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

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Summary

From the earliest days of commercial radio, the Federal Communications Commission (FCC) and its predecessor, the Federal Radio Commission, have encouraged diversity in broadcasting. This concern has repeatedly been supported by the U.S. Supreme Court, which has affirmed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," 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."

The FCC's policies seek to encourage four distinct types of diversity: (1) diversity of viewpoints, as reflected in the availability of media content reflecting a variety of perspectives; (2) diversity of programming, as indicated by a variety of formats and content; (3) outlet diversity, to ensure the presence of multiple independently owned media outlets within a geographic market; and (4) minority and female ownership of broadcast media outlets.

In addition to promoting diversity, the FCC aims, with its broadcast media ownership rules, to promote localism and competition by restricting the number of media outlets that a single entity may own or control within a local geographic market. Two characteristics of broadcast television and broadcast radio stations determine whether or not media ownership rules are triggered: (1) the geographic range of their signals, and (2) the boundaries of their media markets as determined by the Nielsen Company, a market research firm.

After first adopting rules limiting common ownership of multiple local radio stations, multiple local television stations, and multiple national broadcast networks in the 1940s, the FCC continued to expand and modify media ownership rules. It began to limit cross-ownership of radio and television stations in 1970, and cross-ownership of newspapers and television stations in 1975. 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.

Following its most recent review, the FCC retained its media ownership rules in 2016, and readopted rules counting broadcast stations that jointly sell advertising time as commonly owned. Pending approval from the Office of Management and Budget (OMB), the FCC will require independently owned broadcast television stations to include resource-sharing agreements in their online public inspection files. In addition, as directed by the U.S. Court of Appeals, Third Circuit, the FCC reviewed its broadcast ownership diversity policies. It concluded that it did not believe the 1996 Telecommunications Act nor the Communications Act of 1934 requires it to adopt race- or gender-conscious measures in order to promote ownership diversity. In order to increase broadcast ownership diversity, FCC also reinstated rules enabling certain small businesses to abide by less restrictive media ownership and attribution rules, and more flexible licensing policies, than their counterparts. The newly approved media ownership and diversity rules took effect on December 1, 2016.

The FCC's 2016 review occurred against the background of sweeping changes in news consumption patterns. Surveys conducted by the Pew Research Center show 20% of respondents citing printed newspapers as a source they "read yesterday" or used regularly in 2016, down from 50% in 1996. While the percentage of adults citing local broadcast television as a news source declined from 65% in 1996 to 46% in 2016, it still outranked other local news sources. These trends, along with increased consumption of news online, are contributing to debate in Congress as to whether common ownership of multiple media outlets in the same market might limit diversity of viewpoints as much today as 20 or 40 years ago.

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Why Regulate Media Ownership?

From the earliest days of commercial radio, the Federal Communications Commission (FCC) and its predecessor, the Federal Radio Commission, have encouraged diversity in broadcasting.[1] This concern has repeatedly been supported by the U.S. Supreme Court, which has affirmed that "the 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 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]

In addition to promoting diversity, the FCC aims, with its broadcast media ownership rules,[6] to promote localism and competition by restricting the number of media outlets that a single entity may own or control within a geographic market.[7] Localism addresses whether broadcast stations are responsive to the needs and interests of their communities. In evaluating the extent of competition, the FCC considers whether stations have adequate commercial incentives to invest in diverse news and public affairs programming tailored to serve viewers within their communities.[8] In contrast, antitrust authorities primarily consider the prices stations charge

[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] 2002 Biennial Review, p. 13620.

