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The FCC's Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity

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Summary

The Federal Communications Commission (FCC) broadcast media ownership rules restrict the number of media outlets that a single entity may own or control. Its attribution rules define which relationships the FCC counts as ownership. The Telecommunications Act of 1996 requires the FCC to review these rules every four years and repeal or modify those it no longer deems to be in the public interest. The 1996 act also directs the FCC to promote policies favoring the diversity of media voices and vigorous economic competition. In 2004 and again in 2011, the U.S. Court of Appeals, Third Circuit, directed the FCC to review its broadcast ownership diversity policies in conjunction with the media ownership rules.

In response to these directives, the FCC issued a notice in March 2014 that included new final rules governing joint sales agreements (JSAs) among television stations and proposed new rules related to the disclosure of shared service agreements between television stations. The FCC's notice also included proposals and general guidelines for the Quadrennial Review of its ownership rules, as well as proposals to foster broadcast ownership diversity. That review is now under way, but is not expected to be complete until 2016.

Separately, the FCC's Media Bureau issued a public notice stating that it will closely scrutinize any proposed transaction that includes "sidecar" agreements in which two (or more) broadcast stations in the same market enter into an arrangement to share facilities, employees, and/or services, or to jointly acquire programming or sell advertising *and* enter into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee. The Media Bureau's public notice differs from the 2001 attribution rules adopted by the full commission, as well as from the affirmation by the full commission of a Media Bureau public notice condoning similar arrangements in 1997.

The FCC's notice and the separate Media Bureau notice have rekindled a debate as to whether the FCC's actions to promote competition enhance or inhibit its goals in promoting the diversity of ownership and programming. Several broadcasters, as well as FCC Commissioner Ajit Pai, assert that JSAs facilitate minority and female ownership and enable the provision of local news and Spanish-language programming. Chairman Tom Wheeler and Commissioner Mignon Clyburn assert that sidecar business models openly circumvent the FCC's local TV ownership rule, impede the ability of potential broadcasters to compete to buy stations that would otherwise be available for sale, and deny opportunities for minority ownership and management. Several parties have initiated court challenges to the FCC's proposed and adopted media ownership and attribution rules; the challenges have been consolidated into one case before the U.S. Court of Appeals for the D.C. Circuit.

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Introduction: Why Regulate Media Ownership?

From the earliest days of commercial radio, the Federal Communications Commission (FCC) and its predecessor, the Federal Radio Commission, have been concerned about diversity in broadcasting.[1] This concern has repeatedly been supported by the U.S. Supreme Court, which has affirmed that "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"[2] and that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[3]

The FCC's current policies seek to encourage four distinct types of diversity[4] in local broadcast media:

- diversity of viewpoints, as reflected in the availability of media content reflecting a variety of perspectives;
- diversity of programming, as indicated by a variety of formats and content, including programming aimed at various minority and ethnic groups;
- outlet diversity, to ensure the presence of multiple independently owned media outlets within a geographic market; and
- minority and female ownership of broadcast media outlets.[5]

The FCC enacted its broadcast media ownership rules (see the "Media Ownership Rules: Current and Proposed" section below)[6] to promote diversity by restricting the number of media outlets that a single entity may own or control. Congress requires the FCC to review its media ownership rules every four years to determine whether they continue to serve the public interest.[7] In

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[1] Johnson-Kennedy Radio Corp. (WJKS), Docket No. 1156, affirmed sub nom F.R.C. v. Nelson Bros. Co., 289 U.S. 266, 270-271 (1933); United States Broadcasting Corp., 2 FCC 208, 233 (1935). Louis Caldwell, "Legal Restrictions on the Contents of Broadcast Programs," *Air Law Review*, vol. IX, no. 3 (July 1938), pp. 229, 246-248.

[2] Associated Press v. United States, 326 U.S. 20 (1945).

[3] Turner Broadcasting System, Inc. v. FCC 512 U.S. 663 (1994).

[4] A fifth type, source diversity (the availability of media content from a variety of content producers), has been the focus of merger proceedings, but in 2002 the FCC determined that this type of diversity was not relevant to its media ownership rules. Federal Communications Commission, "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; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area," 18 *FCC Record* 13633, July 2, 2003 (2002 Biennial Review).

[5] The FCC first began to encourage minority ownership of broadcast stations in 1978, in response to an initiative by President Jimmy Carter. Federal Communications Commission, "Statement of Policy on Minority Ownership of Broadcasting Facilities, FCC 78-322," Public Notice, May 25, 1978, ftp://ftp.fcc.gov/pub/Bureaus/Mass_Media/Databases/documents_collection/78-322.pdf; Jimmy Carter: "Telecommunications Minority Assistance Program Announcement of Administration Program," January 31, 1978. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=29917.

[6] 47 C.F.R. §73.3555.

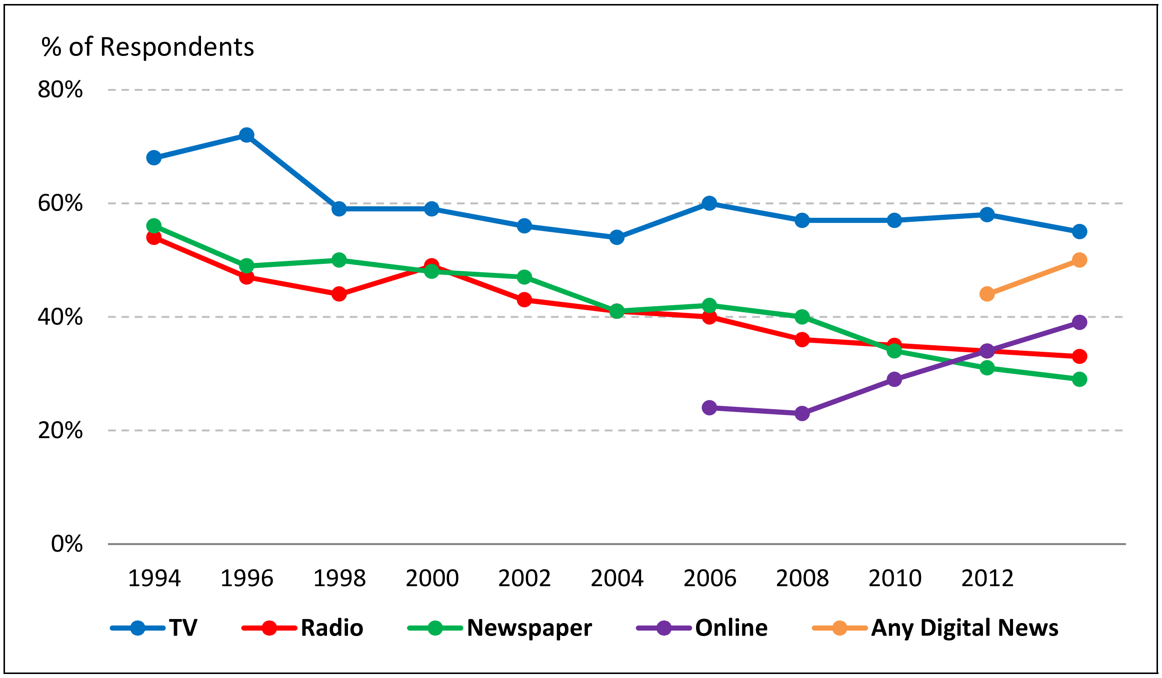
[7] Section 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199) modified Section 202(h) of the Telecommunications Act of 1996 (P.L. 104-104) by instructing the FCC to perform a quadrennial review of all of its broadcast media ownership rules, except the national television ownership rule. The Third Circuit Court of Appeals, rejecting prior analysis by the D.C. Circuit Court of Appeals, determined that Section 202(h) does not carry a (continued...)

assessing the public interest, the FCC also considers localism and competition.[8] Localism addresses whether broadcast stations are responsive to the needs and interests of their communities. In evaluating competition, in contrast to antitrust authorities who consider the prices stations charge to advertisers, the FCC considers whether competition is providing stations adequate incentives to invest in diverse news and public affairs programming.[9]

The rules govern the ownership of broadcast television stations, broadcast radio stations, and broadcast television networks, as well as a broadcaster's ownership of daily newspapers within the broadcast station's local market. The rules do not govern ownership of websites, except those commonly owned by broadcast television, radio, and newspaper outlets, although websites have become increasingly important sources of news (see **Figure 1**).

