.

interest regulation. In a similar vein, Senator McCain indicated at that hearing that many ownership concerns are driven by media vertical integration. Current ownership rules do not address these concerns.

Even if the FCC were to meet the requirements of the Third Circuit by constructing broadcast media ownership limits based on the local market shares of the broadcasters and other media outlets, there might be concern that the simple market shares do not reflect actual economic market power or diversity market power. For example, if a locally-owned stand-alone television station has the same ratings in a local market as another local station that is owned and operated by a media giant that also owns multiple cable networks that are shown on the cable and satellite systems serving that local market (and perhaps also owns a national DBS system), some observers would argue that the two local stations should not be accorded the same diversity market share. This highlights the conflict between those who argue for case-by-case analysis of all proposed media ownership transactions in order to have an in-depth picture of the impact on the specific market affected and those who argue that as soon as one gets away from bright line tests and into case-by-case analysis, regulatory uncertainty becomes so great that all merger activity — including mergers that are clearly beneficial to consumers — may be discouraged.

More broadly, this raises the issue of whether and how Congress might craft legislation focused on media market structure beyond the basically horizontal media ownership rules now in effect.

The various hearings in the 108th Congress have identified a number of policies besides ownership limits that affect the goals of media competition, diversity, and localism.[130] The discussions in those hearings suggest that the ownership rules represent just a subset of those existing policies that were implemented before the widespread occurrence of media consolidation and vertical integration and might merit review. For example, small cable companies and consumer groups claim that the media conglomerates that own both broadcast television stations and multiple cable networks have taken advantage of their retransmission consent rights to require cable companies to carry their full suite of cable networks in order to have access to their broadcast signals.[131] This may restrict diversity of voices. The small cable operators have called on Congress to revise the retransmission consent requirement

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[130] See, for example, prepared testimony and transcripts from the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including an Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004.

[131] See the testimony of Bennett Hooks, chief executive officer, Buford Media Group, before the Telecommunications and the Internet Subcommittee of the House energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004. See, also, American Cable Association *Petition for Inquiry into Retransmission Consent Practices*, filed with Federal Communications Commission on October 1, 2002 ("ACA Petition").

to prohibit large integrated broadcasters from imposing such tying arrangements.[132] The media giants respond that they do make their broadcast signals available for rebroadcast transmission at a stand-alone price and, moreover, it was the cable companies that originally preferred to offer cable carriage of the conglomerates' cable networks rather than cash to obtain retransmission consent.[133]

Policies aiming to utilize the spectrum more efficiently in order to create additional voices also can foster the policy goals of diversity, localism, and competition, and perhaps reduce the need for ownership limits. For example, in January 2000, the FCC, recognizing that there was broadcast spectrum going unused that could provide locally-oriented programming, created a new low power FM radio service, limited to noncommercial operations and to maximum radiated power of 100 watts.[134] In response to complaints from existing broadcasters that the new low power FM stations might create harmful radio interference to the reception of existing FM stations, in December 2000 Congress passed the FY2001 District of Columbia Appropriations Act, Section 632 of which[135] required the FCC to impose third-adjacent channel minimum distance separation requirements on low power FM stations,[136] and also to conduct independent field tests and an experimental program to determine whether the elimination of these third-adjacent channel protection requirements would result in low power FM stations causing harmful interference to existing FM stations operating on third-adjacent channels.[137] The FCC hired the Mitre Corporation to perform the study. Mitre delivered its final report to the FCC on June 2, 2003, with the finding that third adjacent locations without distance separation requirements would not create harmful interference. The FCC sought comment on the Mitre report. The National Association of Broadcasters ("NAB") filed comments critical of the report and its findings. Based on the Mitre study and all the comments filed in the proceeding, the FCC reported back to Congress on February 19, 2004, with the recommendation that Congress eliminate the existing third-adjacent minimum distance separation requirements between low power FM and existing full-service FM stations and FM translators and boosters. This would

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[132] See testimony of James M. Gleason, chairman of the American Cable Association and president and chief operating officer of CableDirect, before the Senate Commerce, Science, and Transportation Committee hearing on Media Ownership and Transportation, May 6, 2003.

[133] See, for example, the testimony of Ben Pyne, executive vice president of Disney and ESPN Affiliate Sales and Marketing, before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including an Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004.

[134] Rules were adopted on January 20, 2000 and appeared in the Federal Register on February 15, 2000.

[135] P.L. No. 106-55, § 632, 114 Stat. 2762, 2762A-111 (2000).

[136] If an existing radio station is at 97.1 on the dial, then the first adjacent stations are at 96.9 and 97.3, the second adjacent stations are at 96.7 and 97.5, and the third adjacent stations are at 96.5 and 97.7.