[8] Federal Communications Commission, "2014 Quadrennial Regulatory Review, 2010 Quadrennial Regulatory Review, Promoting Diversification of Ownership in the Broadcasting Services, Rules and Policies Concerning the Attribution of Joint Sales Agreements in Local Television Markets, Second Report and Order, FCC 16-107," 31 *FCC*

advertisers to air commercials during programming, and, in the case of television stations, the prices they charge cable and satellite operators for the retransmission of broadcast programming.[9]

Authority and Legal Directives

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 act directs the FCC to promote policies favoring the diversity of media voices and vigorous economic competition.[11]

In 2004, 2011, and 2016, 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.[12] 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.[13]

In August 2016, the FCC completed the 2014 Quadrennial Review of its media ownership rules.[14] The final decision contains rules related to (1) the determination and disclosure of media ownership (attribution rules); (2) limits on the type and number of media properties a single entity may own (media ownership rules); and (3) rules designed to enhance media ownership diversity. Three months earlier, the Third Circuit Court of Appeals admonished the FCC for failing to complete the congressionally mandated quadrennial media ownership review, noting that as of May 2016, both the 2010 and 2014 reviews remained open.[15]

Record, 9864, 9873, August 25, 2016 (2014 Quadrennial Review 2nd R&O).

[9] See, for example, U.S. Department of Justice, "Justice Department Requires Divestitures in Order for Nexstar to Proceed with Media General Acquisition," press release, September 2, 2016, https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-nexstar-proceed-media-general-acquisition.

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

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

[12] Prometheus Radio Project v. Federal Communications Commission, 373 F. 3d 372, 420- 421, n. 59 (3d Cir. 2004) (Prometheus I); Prometheus Radio Project v. Federal Communications Commission, 652 F.3d 431, 471 (3d Cir. 2011) (Prometheus II); and Prometheus Radio Project v. Federal Communications Commission, 824 F. 3d 33, 54 n. 13 (3d Cir. 2016) (Prometheus III).

[13] 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 16-107, Further Notice of Proposed Rulemaking and Report and Order," 29 *FCC Record* 4341, 4492-4493, April 15, 2014 (2014 Quadrennial Review FNPRM and R&O). Adarand Constructors v. Peña, 515 U.S. 200 (1995) (discussing the standard of scrutiny to be applied to categorizations based on race). Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (discussing the standard of review to be applied to gender-based categorizations). Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (further discussion the standard of review for race-based categorizations).

[14] 2014 Quadrennial Review 2nd R&O.

[15] Prometheus III 824 F.3d at 39-43.

The new media ownership rules became effective December 1, 2016.[16] The National Association of Broadcasters filed a petition with the FCC requesting that the agency reconsider its 2016 decision by repealing and/or relaxing the rules.[17]

The News Media Alliance (formerly known as the Newspaper Association of America) appealed the FCC's rules in the U.S. Court of Appeals, District of Columbia, claiming that the Newspaper/Broadcast Cross-Ownership Rules in particular (described in "Newspaper/Broadcast Cross-Ownership Rules") are "antiquated" and "no longer serve the public interest," and that the FCC's decision "violates the Administrative Procedure Act, 5 U.S.C. § 706 and the Telecommunications Act of 1996."[18] Prometheus Radio Project has appealed the FCC's rules in the U.S. Court of Appeals, Third Circuit, arguing, among other things, that the FCC's modifications to the rules "permit increased concentration of ownership," and that its decision "violate[s] the Administration Procedure Act, 5 U.S.C. § 551."[19] These cases have been consolidated in the District of Columbia Circuit.[20]

News Consumption Trends

The debate over media ownership rules is occurring against the background of sweeping changes in news consumption patterns. **Figure 1** illustrates these general trends. Based on surveys conducted by Pew Research Center, the percentage of adults citing local broadcast television as a news source declined from 65% in 1996 to 46% in 2016. Nevertheless, local television still outranks other local news sources. The percentage of respondents who stated that they "got news yesterday" from online sources grew from 2% in 1996 to 38% in 2016. In contrast, those citing printed newspapers as a source they "read yesterday" or use regularly declined from 50% in 1996 to 20% in 2016. These trends raise questions as to whether common ownership of multiple media outlets in the same market might limit diversity of viewpoints as much today as two decades ago.

[16] Federal Communications Commission, "2014 Quadrennial Regulatory Review," 81 *Federal Register* 76220, November 1, 2016.

[17] National Association of Broadcasters, "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, Petition for Reconsideration," December 1, 2016, http://www.nab.org/documents/newsRoom/pdfs/120116_Quadrennial_Ownership_PetforRecon.pdf.