Figure 1. Where Americans Get News

Percentage of Respondents Who Got News "Yesterday" from Each Platform



Source: Adapted from Pew Research Center, "In Changing News Landscape, Even Television is Vulnerable," September 27, 2012, http://www.journalism.org/media-indicators/where-americans-get-news/.

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presumption in favor of deregulation. Prometheus Radio Project v. FCC, 373 F. 3d 372, 395 (3d Cir. 2004) (Prometheus I); Prometheus Radio Project v. FCC, 652 F.3d 431, 444-445 (3d Cir. 2011) (Prometheus II).

[8] 2002 Biennial Review, p. 13620.

[9] Federal Communications Commission, "Matter of 2014 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, 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, Promoting Diversification of Ownership In the Broadcasting Services, Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets, FCC 14-28, Further Notice of Proposed Rulemaking and Report and Order," 29 *FCC Record* 4371, 4381, April 14, 2014 (2014 Quadrennial Review).

Section 202(h) of the Telecommunications Act of 1996 directs the FCC to review its media ownership rules every four years to determine whether they are "necessary in the public interest as a result of competition," and "repeal or modify any regulation it determines to be no longer in the public interest."[10] Section 257(b) of the Telecommunications Act of 1996 directs the FCC to promote policies favoring the diversity of media voices and vigorous economic competition. In addition, the U.S. Court of Appeals, Third Circuit, has directed the FCC to consider how its media ownership rules impact minority and female ownership of broadcast stations.[11] The FCC must balance this mandate with the requirement that its rules withstand the U.S. Supreme Court's scrutiny of any rules selectively applied to organizations based on the race or gender of their owners.[12]

Many owners of commercial broadcast stations have relationships that fall short of the FCC's definition of common ownership, yet allow the owner of one station to exert substantial influence over the operation and finances of another station. The FCC has been concerned that such arrangements may be structured to circumvent its media ownership rules. To minimize such behavior, the FCC has developed attribution rules "to identify those interests in or relationships to licensees that confer a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[13]

New and Proposed Rules

In March 2014, the FCC adopted a document with four major elements related to media ownership: (1) new rules attributing joint sales agreements between broadcast television stations, (2) proposed rules to require stations to disclose additional joint operating agreements, (3) proposed rules for media ownership, and (4) proposed rules to increase broadcast ownership diversity. The last element, referred to as 2014 Quadrennial Review, incorporated public comments the FCC received via the incomplete 2010 Quadrennial Review. FCC Chairman Tom Wheeler directed the Media Bureau to compete the 2014 review by June 30, 2016.[14]

[10] P.L. 104-104 §202(h), 257 (47 U.S.C. §§303(h), 257).

[11] Prometheus I, 373 F. 3rd 372, 420- 421(3d Cir. 2004), and Prometheus II and 652 F.3d 431, 471(3d Cir. 2011).

[12] Federal Communications Commission, "2014 Quadrennial Review," 29 *FCC Record* 4341, 4492-4493, April 15, 2014. Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Adarand Constructors v. Peña, 515 U.S. 200 (1995). Nevada Dep't of Human Res. V. Hibbs, 58 U.S. 721 (2003). For additional information, see CRS Report RL34269, *Minority Ownership of Broadcast Properties: A Legal Analysis*, by (name redacted).

[13] Federal Communications Commission, "Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Report and Order (R&O), FCC 99-207," 14 *FCC* Record 12559, August 6, 1999. Section 103 of P.L. 113-200, the Satellite Extension and Localism Reauthorization Act, also prohibits a television broadcast station from negotiating a retransmission consent contract jointly with another broadcast station in the same market, regardless of its audience size, unless the FCC considers the stations to be directly or indirectly owned, operated, or controlled by the same entity. Thus, the FCC's attribution rules impact a station's retransmission consent negotiations.

[14] 2014 Quadrennial Review, p. 4583.

Attribution of Joint Sales Agreements

Joint sales agreements (JSAs) enable the sales staff of one broadcast station to sell advertising time on a separately owned station within the same local market. The FCC's new rules specify that television JSAs allowing the sale of more than 15% of the weekly advertising time on a competing local broadcast television station are attributable as ownership or control.[15] The new rules require stations to file attributable JSAs with the commission.[16] Section 104 of the 2014 Satellite Television Extension and Localism Act (P.L. 113-200) delays enforcement of the JSA attribution rules until December 19, 2016.

The FCC stated that parties may seek a waiver of the attribution rules or the duopoly rule (which, as described below, limits ownership of multiple television stations within a market). The parties must demonstrate that a particular JSA, based on the totality of circumstances, does not provide one media property with the opportunity, ability, and incentive to exert significant influence over the other.[17] The FCC stated that a waiver request for a JSA that is limited in scope and duration is more likely to be successful than an open-ended request. The order directs the Media Bureau to prioritize review of any JSA waiver applications.

The new rules were supported by the U.S. Department of Justice (DOJ), which asserted that JSAs provide incentives similar to common ownership, and should be made attributable.[18] They were opposed by several broadcasters, as well as FCC Commissioner Ajit Pai, who asserted that JSAs facilitate minority and female ownership and enable the provision of local news and Spanish-language programming.[19] The text approved by the FCC majority countered that the examples cited by Commissioner Pai include stations involved in various sharing and financing arrangements, which the new JSA attribution rules would not affect.

The National Association of Broadcasters (NAB), Howard Stirk Holdings LLC, and Nexstar Broadcasting Inc. have filed petitions in the U.S. Court of Appeals, D.C. Circuit (D.C. Circuit), arguing the FCC's decision to attribute certain JSAs went too far.[20] Not-for-profit group

[15] 2014 Quadrennial Review, p. 4527. The FCC decided to attribute radio JSAs in 2003. Federal Communications Commission, 2002 Biennial Review, p. 13620. It proposed attributing television JSAs in 2004, and revisited the issue in 2011, but did not make a final decision. Federal Communications Commission, "Attribution of TV JSAs, NPRM, FCC 04-173," 19 *FCC Record* 15238, July 2, 2004; Federal Communications Commission, "2010 Quadrennial Review, NPRM), FCC 11-186," 26 *FCC Record* 17489, 17565-17566, December 22, 2011.

[16] The FCC required television broadcast stations to file attributable JSAs with the commission by November 28, 2014, or, for JSAs entered into after October 28, 2014, within 30 days after execution. Federal Communications Commission, "Media Bureau Announces Requirement to File Certain Television Joint Sales Agreements, DA 14-1555," Public Notice, November 28, 2014, http://www.fcc.gov/document/tv-joint-sales-agreement-filing-deadline.

[17] 2014 Quadrennial Review, pp. 4540-4541. In examining the "totality of circumstances," Media Bureau staff will review the JSA in combination with any other agreements, documents, facts, or information concerning the operation and management of a brokered station.

[18] DOJ, February 20, 2014, *Ex Parte* Comments. These comments were submitted in the 2010 Quadrennial Review proceeding (MB Docket No. 09-182), the Diversity proceeding (MB Docket No. 07-294), and the TV JSA proceeding (MB Docket No. 04-256).

