Current Legal Status of the FCC's Media Ownership Rules

/name redacted/
Legislative Attorney

August 23, 2010

Congressional Research Service
7-....
www.crs.gov
R41377

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Federal Communications Commission's (FCC) media ownership regulations place limits on the number of broadcast radio and television outlets one owner can possess in a given market and place cross-ownership restrictions on these outlets and on the cross-ownership of broadcast properties and newspapers. The FCC is under a statutory obligation to review these rules every four years to determine whether the restrictions on ownership remain necessary in the public interest as the result of competition. These media ownership regulation reviews have often been controversial. Since the passage of the Telecommunications Act of 1996, the Commission has had little success in relaxing its media ownership rules. The results of the FCC's 2002 review of the rules was largely invalidated by the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC* and remanded to the FCC for further consideration. The FCC responded by folding the Third Circuit's remand order into its *2006 Quadrennial Review* of the Media Ownership Rules. This review sparked its own controversy, as well, and the resulting rule changes have been appealed to the Third Circuit. In conjunction with this appeal, the FCC has commenced its *2010 Quadrennial Review* of its Media Ownership Rules. This report will discuss each of these events in greater detail.

Contents

Contacts

Introduction

The Federal Communications Commission's (FCC) media ownership regulations (1) place limits on the number of broadcast radio and television outlets one owner can possess in a given market and (2) place cross-ownership restrictions on these outlets and on the cross-ownership of broadcast properties and newspapers. The FCC is under a statutory obligation to review these rules every four years to determine whether the restrictions on ownership remain necessary in the public interest as the result of competition.[1] These media ownership regulation reviews have often been controversial. Since the passage of the Telecommunications Act of 1996, the Commission has had little success in relaxing its media ownership rules. The results of the FCC's 2002 review of the rules were largely invalidated by the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC* and remanded to the FCC for further consideration.[2] The FCC responded by folding the Third Circuit's remand order into its 2006 Quadrennial Review of the Media Ownership Rules. This review sparked its own controversy, as well, and the resulting rule changes have been appealed to the Third Circuit. In conjunction with this appeal, the FCC has commenced its 2010 Quadrennial Review of its Media Ownership Rules. This report will discuss each of these events in greater detail.

2002 Biennial Regulatory Review and *Prometheus* Decision

The Commission initiated its 2002 Biennial Review[3] in September of 2002 with a Notice of Proposed Rulemaking announcing that it would review four of its broadcast ownership rules: the national audience reach limit, the local television rule, the radio/television cross-ownership ("one-to-a-market") rule, and the dual network ownership rule.[4] The Commission had previously initiated proceedings regarding the local radio ownership rule and the newspaper/broadcast cross-ownership rule.[5] Those proceedings were incorporated into the Biennial Review.

Results of the 2002 Biennial Review

On June 2, 2003, the Commission adopted a Report and Order modifying its ownership rules.[6] In the Order, the Commission concluded that "neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the 'newspaper/broadcast cross-

[1] Section 202(h) of the Telecommunications Act of 1996, P.L. 104-104.

[2] 373 F.3d 372 (3rd Cir. 2004).

[3] The Telecommunications Act of 1996 required the FCC to review media ownership rules every two years. P.L. 101-104, § 202(h). The Consolidated Appropriations Act of 2004 extended the review cycle to every four years. P.L. 108-199, § 629.

[4] *In the Matter of 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*, 17 FCC Rcd 18503 (2002).

[5] *See* 16 FCC Rcd 19861 (2001) and 16 FCC Rcd 17283 (2001).

[6] *In the Matter of 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003). Hereinafter, cited as Report and Order. For more information on the Commission's media ownership rules, see CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*, by (name redacted).

ownership rule') nor a cross-service restriction on common ownership of radio and television outlets in the same market (the 'radio-television cross-ownership rule') [remained] necessary in the public interest."[7] The Commission found that "the ends sought can be achieved with more precision and with greater deference to First Amendment interests through [its] modified Cross Media Limits ('CML')."[8] The Commission also revised the market definition and the way it counted stations for purposes of the local radio rule; revised the local television multiple ownership rule to permit the common ownership of up to three stations in large markets; modified the national television ownership cap to raise the national audience reach limit to 45%; and retained the dual network rule.