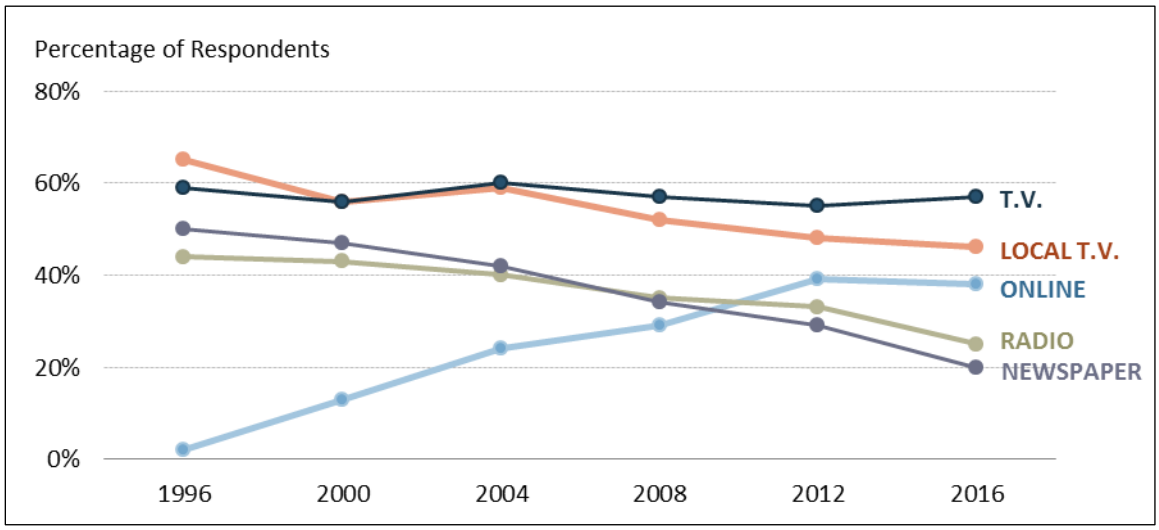
[18] News Media Alliance v. FCC, et al., Petition for Review, Docket # 16-1395, U.S. Court of Appeals, District of Columbia, docketed November 14, 2016.

[19] Prometheus Radio Project, et al. v. FCC, et al. Petition for Review, Docket #16-4046, U.S. Court of Appeals, Third Circuit, docketed November 8, 2016.

[20] Order Granting Mot. to Transfer, Prometheus Radio Project v. FCC, No. 16-4046 (3d Cir. Nov. 18, 2016) (granting the FCC's motion, pursuant to 28 U.S.C. §2112(a)(3), to transfer case to the D.C. Circuit in order to consolidate petitions for review).

Figure 1. Trends in News Consumption, 1996-2016

Percentage of Respondents Who Get News from Each Media Platform



Sources: 1996-2012 data: Pew Research Center, "In Changing News Landscape, Even Television is Vulnerable," September 27, 2012, http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/. 2016 data: Kristine Lu and Jesse Holcomb, *State of the News Media 2016*, Pew Research Center, Digital News Audience: Fact Sheet, June 15, 2016, p. 45, http://www.journalism.org/2016/06/15/digital-news-audience-fact-sheet/.

Notes: Data from 1996 to 2012 show the percentage of adults who got news "yesterday" from each media platform, except that data on "Local TV" are based on the percentage of adults who "regularly watch." Data from 2016 are based on the percentage of adults who get news "often" from each media platform. "TV" includes local broadcast television as well as cable networks and broadcast television networks.

Broadcast Signals and Markets

Two characteristics of broadcast television and broadcast radio stations determine whether or not the media ownership rules described in later sections of this report are triggered: (1) the geographic range (or *contours*) of their signals, and (2) the limits of their media markets as determined by the Nielsen Company, a market research firm.

Television Signal Contours

In the past, the FCC employed analog broadcast television signal contours as one criterion in determining whether television licensees were complying with media ownership rules. On June 12, 2009, however, full-power television stations completed a transition from analog to digital service pursuant to a statutory mandate, thereby rendering the analog contour criteria obsolete.[21] In 2016, the FCC modified the media ownership rules to reflect two digital television service contours:[22]

1. The digital "principal community contour" (digital PCC). This contour specifies the signal strength required to provide television service to a station's community

[21] 47 U.S.C. §309(j)(14)(A).