[19] Quadrennial Review, p. 4538, n. 1104 and pp. 4587-4602. Federal Communications Commission, "Office of FCC Commissioner Ajit Pai Releases Results of Broadcast Ownership Diversity Research, Concludes Joint Sales Agreements Disproportionately Benefit Women and African-Americans," press release, March 20, 2014, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0320/DOC-326157A1.pdf.

[20] Howard Stirk Holdings, LLC v. FCC, "Petition for Review of Final Order on Television Joint Sales Agreements," USCA Case No. 14-1090, May 30, 2014 (D.C. Circuit); Nexstar Broadcasting, Inc. v. FCC, USCA Case No. 14-1091, May 30, 2014 (D.C. Circuit) (consolidated with No. 14-1090).

Prometheus Radio Project (Prometheus) has filed a petition in the Third Circuit arguing that the FCC did not go far enough. Prometheus also argued that the FCC failed to comply with the court's prior orders to justify how its proposed media ownership rules would promote ownership by minorities and women.[21] The cases have been consolidated and referred to the D.C. Circuit.[22] In previous cases, the D.C. Circuit ruled that the FCC's statutory requirement to review its media ownership rules carries a presumption favoring deregulation,[23] while the Third Circuit ruled that it does not.[24]

Disclosure of Sharing Agreements

The FCC proposed requiring commercial television stations to disclose all joint operating agreements, broadly encompassed by the term "shared services agreements." Such agreements can take a number of forms. Local marketing agreements (LMAs), formerly known as time brokerage agreements (TBAs), typically allow the licensee of one station to program substantial portions of the LMA partner's broadcast week and to sell advertising time during such segments, subject to the licensee's ultimate editorial control. Local news service agreements (LNSs) may involve the provision of raw news footage to another station in the market, or the sharing of news-gathering equipment such as a helicopter. Shared services agreements (SSAs) may include a range of nonprogramming services such as administration.

The FCC proposed requiring broadcast licensees to report the substance of oral SSAs in writing to the FCC. It asked whether stations should be required to place SSAs in the public inspection files at their studios, online, or both; whether stations should file the contracts with the FCC;[25] and whether the commission should permit licensees to redact confidential or proprietary information.

Two recent studies have found that sharing agreements are widespread. One study estimates that as of 2013, joint agreements of one kind or another existed in 94 out of the 210 total television markets, an increase from 55 in 2011.[26] A 2012 survey of television news directors found that 25% of the 953 broadcast stations that aired local newscasts relied on another station to produce the newscast.[27] In its notice, the FCC tentatively concluded that disclosure of SSAs, as defined in the proceeding, is necessary to enable the FCC and the public to assess the extent of joint

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[21] Prometheus Radio Project. v. FCC, USCA Case No. 14-2814, May 22, 2014 (Third Circuit).

[22] When parties challenge the same case in different circuits of the U.S. Court of Appeals, the U.S. Judicial Panel on Multidistrict Litigation conducts a lottery to see which court will review the case. The D.C. Circuit was selected, but Prometheus is requesting that the D.C. Circuit transfer it to the Third Circuit. John Eggerton, "Briefing Schedule Set in FCC JSA/Media Ownership Challenge," *Broadcasting & Cable*, February 20, 2015, http://www.broadcastingcable.com/news/washington/briefing-schedule-set-fcc-jsamedia-ownership-challenge/138165.

[23] *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F. 3d 148, 159 (District of Columbia 2002).

[24] Prometheus I, 373 F. 3d 372, 395 (3d Cir. 2004); Prometheus II, 652 F.3d 431, 444-445 (3d Cir. 2011).

[25] Pursuant to 47 C.F.R. §73.3613.

[26] Deborah Potter et al., *State of the News Media 2014: A Boom in Acquisition and Content Sharing Shapes Local News in 2013*, p. 2, Pew Research Center, Report, March 2014, http://www.journalism.org/files/2014/03/Local-News-Aquisitions-and-Content-Sharing-Shapes-Local-TV-News-in-2013_Final.pdf.

[27] Bob Papper, *Newsroom Technology, Partnerships Stabilize*, Radio Television Digital News Association, June 2013, http://rtdna.org/article/newsroom_technology_partnerships_stabilze#.UnKnifmshSi.

operations and collaborations between independently owned commercial television stations, and the agreements' impact on the FCC's policy goals.

The FCC observed that its rules define LMAs and JSAs, but not other types of sharing agreements between television stations. The FCC tentatively concluded that it should define SSAs as

> any agreement or series of agreements, whether written or oral, in which (1) a station, or any individual or entity with an attributable interest in the station, provides any station-related services including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not under common ownership (as defined by the FCC's attribution rules); or
>
> (2) stations that are not under common ownership (as defined by the FCC's rules), or any individuals or entities with an attributable interest in those stations, collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.

In addition, the FCC proposed that the definition of "SSA" encompass agreements involving any entities, including the parent companies of the stations, in which one independently owned station provides station-related services for another station, using the same employees for both. It seeks comment on whether it should expand the requirements to cover commercial radio stations and/or noncommercial television stations as well.[28]

Media Bureau "Sidecar" Policy Statement

"Sidecar" business models involve contingent (financial) interest agreements as well as operational agreements described above.[29] In 2012 and 2013, the FCC Media Bureau reviewed 22 transactions involving the sale of 31 stations that included a JSA. In each case, the JSA included the sale of 100% of the brokered station's advertising time.[30] Moreover, of those 22 transactions, 20 involved some type of contingent interest agreement, such as an option, right of first refusal, put/call arrangement, or loan guarantee.[31]

[28] 2014 Quadrennial Review, pp. 4522-4524.

[29] Keach Hagey, "Sinclair Draws Scrutiny Over Growth Tactic; TV Station King Uses 'Sidecars' to Skirt Ownership Limits," *Wall Street Journal*, October 20, 2013; Phil Verveer, Senior Counsel to Chairman Wheeler, *How the Sidecar Business Model Works*, Federal Communications Commission, March 6, 2014, http://www.fcc.gov/blog/how-sidecar-business-model-works.

[30] 2014 Quadrennial Review, p. 4528, n. 1041.

[31] Ibid., n. 1047.

What Are Contingent Interest Agreements?

- An option is a privilege or right that the owner of property (the "optionor") gives to another person (the "optionee") to engage in a transaction at a fixed price within a certain period.

  • For example, Station A may pay Station B, located within the same market, $10,000 for a right to purchase it for $2 million within an eight-year period (a call option).

  • Conversely, Station B may retain the right to require Station A, located within the same market, to purchase its assets for $2 million within an eight-year period (a put option).
- A right of first refusal gives Station A a contractual right to buy Station B before anyone else can. Typically, Station B is obligated to offer the property to Station A upon the same terms as those offered by any third party. If Station A declines to exercise its right, Station B is free to sell itself to another buyer.
- A loan guarantee is a promise by Station A (the guarantor) to assume a debt obligation of Station B if Station B defaults. A guarantee can be limited or unlimited, making the guarantor liable for only a portion or all of the debt.

In February 2014 comments filed with the FCC, the DOJ stated that "combinations of SSAs, LNS agreements, purchase options, substantial loan guarantees, or other engagements can confer similar degrees of controls as JSAs, or may preserve some competition between the participants, depending on their precise terms." The DOJ recommended that the FCC analyze such agreements on a case-by-case basis."[32]

In March 2014, the Media Bureau issued a public notice stating that it would closely scrutinize any application in which two (or more) stations in the same market propose to

1. enter into an arrangement to share facilities, employees, and/or services, or to jointly acquire programming or sell advertising, including a JSA, an LMA, or any other arrangement that would have the same practical operational or financial effect as any of these agreements, *and*
2. enter into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee.