Prometheus Decision

Following the publication of the Commission's Order, several organizations filed petitions for review of the new rules. The Third Circuit Court of Appeals issued its decision in the *Prometheus* case, invalidating a substantial portion of the FCC's order. First the FCC's decision to raise the national television ownership cap to 45% was considered moot because Congress had intervened and set the cap at 39%. Following that holding, a common theme throughout the rest of the Third Circuit's decision to remand many of the rules to the FCC was the court's finding that the FCC failed to provide adequate reasoned bases for its rule modifications. For example, with respect to the Commission's local ownership rules, the court agreed with the Commission's decision to modify these rules in many respects. However, the court found fault with the numerical limits set by the FCC in each of the local ownership rules because the Commission's assumption that all types of media outlets make the same contribution to diversity and competition was unjustified.[9] The court also determined that the Commission's decision to repeal the ban on broadcast/newspaper cross-ownership was justified and supported by evidence in the record and found that the Commission's decision to retain some limits on common ownership was constitutional and not in violation of the Communications Act.[10] However, the court found that the FCC failed to provide reasoned analysis to support the specific limits that it chose with respect to the new "cross-media" rules, stating that the limits "employ several irrational assumptions and inconsistencies," due to what the court found to be questionable methodologies for measuring diversity.[11]

The court in *Prometheus* upheld the restriction on common ownership of the market's top four broadcast television stations, but, again, remanded the numerical limits "for the Commission to harmonize certain inconsistencies and better support its assumptions and rationale."[12] In making its decision, the court found that the Commission had presented evidence in the record to adequately support the "top-four restriction,"[13] while failing to justify the market share assumptions used as the basis for the numerical limits. The court stated that "[n]o evidence supports the Commission's equal market share assumption, and no reasonable explanation

[7] *Id* at ¶ 2.

[8] 373 F.3d 372.

[9] *Id.* at 435.

[10] *Id.* at 397 - 401.

[11] *Id.* at 402.

[12] *Id.* at 412.

[13] *Id.* at 418.

underlies its decision to disregard actual market share."[14] The court upheld the Commission's new definition of local markets with respect to radio finding that the Commission's decision was "in the public interest" and that it was a "rational exercise of rulemaking authority."[15] The court also found that the Commission justified the inclusion of noncommercial stations in the new definition. However, with respect to the numerical limits retained by the Commission, the court concluded that while the numerical limits approach was rational and in the public interest, the Commission failed to support its decision to retain these particular limits with "reasoned analysis."[16] Because, none of the parties bringing the *Prometheus* case challenged the retention of the dual network rule, this was not addressed by the court.

On September 3, 2004, the Third Circuit granted the Commission's motion requesting a partial lifting of the stay to allow those parts of the rules approved by the court in its June 24 decision to go into effect. Specifically, the stay was lifted with respect to the use of Arbitron metro markets to define local markets; the inclusion of noncommercial stations in determining the size of a market; the attribution of stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals; and the imposition of a transfer restriction.

2006 Quadrennial Regulatory Review

On July 24, 2006, the FCC issued a Further Notice of Proposed Rulemaking (FNPR) in the Broadcast Media Ownership proceedings that had been remanded to the Commission in 2003.[17] The FNPR sought comment on new ownership rules that would comport with the Third Circuit's decision in *Prometheus*.[18] Specifically, the FCC sought comment suggesting new rules that would foster "localism;" increase opportunities for ownership among minorities and women; revise the numerical limits placed on cross ownership of local television stations and local radio stations; revise the Diversity Index used to calculate the availability of outlets that contribute to diversity of viewpoints in local media markets; and other suggestions for improvement of existing and proposed rules.[19] The FCC also commissioned multiple studies on media ownership and sought comment on these studies to determine whether and to what extent to take the studies into account in the final ownership rules.[20]

Following the close of all comment and reply comment periods, FCC Chairman Martin proposed that the review of broadcast ownership rules should conclude by adopting a relaxation of the ban on newspaper and broadcast cross-ownership.[21] The proposal also indicated that no changes

[14] *Id.* at 420.

[15] *Id.* at 425.

[16] *Id.* at 426.

[17] *In the Matter of 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (July 24, 2006).

[18] *Id.*

[19] *Id.* For a thorough discussion of the rules proposed in 2002 and the current state of the FCC's media ownership rules, *see* CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*, by (name redacted).

[20] FCC Seeks Comment on Research Studies on Media Ownership, Public Notice, MB Docket No. 06-121 (July 31, 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf.

[21] Press Release, Federal Communications Commission, Chairman Kevin J. Martin Proposes Revision to Newspaper/Broadcast Cross-Ownership Rule (November 13, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf.

would be made in the local television "duopoly" rule, the local radio ownership rule, or the local radio-television cross-ownership rule already in force.