[22] 2014 Quadrennial Review 2nd R&O, pp. 9876-9877 (for local television ownership rule); pp. 9944–9872 (for radio/television cross-ownership rule); p. 9931 (for newspaper-broadcast television cross-ownership rule).

of license. The FCC sought, when defining the digital PCC, to provide television stations with flexibility in siting and building their facilities while still preventing stations from straying too far from their respective communities of license.[23]

2. The digital "noise limited service contour" (digital NLSC). The FCC designed this contour to define a geographic area in which at least 50% of residents can receive the signal a majority of the time.[24] The FCC wanted to ensure that after the digital transition, broadcasters would be able to reach the same audiences they served previously with analog transmissions.

Radio Signal Contours

FM Primary Service Area

The 1 millivolt-per-meter (1 mv/m) contour for FM radio represents a signal that will result in satisfactory service to at least 70% of the locations on the outer rim of the contour at least 90% of the time.

AM Primary Service Area

In its rules for AM radio stations, the FCC delineates three types of service areas: (1) primary, (2) secondary, and (3) intermittent. Some classes of radio stations render service to two or more areas, while others usually have only primary service areas.[25] The FCC defines the primary service area of an AM broadcast radio station as the service area in which the groundwave is not subject to objectionable interference or fading.[26] The signal strength required for a population of 2,500 or more to receive primary service is 2 millivolts-per-meter (2 mv/m). For communities with populations of fewer than 2,500, the required signal strength is 0.5 mV/m.

When the FCC first proposed incorporating AM contour signals in its media ownership rules, it noted that "a one mv/m AM signal is somewhat less than the signal intensity needed to provide service to urban populations, but somewhat greater than the signal at the outer limit of effective non-urban service."[27]

Television Markets

The FCC uses Designated Market Areas (DMAs), created 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.

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[23] Federal Communications Commission, "Advanced Television Systems and their Impact on the Existing Television Broadcast Service," 25 *FCC Record* 14588, 14634-14635, April 21, 1997 (1997 Sixth R&O). Federal Communications Commission, "2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry, FCC 10-92," 25 *FCC Record* 6086, 6117, n. 150, May 25, 2010 (2010 Quadrennial NOI).

[24] 1997 Sixth R&O, pp. 14605-14607.

[25] 47 C.F.R. §73.182(c).

[26] 47 C.F.R. §73.14.

[27] Federal Communications Commission, "Standard, FM and Television Broadcast Stations: Multiple Ownership; Notice of Proposed Rulemaking," 27 *Federal Register* 6847, July 19, 1962.

Radio Markets

The FCC also relies on the Nielsen Company to define local radio markets. These markets, called "Metros," generally correspond to the metropolitan statistical areas defined by the U.S. government's Office of Management and Budget (OMB), but are subject to exceptions based on historical industry usage or other considerations at the discretion of Nielsen.[28] In contrast to television markets, radio markets do not include every U.S. county.[29] To determine the number of radio stations within a radio market, the FCC uses a database compiled and updated by BIA Kelsey, another market research firm.[30]

Attribution Rules

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. 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."[31]

The following summarizes the media attribution rules, as described and modified in the 2014 Quadrennial Review Second Report and Order, and related FCC policies.

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. In 2014, the FCC adopted rules specifying 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.[32] Congress subsequently twice extended the period by which parties must comply with these rules, ultimately extending the deadline to September 30, 2025.[33]

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[28] 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.

[29] 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.

[30] 2014 Quadrennial Review 2nd R&O, pp. 9903-9904.

[31] 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, FCC 99-207," 14 *FCC Record* 12559, August 6, 1999. §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.

[32] 2014 Quadrennial Review 2nd R&O, pp. 9888-9890. 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.