The Media Bureau added that applicants would bear the burden of showing that its approval of a proposed transaction would be consistent with the public interest, convenience, and necessity.[33]

The public notice differs from the FCC's affirmation of a notice that the Media Bureau issued in 1997 approving of similar agreements. It also differs from the FCC's 2001 interpretation of its attribution rules, and from the Media Bureau's decisions in published cases from December 2004 through December 2013.[34]

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[32] Department of Justice, February 20, 2014, *Ex Parte* Comments, p. 16. These comments were submitted in the 2010 Quadrennial Review proceeding (MB Docket No. 09-182), the Diversity proceeding (MB Docket No. 07-294), and the TV JSA proceeding (MB Docket No. 04-256).

[33] Federal Communications Commission, "Broadcast TV Applications Proposed Sharing Arrangements, 29 *FCC Record* 2647, 2648, March 12, 2014. Federal Communications Commission," Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Agreements and Contingent Interests," press release, March 11, 2014, http://www.fcc.gov/document/commissioner-pais-statment-media-bureaus-new-guidance.

[34] Federal Communications Commission, "Processing of Applications Proposing Local Marketing Agreements," Public Notice, June 1, 1995, 1995 FCC Lexis 3593, Mimeo No. 54161. Federal Communications Commission, "Applications of: Priscilla A. Schwier, et al. (Transferor) and SJL Communications, L.P. (Transferee); for Consent to the Transfer of (continued...)

In a blog post, however, Chairman Tom Wheeler and Commissioner Mignon Clyburn characterized the sidecar business models as "openly circumventing [the FCC's] local TV ownership rule, which generally forbids ownership of more than one station in a local market. The effect [of these business models] was to deny opportunities for minority ownership and management."[35] They added that by tying up stations as sidecars, major broadcasters impede the ability of truly independent would-be broadcasters to compete to buy stations that would otherwise be available for sale.

Delegated Authority vs. Commission Votes

Commissioners Ajit Pai and Michael O'Reilly issued statements objecting to the Media Bureau's sidecar policy on procedural grounds. They claimed that, rather than a clarification of existing policy issued under the Media Bureau's delegated authority, the notice constituted a policy change that should have been subjected to a vote by the full Commission.[36]

Part 0 of Title 47 of the *Code of Federal Regulations* contains provisions related to the FCC's organization. Specifically, 47 C.F.R. §0.283 delegates authority to the chief of the FCC's Media Bureau to perform all functions of the bureau, with two key exceptions:

- notices of proposed rulemaking and of inquiry and final orders in such proceedings,[37] and
- matters that present novel questions of law, fact, or policy that cannot be resolved under existing precedents and guidelines.

Matters falling under the criteria described above, must, per the FCC's own rules, be referred to the five FCC commissioners for a vote.[38]

On February 18, 2015, Representative Fred Upton, chairman of the House Committee on Energy and Commerce; Representative Greg Walden, chairman of the House Subcommittee on Communications and Technology; and Representative Tim Murphy, chairman of the House Subcommittee on Oversight and Investigation, jointly wrote a letter to FCC Chairman Tom Wheeler expressing concern about the FCC's use of delegated authority, including the Media Bureau's public notice concerning sidecar arrangements. They requested that the FCC submit information and documents about this practice.[39]

(...continued)

Control of Station WICU-TV, Erie, PA; Erie Broadcasting, Inc. (Assignor) and NV Acquisition (Assignee); for Consent to the Assignment of License of Station WFXP (TV), Erie, PA, Memorandum Opinion and Order, FCC 97-313," 12 *FCC Record* 20769, September 22, 1997. Federal Communications Commission, "Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, FCC 00-438, Memorandum Opinion and Order," 16 *FCC Record* 1097, 1112-1113, January 19, 2001. Federal Communications Commission, "Applications from Shareholders of Belo Corp. to Gannett Co., Inc. et al., Memorandum Opinion and Order," 28 *FCC Record* 16867, 16878, n. 81, December 19, 2013.

[35] Chairman Tom Wheeler and Commissioner Mignon Clyburn, "Making Good on the Promise of Independent Minority Ownership of Stations," Federal Communications Commission, Official FCC Blog, December 4, 2014, http://www.fcc.gov/blog/making-good-promise-independent-minority-ownership-television-stations.

[36] Federal Communications Commission, "Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Agreements and Contingent Interests," press release, March 11, 2014, http://www.fcc.gov/document/commissioner-pais-statment-media-bureaus-new-guidance; Federal Communications Commission, "Statement of Commissioner Michael O'Rielly on the Media Bureau's New Guidance on Sharing Agreements and Contingent Interests," press release, March 12, 2014, http://www.fcc.gov/document/orielly-statement-media-bureaus-guidance-sharing-arrangements.

[37] 47 C.F.R. §0.283(a).

[38] 47 C.F.R. §0.283(c).

[39] Letter from Reps. Fred Upton, Chairman, House Committee on Energy and Commerce, Tim Murphy, Chairman, House Subcommittee on Oversight and Investigations, and Greg Walden, Chairman, Subcommittee on (continued...)

Table 1 summarizes past, present, and proposed FCC and Media Bureau rules and policies related to operational and financial agreements between television stations.

Table 1. FCC Rules, Proposals, and Guidelines Regarding Television Station Programming, Sales, Operating, and Financing Agreements

Past, Current, and Proposed

	Time Brokerage and Local Marketing Agreements	Joint Sales Agreements	Shared Services Agreements	Local Marketing Agreements plus Financing	Financing	Joint Sales/Shared Services Agreements Plus Financing
Status	TBAs: Policy statement supporting diversity of voices) LMAs: Final rule	Final rule	Proposed rule	(1) Processing guidelines, public notice, interim interpretive statement of FCC rules (2) Processing guidelines, public notice (silent re: Media Bureau's reading of FCC rules)	Final rule	Processing guidelines, public notice (Silent re: Media Bureau's interpretation of FCC rules)
Decisionmaker	TBAs: Policy statement: FCC in 1980 LMAs: Attribution rules: FCC in 1999	FCC (3-2 vote) in 2014	FCC (3-2 vote) in 2014	(1) Chief, Mass Media Bureau, June 1995 (affirmed by full FCC in 1997) (2) Chief, Mass Media Bureau, March 2014, pursuant to delegated authority	FCC	Chief, Mass Media Bureau, March 2014, pursuant to delegated authority
Agreements covered	One station brokers more than 15% of weekly broadcasting hours of another	One station sells more than 15% of weekly advertising time of another	Any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support	(1) (a) LMA plus (b) arms-length loan for station acquisition *or* option to purchase station (2) (a) LMA plus (b) loan guarantee *or* option, right of first refusal, or similar contingent interest	Options, warrants, and other nonvoting interests	(1) JSA or SSA plus (2) loan guarantee *or* option, right of first refusal, or similar contingent interest

(...continued)

Communications and Technology, to Tom Wheeler, Chairman, Federal Communications Commission, February 18, 2015, http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150218FCC.pdf.