The FCC adopted a revised version of Chairman Martin's proposal to ease the ban on newspaper/broadcast cross-ownership on December 18, 2007.[22] The Report and Order in the proceeding was released on February 4, 2008.[23] The new rule established the presumption that newspaper/*radio* broadcast station cross-ownership in the top 20 largest DMAs is in the public interest, and that newspaper/*television* broadcast station cross-ownership in the top 20 largest DMAs is in the public interest when the television station is not among the top four ranked stations in the market and at least eight "major media voices" would remain in the DMA post-merger.[24] For all other DMAs, the new rule establishes the presumption that newspaper/broadcast station cross-ownership is not in the public interest, except in two circumstances (discussed below).[25] Applicants attempting to overcome a presumption that the proposed combination is not in the public interest will have to demonstrate, through clear and convincing evidence, that the merged entity will increase the diversity of independent news outlets and increase competition among independent news sources in the relevant market.[26] The FCC also has laid out four factors to help inform its evaluation of these proposed combinations.[27]

The new rules identify two circumstances in which the presumption that cross-ownership is not in the public interest will be reversed.[28] The first circumstance adapts the FCC's failed or failing station waivers to newspaper/broadcast combinations.[29] Therefore, when either the broadcast station or the newspaper involved in a proposed combination is "failed" or "failing," the FCC will presume that the proposed combination is in the public interest.[30] The presumption that a combination is not in the public interest also will be reversed when the proposed combination will result in a new source of local news in a market, specifically defined as a combination that would initiate at least seven hours of new local news programming per week on a broadcast station that previously has not aired local news.[31] All other cross-ownership rules and restrictions will remain unchanged.[32]

---

[22] Press Release, Federal Communications Commission, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (December 18, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf.

[23] *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate to Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licensees*, MB Docket No. 06-121, MB Docket No. 02-227, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360 (Released February 4, 2008), 23 FCC Rcd 2010.

[24] *Id.* at ¶¶ 20, 53-62.

[25] *Id.* at ¶¶ 20, 63-75.

[26] *Id.* at ¶ 68.

[27] *Id.*

[28] *Id.* at ¶ 65.

[29] *Id.* at ¶¶ 65-66.

[30] *Id.*

[31] *Id.* at ¶ 67.

[32] *Id.* at ¶ 1.

The FCC also adopted rules in December 2007 to promote diversification of broadcast ownership in a separate order from the newspaper/broadcast station cross-ownership rule ("Diversity Order"). The new rules are intended to allow "eligible entities" to more easily access financing and spectrum by, for example, modifying the distress sale policy to allow a licensee whose licenses were designated for a revocation hearing to sell its station to an eligible entity prior to the commencement of the hearing, revising the FCC's equity/debt plus attribution standard to facilitate investment in eligible entities, and giving priority to any entity financing an eligible entity in certain duopoly situations.[33] "Eligible entities" are defined as "entities that would qualify as a small business consistent with Small Business Administration standards, based on revenue."[34]

The Third Circuit lifted its stay against the enforcement of the rules as modified by the 2006 Quadrennial Review on Mach 23, 2010.[35] The changes to the newspaper/broadcast cross-ownership rule and the "Diversity Order" have been challenged by Prometheus Radio in the Third Circuit Court of Appeals.[36] The case has not been set for oral argument yet.

2010 Quadrennial Regulatory Review and Current Media Ownership Rules

Concomitant with its defense of its previous rulemaking proceedings, the FCC has also launched its 2010 review of its media ownership rules. On May 25, 2010, the FCC issued a Notice of Inquiry (NOI) to begin the proceedings.[37] The NOI asks a number of fundamental questions about the nature of the media market of today and how ownership restrictions benefit or detract from diversity and competition in that market (or those markets, as the definitions may require). Presumably, after reviewing the comments it receives pursuant to this notice, the Commission will then issue a notice of proposed rulemaking with more specific proposals for rule revision. What follows is a description of the current rules governing media ownership, and some of the questions the FCC has posed related to those rules in the NOI.

[33] *In the Matter of Promoting Diversification of Ownership in Broadcasting Services, 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2002 Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Ways to Further Section 257 Mandate to Build on Earlier Studies*, MB Docket No. 07-294, MB Docket No. 06-121, MB Docket No. 02-277, MM docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228 adopted December 18, 2007, released March 5, 2008.

[34] *Id.*

[35] *Prometheus v. FCC*, Order Nos. 08-3078 et al. (3d Cir. Mar. 23, 2010).

[36] *Prometheus Radio v. FCC*, Brief for FCC and United States on Notices of Appeal and Petitions for Review of Orders of the Federal Communications Commission, Nos. 08-3078, *et al.* (3d Cir. Jul 21, 2010).

[37] *In the Matter of 2010 Quadrennial Regulatory REview – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MB Docket No. 09-182 (2010) ("NOI").

Local Television Ownership Limit

Currently, an entity may own two television stations in the same designated market area (DMA) only if (1) the Grade B contours do not overlap, or (2) at least one of the stations is not ranked in the top four stations for audience share in that DMA and at least eight independently owned-and-operated commercial or noncommercial full-power broadcast television stations remain after the merger.[38] The "eight voices" test includes the four major networks in each market, "plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network."[39]

For this rule the FCC has asked, among other things, whether the eight voices test serves its purpose of promoting competition and diversity.[40] The Commission asks if this rule should be considered in the context of the larger market for program delivery, including cable, satellite, and Internet providers, and to what extent the broadcast market should be considered a market of its own. Lastly, the Commission asks how a modification to this rule might affect the market for acquiring content.