[137] All radio station signals create some level of interference, but in most situations that interference is so limited that it does not affect reception.

allow many additional low power FM stations to be constructed. Explicitly noting that all five FCC commissioners testified at the June 4, 2003 Senate hearing that there has been, in at least some local radio markets, too much consolidation, and that local communities have sought to launch radio stations to meet their local needs, Senator McCain introduced S. 2505, which would implement the recommendations of the FCC, thereby substantially increasing the total number of low power FM stations that could be constructed. The bill was amended during markup in the Senate Commerce Committee to exempt New Jersey from the recommendations due to the high density of population in that state (and therefore greater potential for interference).

The NAB claims that a new broadcast service created by the FCC to provide national radio programming, satellite digital radio, threatens the provision of local programming on broadcast radio stations because the national licensees have begun to offer local weather reports and other informational programming that compete head-on with the programming of local radio broadcasters. The satellite radio providers (XM and Sirius) claim their local programming is limited in scope and meets the needs of mobile listeners who seek weather reports and other information as they travel from one location to another. Representative Pickering has introduced H.R. 4026, which would place limits on localized digital audio radio satellite service programming.

The transition to digital television will allow for more efficient utilization of the spectrum, providing additional spectrum for public safety and wireless broadband and also allowing broadcasters to use digital technology to offer more programming than they can using analog technology. As valuable as the UHF band is for public safety and wireless purposes, it is inferior to the VHF band for the analog transmission of broadcast signals. After the digital transition, the current technological inferiority of UHF to VHF will no longer be an issue. Ownership of a UHF station will not bring with it more limited audience reach. The rationale for treating UHF stations differently from VHF stations will disappear. In its June 2, 2004 Order, the FCC adopted a rule to end the UHF discount for stations owned by the four major television networks — but not for other stations — when the transition to digital television has been completed. When that transition is completed (and likely long before its completion), the current UHF and VHF licensees will have the ability to multicast as many as five channels of programming over their licensed spectrum. This will increase the amount and perhaps diversity of programming available, though it may not result in an increase in the diversity of voices or localism. Congress may want to review the UHF discount — and its impact on the goals of competition, diversity, and localism — in light of the digital transition and in light of some of the policies it develops for that transition. For example, Congress might be concerned that a network comprised entirely of UHF stations offering five channels of broadcast programming could reach 78% of all U.S. television households. This might be of particular concern if that UHF network could impose must carry requirements on all the cable systems serving such a broad portion of all U.S. television households.

At the same time, Congress may be pleased that multicasting and must carry could, with appropriate guidance, help to serve the goals of diversity and localism, and reduce the need for strict ownership limits. For example, Congress might want

to consider the pros and cons of requiring stations that multicast five channels of programming and whose coverage area overlaps multiple states — a very frequent occurrence since state lines often follow rivers that have large population centers on either side of the river — to require, for each state jurisdiction in the television broadcaster's serving area, that at least one of the multicast channels provides state-jurisdiction-specific local coverage. An argument in favor of multicast must carry might be that, with associated local programming requirements, it could foster localism. On the other hand, if a local programming requirement is imposed on broadcasters that choose to use digital technology to multicast, this might artificially incent broadcasters to choose to use their spectrum for HDTV or other purposes, rather than multicasting, just to avoid the burden of providing additional local programming.

More broadly, the FCC recently has adopted a Notice of Inquiry on broadcast localism,[138] seeking information on broadcasters' responsibilities with respect to communication with their local communities, the nature and amount of community-responsive programming, political programming, underserved audiences, disaster warnings, network-affiliation rules, payola and sponsorship identification, voice-tracking, national playlists, and license renewals. As the FCC proceeds with this inquiry, Congress may choose to provide guidance. It is possible that more stringent localism requirements on all broadcasters might reduce concerns about the impact of media ownership consolidation on local programming.

Some observers have been concerned with the impact of media ownership consolidation on control of programming — and hence on the diversity of voices. When television was dominated by three networks, the FCC had financial syndication and network program ownership rules that restricted the ownership stake that networks could have in the programming they carried. These rules were eliminated in the 1990s, after which the networks integrated backward into program production. Some independent program producers allege that, as a result of that vertical integration, they are not able to control the programming they produce, with the consequence that creative programming has been discouraged. For example, they claim if they produce a program for a network and then the network decides not to air the programming, the independent producer is not allowed to try to sell that programming to another network. The large media conglomerates deny that their vertical reach has any harmful effect on consumers or competition. The Media Ownership Reform Act of 2004 (H.R. 4069) would require the FCC to implement rules that restrict the proportion of a broadcast or cable network's prime time programming that can be owned and produced by the network as follows: 60% for the four largest national television broadcast networks; 70% for other national television broadcast networks; 90% for national television networks that have been in operation for less than three years; 65% for cable networks that are owned or controlled by a cable operator with 3,000,000 or more subscribers in the aggregate nationwide or by a national broadcast television network; 75% for any other cable networks.

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[138] *In the Matter of Broadcast Localism,* Notice of Inquiry, MB. Docket No. 04-233, adopted on June 7, 2004, released on July 1, 2004.