	Time Brokerage and Local Marketing Agreements	Joint Sales Agreements	Shared Services Agreements	Local Marketing Agreements plus Financing	Financing	Joint Sales/Shared Services Agreements Plus Financing
Attributable?	Yes, if one station brokers more than 15% of weekly broadcasting hours of another	Yes, if one sells more than 15% of weekly advertising time of another	To be determined—FCC must collect data first	(1) To be determined—pending attribution rulemaking. Media Bureau would approve LMA plus loan, or LMA plus option, but not all three (2) Media Bureau unlikely to approve LMA plus loan, option, or other contingent interest; applicants bear burden of proof to show that the combination of agreements is not attributable	Not ordinarily attributable until conversion affected	Applicants bear burden of proof to show that combination of agreements is *not* attributable
Must agreement(s) be filed with FCC?	Yes, as of 1999 1945-1972: yes 1972-1999: no	Yes, as of 2014	Issue pending—FCC tentatively concludes yes	Yes, when filing applications	Silent	Yes, when filing applications
Must agreement be included in station's public file?	Yes, as of 1999 1972-1999: at station, available to public upon request	Yes, for *all* JSAs as of 2001 Public files available on FCC website as of 2012	Issue pending—FCC tentatively concludes yes	Silent	Silent	Silent
Entities covered	Station receiving TBA services only	Station receiving JSA services only	Tentatively proposed commercial TV only	Applicants seeking transfer or assignment of TV and radio broadcast licenses	Silent	Applicants seeking transfer or assignment of TV and radio broadcast licenses
Waivers / grandfathering	Pre Nov. 4, 1996, LMAs grandfathered	Expedited review of waiver process				(Potentially for eligible entities?)
Compliance deadline	Aug. 5, 2001, for duopoly rule	Nov. 28, 2014, for filing agreements with FCC; Dec. 19, 2016, for duopoly rule				

Source: FCC rulemakings, FCC Notices, Media Bureau notices available via Lexis.

Media Ownership Rules: Current and Proposed

The following summarizes the current and proposed local media ownership rules, as described in the 2014 Quadrennial Review. For more information about the rationale, public policy analysis, proposed waiver criteria, and proposed grandfathering of the local media ownership rules, see **Table 6**.

Local Television Ownership Rule (Television Duopoly Rule)

Under the current local and proposed television ownership rule, known as the "TV duopoly" rule, an entity may own or control two television stations in the same television market, so long as the overlap of the stations' signals is limited and the joint control does not violate the "top four/eight voices test." The proposed modification would change the applicable signal contours to reflect stations' transition to digital television. Markets would be those defined as Designated Market Areas (DMAs) by the Nielsen Company, which has assigned each county in the United States to a specific DMA based on the pattern of residents' viewing of broadcast television stations.[40]

Table 2 summarizes both the current and proposed rules.

[40] 2014 Quadrennial Review, pp. 4418, 4378.

Table 2. Current and Proposed TV Local Ownership (Duopoly) Rules

Permitted Combinations of TV Stations in a Market

	Signal Overlap	Top 4/8 Voices Test
Current Rule	The Grade B contours[a] of the stations do not overlap	(a) At least one of the stations is not among the four highest-ranked stations in the DMA,[b] *and* (b) at least eight independently owned and operating commercial or noncommercial full-power broadcast television stations would remain in the DMA after the proposed combination is consummated[c]
Proposed Rule	The digital noise limited service contours (NLSC)[d] of the stations do not overlap	
Waiver	If one station fails/is failing;[e] as part of diversity order, the FCC proposed to reinstate failed station solicitation rule to facilitate entry	

Source: 2014 Quadrennial Review.

Notes: The FCC first adopted the duopoly rule in 1941. Federal Communications Commission, "Experimental and Commercial Television Broadcast Stations," 6 *Federal Register* 2282, 2284-2285, May 6, 1941. This was the year that commercial television service first became available in the United States. The FCC adopted the Grade B signal contour component of the rule in 1964. Federal Communications Commission, "Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 64-445," 29 *Federal Register* 7535, June 12, 1964.

a. Grade B is a measure of signal intensity associated with acceptable reception when a television signal is being transmitted using analog technology. The FCC's rules define this contour, represented by a circle drawn around the transmitter site, in such a way that 50% of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90% of the time. Although a station's predicted signal strength increases as one gets closer to the transmitter, there may be some locations within the Grade B contour that do not receive a signal of Grade B intensity.

b. The FCC uses Designated Market Areas (DMAs) constructed by the Nielsen Company to define local television markets. Nielsen has constructed 210 DMAs by assigning each county in the United States to a specific DMA, based on the predominance of viewing of broadcast television stations licensed to operate in a given Standard Metropolitan Statistical Area.

c. 47 C.F.R. §73.3555(b).

d. As determined by 47 C.F.R. §73.622(e).

e. 2014 Quadrennial Review, pp. 4397-4398.

The "top four ranked" stations in a local market generally are the local affiliates of the four major English-language broadcast television networks—ABC, CBS, Fox, and NBC. In some television markets, however, other stations may emerge within the top four. For example, in Chicago, independent station WGN-TV and Univision affiliate WGBO-TV have ranked among the top three stations during certain time periods.[41] The rule applies to the stations' ranking at the time they apply for common ownership. The FCC proposed prohibiting "affiliation swaps," that would enable broadcast licensees to obtain control over two of the top four stations in a market through

[41] "Chicago's November TV Sweeps Ratings Wrap-Up," *Chicagoland Radio and Media*, December 6, 2013, http://chicagoradioandmedia.com/news/6185-chicago-s-november-tv-sweeps-ratings-wrap-up. In the 2014 Quadrennial Review, the FCC stated while that the ratings "cushion" between the fourth- and fifth-rated television stations does not exist in every market, the fact that such a cushion exists in most markets supports its decision to retain the top-four prohibition. 2014 Quadrennial Review, p. 4390, n. 111.

an exchange of network affiliations with other licensees, such as occurred in Honolulu, HI, in 2011.[42]

The "eight voices" test effectively limits duopolies to larger television markets, which have more separately owned television stations than smaller markets. For example, the largest television market, New York City, has more than 15 full-power commercial broadcast television stations (excluding satellite stations) and four duopolies (owned by Comcast NBC Universal, Fox Television, CBS, and Univision).[43] The Burlington, VT-Plattsburgh, NY, television market, which is ranked number 98 as of the 2014-2015 television season, has four full-power commercial television stations (excluding satellites), including two separately owned stations (an ABC affiliate licensed to Mission Broadcasting and a FOX affiliate licensed to Nexstar Broadcasting) that operate pursuant to a joint sales agreement.[44]

The FCC proposed to retain the failed station solicitation rule, reiterating its assessment in 1999 that the rule promotes new entry in a local television market by ensuring that entities located outside of the DMA that are interested in purchasing a station, including those owned by minorities and women, will have an opportunity to bid.[45]

[42] In addition to switching network affiliations, the parties swapped nonnetwork programming and call signs. 2014 Quadrennial Review, pp. 4390-4393. At the time of the Honolulu transaction, the Media Bureau found that the transaction technically complied with the duopoly rule. Ibid., p. 4392, n. 119. The FCC put parties on notice, however, that "similar efforts to evade the media ownership rules could be subject to enforcement action." Ibid., p. 4392, n. 125.

[43] CRS analysis of SNL Kagan, TV Stations by Market (database).

[44] *TV & Cable Factbook, Stations*, ed. Albert Warren, 83 ed., vol. 2 (Washington, DC: Warren Communications News, 2015), pp. A-1319–A-1323, and Federal Communications Commission, TV Station Profiles and Public Inspection Files, WVNY, https://stations.fcc.gov/collect/files/11259/Joint%20sales%20agreements/WVNY%20JSA%20%2814169448663782%29.PDF.

[45] 2014 Quadrennial Review, p. 4402, n. 182. The FCC noted that it does not collect data regarding sales of failed or failing stations. Ibid., p. 4507, n. 917.

Local Radio Ownership Rules

The FCC proposed to retain the local radio ownership rules without modification.[46]

Table 3 illustrates the current rules.

Table 3. FCC Local Radio Ownership Rules

Number of Commercial Radio Stations in Market	Number of Full Power Commercial and Noncommercial Radio Stations Under Common Ownership Permitted	Number of Stations Within Same Service (AM or FM) Under Common Ownership Permitted
45	8	5
30-44	7	4
15-29	6	4
14 or fewer	5	3

Source: 47 C.F.R. §73.3555(a).