Local Radio Ownership Rule

The local radio ownership rules allow a single person or entity to (1) own up to eight commercial radio stations, not more than five of which are in the same service in a radio market with 45 or more stations; (2) own up to seven commercial radio stations, not more than four of which are in the same service in radio markets with between 30 and 44 radio stations; (3) own up to six commercial radio stations with not more than four in the same service, in markets with between 15 and 29 radio stations; and (4) own up to five commercial radio stations, not more than three of which are in the same service in radio markets with 14 or fewer stations, except than an entity may not own more than fifty percent of the stations in a market unless the combination consists of not more than one AM and one FM station.[41] These limits are the same as those imposed by Congress in the 1996 Telecommunications Act. The FCC has not relaxed these ownership limitations in any of its previous ownership rule reviews.

In the NOI, the FCC has asked whether the current limits achieve the goal of preserving competition in the local radio market.[42] Specifically, the Commission asks if it continues to make sense to have subcaps on ownership of stations within the same service (FM and AM), and whether it should take into account other forms of delivery for audio programming (presumably satellite and Internet radio) when determining the ownership caps.

[38] 47 C.F.R. § 73.3555(b).

[39] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2605.

[40] NOI, *supra* note 37 at ¶¶ 83 – 85.

[41] 47 C.F.R. § 73.3555(a).

[42] NOI, *supra* note 37 at ¶ 86.

Newspaper/Broadcast Cross-ownership Rule

The current state of the newspaper/broadcast cross-ownership rule was described in the previous section discussing the results of the *2006 Quadrennial Review*.[43] In the NOI, the FCC asked whether the structure of the rules fits the market.[44] Specifically, the Commission asked what effect the decline in newspaper readership, as consumers get their news more often from non-traditional sources, should have on the ownership restrictions, if any. The Commission also inquired about the extent to which its recent relaxation of this rule would benefit or harm competition and the provision of local news to communities.

Radio/Television Cross-Ownership Rule

This rule allows a single person (or entity) to own up to two television stations and up to six radio stations in markets where at least 20 independently owned voices would remain post-merger.[45] In these markets, a person may alternatively own seven radio stations and one television station. In markets, where at least ten independently owned media voices would remain post-merger, a single entity or person may own up to two television stations and up to four radio stations.[46] An entity can own two television stations and one radio station regardless of the number of voices remaining in the market. This rule is also subject to the local radio and local television ownership rules described above. In relation to this rule, the Commission has asked, among other questions, whether recent technological developments should change the way that media voices are counted in a particular market.

Dual Network Rule

The dual network rule prohibits a merger between the top four networks (ABC, NBC, CBS, and Fox).[47] It otherwise permits common ownership of multiple broadcast networks. With regards to this rule, the Commission has asked if it should refine its approach to consider common ownership of networks more broadly, rather than merely banning common ownership of the top four.[48] Among other general questions, the Commission also asked how a merger of two of the top four might affect access to programming and competition in the market.

Broader Issues

The Commission also asked generally about how to quantify its policy goals of increased competition, localism, and diversity of voices.[49] The Commission noted that there are multiple ways to define each of those terms and inquired as to how to do so more precisely, so as to comport with the demands of judicial review and more clearly achieve the goals of the

[43] *See* 47 C.F.R. § 73.3555(d).

[44] NOI, *supra* note 37 at ¶ 87.

[45] 47 C.F.R. § 73.3555(c).

[46] NOI, *supra* note 37 at ¶ 88.

[47] 47 C.F.R. § 73.658(g).

[48] NOI, *supra* note 37 at ¶ 89.

[49] NOI, *supra* note 37 at ¶¶ 28 – 75.

Communications Act. Furthermore, the Commission inquired as to whether the rules as they are currently structured, should generally remain or if there were more effective ways to define media ownership.[50] For example, the Commission has asked whether it should, as it has generally in the past, maintain bright line rules.[51] In the alternative, the Commission asked about taking a more case-by-case approach to media ownership, as it did when it relaxed the newspaper/broadcast cross-ownership ban by establishing a presumption in favor or against cross-ownership depending on market size. The Commission noted that there were certainly benefits and detractions to each potential course, but sought comment on the potential effects of developing a new strategy for a new media marketplace.

Many other questions were posed by the NOI. The information accepted and analyzed by the Commission in addressing these questions likely will be processed and presented in a notice of proposed rulemaking later in the year.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

Acknowledgments

An earlier version of this report was originally authored by Angie Welborn, Legislative Attorney.

[50] NOI, *supra* note 37 at ¶¶ 90 – 91.

[51] NOI, *supra* note 37 at ¶¶ 92 – 96.