Notes: The FCC bases its definition of "radio markets" on those provided Nielsen Audio (formerly known as Arbitron). These markets, called "metros," generally correspond to the metropolitan statistical areas defined by the U.S. government's Office of Management and Budget, but are subject to exceptions based on historical radio listening patterns and other marketing considerations. (The Nielsen Company, *Arbitron eBook Reference Guide*, 2009, p. 46, http://www.nielsen.com/content/dam/corporate/us/en/docs/nielsen-audio/guide-to-understanding-and-using.pdf.)

In contrast to television markets, radio markets do not include every U.S. county. (Americanradiohistory.com, Arbitron Reports and Data of Interest, Metropolitan Survey Area Maps, 2013 Metro Radio Metro Areas Hi-Res, http://www.americanradiohistory.com/Archive-Arbitron/2013_RadioMetroMap_hi-res.pdf.)

In 2003, as part of its 2002 media ownership review, the FCC proposed that for stations located outside of metro areas, it would base its radio ownership rules on the overlaps of their radio signals, and would require proposed JSAs involving such stations to be filed within 60 days of the effective date of its decision in a pending rulemaking. (2002 Biennial Review, pp. 13724, 13746.) As of 2015, that rulemaking is still pending.

[46] 2014 Quadrennial Review, pp. 4402-2217.

Radio/Television Cross-Ownership Rules

The FCC proposed to repeal its radio/television cross-ownership rules.[47] The current rules restrict common ownership of multiple television and radio stations, depending on the number of independent media owners that would remain in the local market.

Table 4 illustrates the current rules.

Table 4. FCC Radio/Television Cross-Ownership Rules

Permitted Combinations Based on Independently Owned Media Outlets

Number of Independently Owned Media "Voices" Post-Merger	Number of TV Outlets	Number of Radio Outlets
20	1	7
20	2	6
10	2	4

Source: 47 C.F.R. §73.3555(c)(2).

Notes: The FCC triggers the cross-ownership rules when the signal of one station encompasses the city to which the other station is licensed by the FCC. 47 C.F.R. §73.3555(c)(1). The rules do not apply to noncommercial stations.

Newspaper/Broadcast Cross-Ownership (NBCO) Rule

The FCC proposed to repeal its radio/newspaper cross-ownership rules.[48] It proposed to retain the general prohibition on the cross-ownership of newspapers and television stations, but consider waivers on a case-by-case basis, based on published guidelines of circumstances that the FCC would deem to be in the public interest.[49]

[47] 2014 Quadrennial Review, pp. 4460-4471.

[48] 2014 Quadrennial Review, pp. 4435-4438. It noted that research shows most radio stations do not produce significant amounts of local news and that most consumers do not rely on radio stations as their primary source of local news. Ibid., p. 4419.

[49] 2014 Quadrennial Review, pp. 4438-4460.

Current Rules

Table 5 summarizes the current rules.

Table 5. Broadcast/Newspaper Cross-Ownership Rules

Prohibited Combinations Based on Signal Overlap

Broadcast Outlet	Signal
Full power television station	Grade A service contour[a]
Full power AM radio station	Predicted or measured 2 millivolt per meter contour[b]
Full power FM radio station	1 millivolt per meter contour[c]

Source: 47 C.F.R. §73.3555(d); C.F.R. §73.3555, note 6.

Notes: The applicable geographic area is the community in which the newspaper is published. The FCC triggers the newspaper/ broadcast cross-ownership rules when the signals of the broadcast or radio television stations overlap the newspaper's entire community. For the purposes of these rules, the FCC defines a daily newspaper as "one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication."

a. A Grade A service contour maps the geographic area that is predicted by an engineering model to receive a broadcast television signal at an intensity associated with good reception.

b. A 2 millivolt-per-meter (2 mv/m) contour maps the geographic area that is predicted by an engineering model or measured to receive a radio signal of that intensity.

c. A 1 millivolt-per-meter (1 mv/m) contour maps the geographic area that is predicted by an engineering model or measured to receive a radio signal of that intensity.

A broadcaster may start a new daily newspaper in a local market in which it owns a television or radio station, but may not combine with an existing newspaper.

The FCC currently considers waivers of the NBCO rules in four situations:

1. the entity is unable to dispose of a financial interest in a newspaper or station in order to conform to the NBCO rules;
2. the entity can sell a newspaper or station only at an artificially depressed price;
3. the entity's divestiture of a newspaper or station would not serve the rules' purposes; or
4. the community in which the newspaper is published cannot support separate ownership of the newspaper and station.[50]

Under the commission's current practice, if a television licensee purchases a newspaper that triggers the NBCO rule, then, absent a waiver, it must dispose of its station within one year or by the date of its next license renewal, whichever is later.[51] Alternatively, the television station licensee may seek a waiver of the rule in conjunction with its license renewal, at which point

[50] These waiver criteria have been effective since the FCC adopted the NBCO rules in 1975. FCC Media Bureau, "Tribune Company and its Licensee Subsidiaries, et al., Memorandum Opinion and Order, DA 12-1258," 27 *FCC Record* 14239, 14247, November 16, 2012 (citing Federal Communications Commission, "1975 Media Ownership Second Report and Order, FCC 75-104," 50 *FCC Reports, Second Series,*1046, 1084-1085, January 31, 1975).

[51] 2014 Quadrennial Review, p. 4379.

interested parties are free to comment on the waiver request. As a result, the opportunity to comment on a television station's acquisition of a newspaper may not occur until many years after consummation of the purchase.

Proposed Television/Newspaper Cross-Ownership Rules

The FCC proposed to modify its television/newspaper cross ownership rule by prohibiting common ownership under the following conditions:[52]

1. the broadcast television station's community of license (by the FCC) and the newspaper's community of publication are located within the same DMA, *and*
2. the broadcast television station's principal community contour (PCC)[53] encompasses the newspaper's entire community of publication.

The FCC also seeks comment on whether it should adopt a pure case-by-case approach to considering waivers. Alternatively, the commission might evaluate applications with the presumption that an application involving one of the 20 largest DMAs would be approved if it does not involve a television station ranked among the top four in the DMA, and if at least eight major media voices would remain in the DMA following the transaction. All other waiver applications would be considered with a negative presumption.

The FCC seeks comment on whether, to enable a timely public response to a merger involving a newspaper purchase by a television licensee, it should require the station to file its waiver request prior to a newspaper acquisition, rather than at the time of the station's license renewal, and whether commission staff should place such waiver requests on public notice.[54]

Table 6 summarizes the proposed local media ownership rules. The digital broadcast signals the FCC proposed to include in the duopoly and NBCO rules are slightly different, but the FCC does not explain why. The FCC's public interest rationales for retaining or repealing the various rules also differ. For example, the commission states that TV stations that combine operations with newspapers or radio stations might increase the overall output of local news in a community, due to efficiencies they might realize. On the other hand, it states that TV stations that operate separately are more likely to increase news production, due to their incentives to compete.

[52] 2014 Quadrennial Review, pp. 4420, 4441-4442. The FCC would trigger the television NBCO rule only if both conditions are met.

[53] The PCC is defined in 47 C.F.R. §73.625. It is a digital signal contour that ensures reliable service for the community of license.

[54] 2014 Quadrennial Review, p. 4439. Such a prohibition would mirror antitrust laws, which prohibit the premature combining of parties ("gun jumping"). Adam Eckart, "Jumping the Gun: Navigating Antitrust Laws before Closing the Merger," *American Bar Association*, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/jumping_gun_navigating_antitrust_laws.html.

Table 6. Summary of Proposed Local Media Ownership Rules

Proposals, Waivers, and Grandfathering

	TV Local Ownership (Duopoly)	TV-Newspaper Cross-Ownership	Radio-Newspaper Ownership	Radio-TV Cross-Ownership	Radio Local Ownership
Proposal	Modify	Modify	Repeal	Repeal	Retain
Acceptable combinations	TV stations' digital noise limited service contours (NLSC)[a] (proposed) do not overlap Top 4/8 voices test	TV station's principal community contour (PCC) (proposed) does not encompass newspaper's entire community of publication	Any	Any	Varies by number of radio stations in market
Geographic area	TV stations' DMAs, as defined by Nielsen	Newspaper's community of publication/TV station's DMA (proposed)	Overlap of newspapers' community of publication/radio stations' signals		Radio stations' "metros," as defined by Nielsen
Special waiver criteria	Failed/failing station	Favorable presumption: • top 4/8 voices test; • top 20 DMAs Negative presumption otherwise (proposed)	Not applicable	Not applicable	None
Failed station solicitation rule	Yes	None proposed	Not applicable	Not applicable	None proposed
Grandfathering (based on proposed rule change)	Existing combinations that would violate duopoly rule under revised contour signal standard (proposed)	Existing combinations that would violate NBCO rules under revised contour signal standard (proposed)	Not applicable	Not applicable	None proposed
Are grandfathered combos transferable?	No (proposed)	No (proposed)	Not applicable	Not applicable	Not applicable

Source: 2014 Quadrennial Review.

Note: The FCC seeks comment on all of its proposals.

a. As determined by 47 C.F.R. §73.622(e).

Table 7 summarizes the FCC majority's proposed public policy rationales for maintaining, revising, or repealing the local media rules. Its rationales for revising the television duopoly rule are internally inconsistent. When discussing the rule itself, the majority tentatively concludes that it need not discuss the rules' impact on localism and viewpoint diversity because the rules remain necessary to foster competition. When rebutting a broadcaster's comment, however, the majority states that the television duopoly rule is based on a broader concern of promoting localism and diversity as well as competition. It also states that efficiencies from joint operations of television and radio stations, or newspapers and television stations, could promote localism by enabling these outlets to invest in more local programming, while competition from separately owned television stations is necessary to achieve the same outcome.

Table 7. Summary of Public Interest Rationales for Local Media Ownership Rules

	TV Local Ownership (Duopoly)	TV-Newspaper Cross-Ownership	Radio-Newspaper Ownership	Radio-TV Cross-Ownership	Radio Local Ownership
Are rules necessary to promote competition?	Yes Rules enable TV stations to compete for revenues from (1) advertising (broadcast TV is separate product market) and (2) retransmission consent.	No (Newspapers and TV stations are separate product markets)	No (Newspapers and radio stations are separate product markets)	No (TV and radio stations are separate product markets)	Yes (Broadcast radio is separate product market for listeners and advertisers)
Are rules necessary to promote localism?	FCC need not consider (n. 106) *but* Retention of rules is consistent with localism; competition-based rules can promote localism (p. 4377) *and* Yes, rules are based on FCC's broader concern of promoting localism (n. 1108)	No *but* case-by-case waiver might promote localism; combined operations might increase news production	No	No *but* repeal of rule might increase localism Joint broadcast operations might lead to investment in TV and radio news operations, thanks to financial efficiencies	Yes Competitive market promotes localism
Are rules necessary to promote viewpoint diversity?	FCC need not consider (n. 106) *but* Competition-based rules can promote viewpoint diversity (p. 4377) *and* Yes, rules are based on FCC's broader concern of promoting viewpoint diversity (n. 1108)	Yes Newspapers, TV stations, and associated websites remain primary sources of local news	Seeks comment Commercial radio stations do not produce much local news; most consumers do not rely on commercial radio stations as primary sources of local news	No	Yes Rules enable entry into broadcast radio industry

	TV Local Ownership (Duopoly)	TV-Newspaper Cross-Ownership	Radio-Newspaper Ownership	Radio-TV Cross-Ownership	Radio Local Ownership
Are rules necessary to promote minority/female ownership of broadcast stations?	No *but* competition can indirectly promote minority/female ownership of TV stations Proposed FSSR would promote entry by enabling out-of-market entities, including women and minorities, to bid for stations they might not otherwise know are for sale	No	No	No Record does not indicate that minority/female-owned radio stations contribute to viewpoint diversity	Yes AM stations provide low-cost ownership opportunities for minorities and women to enter broadcast radio industry

Source: 2014 Quadrennial Review.

Note: The FCC seeks comment on its analyses.

Dual Network Rule

The FCC proposes to retain the dual network rule without modification, in order to foster its goals of preserving competition and localism.[55] The dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top-four" networks (ABC, CBS, Fox, and NBC).

The FCC tentatively finds that a combination of top-four broadcast networks would reduce the choices available to advertisers seeking large, national audiences. Such a reduction in choices for national advertisers could substantially lessen competition and lead the networks to pay less attention to viewer demand for innovative, high-quality programming.[56]

It also tentatively finds that the rule remains necessary to preserve the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities.

[55] 2014 Quadrennial Review, pp. 4471-4478.

[56] While the FCC cites preserving competition in the market for selling national television advertising as a public policy rationale for retaining the rule, it does not specifically mention preserving competition in the market for purchasing television programming as a rationale. The FCC repealed its former financial interest and syndication rules, which limited the amount of programming in prime time and syndication that the broadcast networks could own in the mid-1990s, and declined to consider implementing a similar restriction in the 2014 Quadrennial Review, p. 4477, n. 708.

Ownership Diversity

Analysis Related to Minority and Female Broadcast Ownership Policies

Finally, to comply with the directive of the Third Circuit, the 2014 Quadrennial Review notice contained proposals to increase broadcast ownership diversity, and addressed whether the FCC believes that it has the constitutional authority to adopt rules specifically targeting minority and female ownership of broadcast stations.

The FCC tentatively found that the U.S. Supreme Court could deem the commission's interest in promoting a diversity of viewpoints sufficiently compelling to pass its legal tests for regulations targeting minorities and females.[57] Nevertheless, the FCC tentatively concluded that it lacked sufficient evidence to pass other elements of the Supreme Court's tests for such rules.[58] The FCC cited two reasons:

1. the Media Ownership studies it commissioned (based on data from its broadcast ownership reports), as well as studies submitted by commenters, did not demonstrate that the connection between minority and female ownership and viewpoint diversity is direct and substantial.
2. the record did not reveal a feasible means of adopting race- or gender-based measures in the flexible, nonmechanical way.

The FCC seeks comment on its tentative analysis and findings.

Broadcast Ownership Data Collection Initiatives

The FCC has launched initiatives to improve its collection and analysis of broadcast ownership information.[59] Among the initiatives, it has implemented major changes to its Form 323 biennial ownership reports to improve the reliability and utility of the data reported in the form, including data regarding minority and female broadcast ownership. The FCC made the ownership data available to the authors of the 11 peer-reviewed media ownership studies included in the 2010 media ownership proceeding's record. The Media Bureau has published reports on ownership of commercial broadcast stations, including minority and female ownership of commercial broadcast stations, in 2012[60] and 2013.[61]

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[57] The Supreme Court also recognizes a compelling governmental interest in remedying past discrimination. In order for the FCC to impose race or gender-based remedial regulations, the FCC would first need to find evidence that past discrimination had existed. The FCC tentatively found that, while some evidence might support a finding of race and gender discrimination, currently, it was not of a sufficient weight to withstand the levels of scrutiny that would be applied. If sufficient evidence could be discovered, the FCC might be able to justify adopting rules that would rectify past discrimination. See Adarand Constructors v. Pena, 515 U.S. 200 (racial discrimination); United States v. Virginia, 518 U.S. 515 (1996) (gender discrimination).

[58] 2014 Quadrennial Review, pp. 4496-4512.

[59] 2014 Quadrennial Review, pp. 4481-4487.

[60] Federal Communications Commission, *Report on Ownership of Commercial Broadcast Stations, DA 12-1667*, November 14, 2012, https://apps.fcc.gov/edocs_public/attachmatch/DA-12-1667A1.pdf.

[61] Federal Communications Commission, *Report on Ownership of Commercial Broadcast Stations, DA 14-294*, June 26, 2014, https://apps.fcc.gov/edocs_public/attachmatch/DA-14-924A1.pdf.

Proposed Eligible Entity Standard

In order to promote the diversity of media ownership, the FCC proposed setting aside a special class of organizations, called "eligible entities," that would be subject to less restrictive media ownership and attribution rules, and more flexible licensing policies, than their counterparts. The FCC proposed reinstating a revenue-based eligible entity standard, thereby encouraging the participation of small businesses in the broadcast industry. The FCC conceded that it lacked evidence that targeting small businesses would specifically increase minority and female broadcast ownership, which the Third Circuit directed it to provide. Nevertheless, the FCC suggested that ownership by small businesses could enhance viewpoint diversity.[62]

The FCC proposed to use the Small Business Administration's definition of a "small business" for its eligible entity standard, which would apply to any entity, commercial or noncommercial, that met the definition of a small business within its industry. Entities that already own broadcast stations and have total annual revenue of $35.5 million or less would qualify.[63] Such a definition could potentially apply to entities that own stations involved with the "sidecar" arrangements that the Media Bureau has stated it will scrutinize more carefully.

Table 8 summarizes the FCC's proposed measures to increase broadcast ownership diversity and their potential impact on its ownership and attribution rules.[64] By exempting small businesses from some of its ownership and attribution rules, the FCC might undermine the rationales for retaining and tightening these rules as described in **Table 6**, other portions of the 2014 Quadrennial Review, and the Media Bureau Public Notice.

[62] 2014 Quadrennial Review, pp. 4374, 4489.

[63] 2014 Quadrennial Review, pp. 4491-4492. The FCC also proposed that the eligible entity meet one of three control tests to ensure that ultimate control over the licenses rests with it. Each of these three tests requires that more than 50% of the voting stock rest with the corporation or partnership that will hold the broadcast license.

[64] The FCC discussed additional proposals set forth by commenters in the 2010 Diversity proceeding, but the FCC recommends against adopting them.

Table 8. Proposed Regulatory Measures for Eligible Entities

Eligible Entities Would Meet SBA's Definition of a Small Business

Proposed Measure	Description	Analysis/Rationale (in original 2008 proposal)	Impact on Media Ownership/Attribution Rules?
Modify attribution rule	Allow a holder of debt or equity interest in an eligible entity to exceed the attribution threshold. The debt cannot be convertible into equity or accompanied by an equity interest.[a]	The new threshold still would not permit a controlling interest. Relaxing the attribution rule may foster investments by larger broadcasters, and therefore make it easier for small businesses, including those owned by women and minorities, to obtain financing.	Yes. The stronger the rules, the more likely capital might flow to eligible entities that are exempt.
Reinstate distress sale policy	Enable a broadcaster whose license renewal has been designated for a hearing to sell its station to an eligible entity.	Policy would make it easier for small businesses and new entrants, including minority-owned businesses, to purchase stations. This, in turn, may result in a greater diversity of program services, including services that are responsive to local needs and interests and the interests of underserved audiences.	Possibly. Owners of stations in danger of losing their license by violating the FCC's rules might be more willing to sell the stations to eligible entities.
Prioritize duopolies for eligible entities	FCC would prioritize any entity financing or "incubating" an eligible entity, if it files for a duopoly simultaneously with noneligible entities in a market that can support only one additional duopoly. (The FCC does not define "incubating.")	A general statement of policy that grants priority to entities funding or incubating eligible entities would promote ownership diversity.	Yes. The stronger the rules, the more likely capital might flow to eligible entities whose applications are prioritized by the FCC.
Extend divestiture deadlines in mergers in which applicants have actively solicited bids from eligible entities	Entities availing themselves of an extension must either sell a given property to an eligible entity within the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity. This would prevent potential abuse of the extensions and ensure that they will actually result in sales to eligible entities.	The FCC has encouraged companies undertaking major transactions to assist small businesses, including those owned by minority and female entrepreneurs interested in purchasing divested properties. Such entities may need additional time to secure funding to complete potential transactions.	Yes. Companies seeking FCC merger approvals may be able to retain broadcast stations or newspapers longer than they might otherwise.

Proposed Measure	Description	Analysis/Rationale (in original 2008 proposal)	Impact on Media Ownership/Attribution Rules?
Revise rules regarding construction permit deadlines	Allow the sale of an expiring construction permit to an eligible entity that pledges to build out the permit within the time remaining in the original construction permit or within 18 months, whichever period is greater. Limit of one 18-month extension. FCC would assess whether transaction is arms-length and assignee is eligible entity.	Divestiture deadlines are intended to prevent undue concentration of media ownership. Deadline extension provides eligible entities additional opportunities to enter broadcast industry.	Possibly. Media Bureau's/FCC's determination of "arms-length" status might depend on attribution rules and processing guidelines (e.g., sidecar policy).
Allow assignment or transfer of grandfathered radio combinations	Permit the assignment or transfer of a grandfathered radio station combination intact to *any* buyer so long as the buyer files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust for the ultimate assignment to an eligible entity within 12 months after consummation of the purchase of the grandfathered stations.	Would promote small business investment in broadcasting by providing additional time and flexibility to raise the capital necessary to purchase the excess stations.	Yes. Radio station buyers might be able to retain a combination of radio stations longer than they might otherwise.

Source: CRS Analysis of 2008 Diversity Order and 2014 Quadrennial Review.

a. The FCC also proposed to reinstate the application of the modified "equity debt plus" standard to its broadcast auction rules. Interest holders in eligible entities would be entitled to new entrant bidding credits. See 47 C.F.R. §73.5008(c)(2). 2014 Quadrennial Review, p. 4578, n. 798.

Additional Measures to Increase Broadcast Ownership Diversity

The FCC has taken two additional actions that it claims will increase the availability of investment capital for minority owners, females, small businesses, and new entrants into the radio and television broadcasting industries. First, in November 2013, the commission lifted its 25% foreign investment cap on broadcast stations, stating that it would consider such investments on a case-by-case basis.[65] Second, the FCC recommended that Congress pass a new tax incentive program to spur ownership diversity among small businesses, including those owned by women and minorities.[66]

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[65] Federal Communications Commission, "Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees, Declaratory Ruling," 22 *FCC Record* 16244, November 14, 2013. The FCC issued a Declaratory Ruling clarifying that as it interprets Section 310(b)(4) of the 1934 Communications Act (47 U.S.C. §310(b)(4), the section provides the FCC with the authority to review applications for approval of foreign investment in the controlling U.S. parent of a broadcast licensee above the 25% benchmark on a case-by-case basis.

[66] The former tax certificate policy permitted firms to defer capital gains on the sale of media properties to minorities. 2014 Quadrennial Review, pp. 4514-4515. The FCC submitted the recommendation pursuant to Section 257 of the Communications Act of 1934 (47 U.S.C. §257). This section directs the FCC to report to Congress, every three years, market entry barriers for entrepreneurs and other small businesses in the provision of telecommunications and information services. One of the underlining purposes of the section is to promote the diversity of media voices. Federal Communications Commission, *Section 257 of the Communications Act of 1934*, http://www.fcc.gov/encyclopedia/section-257-communications-act-1934.