[33] Consolidated Appropriations Act, 2016, §626, P.L. 114-113 (2015). The first extension was through December 19,

In May 2016, the Third Circuit Court of Appeals ruled that the FCC's initial adoption of such rules in 2014 was procedurally invalid. The court determined that media ownership attribution rules are inextricably linked to media ownership rules. The court ruled that the FCC could not adopt new attribution rules without deciding whether or not to retain its media ownership rules.[34] The court offered no opinion on substantive challenges to the television JSA attribution rules.[35]

In August 2016, the FCC readopted its JSA attribution rules in conjunction with its decision to retain the "duopoly rule," which, as described in "Local Television Ownership Rules (Television Duopoly Rules)," limits ownership of multiple television stations within a market. The FCC's rules also specify that stations must file copies of attributable JSAs with the commission.[36] However, the transition procedures are different from those FCC adopted in 2014. The FCC retained its previous deadline, March 31, 2014, for television licensees to ask the agency to grandfather its JSAs, and gives stations until September 30, 2025, to comply with the JSA rules. Until that time the FCC will permit parties to transfer JSAs to other parties without terminating the grandfathering provisions.[37]

The FCC did not specify whether the procedures it adopted in 2014 allowing JSA waivers on a case-by-case basis still apply.[38] Likewise, it did not state how its 2016 decision to allow stations to transfer JSAs would affect the Media Bureau's 2014 public notice regarding close scrutiny of any license transfers involving both JSAs or other operational agreements and a contingent interest or loan guarantee.[39]

Disclosure of Sharing Agreements

In August 2016, the FCC adopted new disclosure requirements for all joint operating agreements, broadly encompassed by the term "shared services agreements" (SSAs) among broadcast television stations.[40] Pending approval from the OMB, each station that is a party to an SSA, whether in the same or different television markets, must file a copy of the SSA in its online public inspection file.[41] Licensees may redact confidential or proprietary information. Broadcast licensees must report the substance of oral SSAs in writing to the FCC.

2016, per §104 of the 2014 Satellite Television Extension and Localism Act (P.L. 113-200).

[34] Prometheus III, 824 F.3d, 43-57.

[35] Ibid., p. 55.

[36] Once the media ownership and attribution rules become effective, 30 days after the FCC publishes them in the *Federal Register*, broadcast station licensees must file the JSAs with the commission. 2014 Quadrennial Review 2nd R&O, p. 9888-9989, n. 168.

[37] In its 2014 Quadrennial Review 2nd R&O, p. 9889, the FCC stated that while generally the agency does not allow licensees to assign or transfer grandfathered combinations unless the combinations comply with ownership rules in effect at the time, "we believe that the relief [with respect to JSAs] is warranted given the various expressions of Congressional will in this regard."

[38] 2014 Quadrennial Review FNPRM and R&O, 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.

[39] 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.

[40] 2014 Quadrennial Review 2nd R&O, pp. 10008-10023.

[41] The new disclosure rule is subject to the approval of OMB under §3507(d) of the Paperwork Reduction Act of 1995, P.L. 104-13. After the FCC publishes a separate document in the *Federal Register*, OMB, the general public, and other

The FCC defined an SSA as

> any agreement or series of agreements, whether written or oral, in which
>
> (1) a station provides any station-related services including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common *de jure* control permitted under the [FCC's] regulations; or
>
> (2) stations that are not directly or indirectly under common *de jure* control permitted under the [FCC's] regulations 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.[42]

The term "station" includes the licensee, including any subsidiaries and affiliates, and any other individual or entity with an attributable interest in the station. SSA disclosure requirements do not apply to noncommercial television stations, radio stations, and newspapers.

The FCC concluded that industry-wide disclosure of SSAs is necessary to enable the FCC and the public to comprehensively evaluate the extent to which broadcast television stations use various types of SSAs, the nature of the contractual relationships, and the manner in which specific types of agreements affect competition, diversity, or localism. The FCC declined to make SSAs attributable, but stated that it may do so later.

Media Ownership Rules

The FCC has five distinct sets of rules governing ownership of multiple media outlets in a single market: (1) local television ownership rules (known as the television duopoly rules); (2) local radio ownership rules; (3) radio/television cross-ownership rules; (4) newspaper/broadcast cross-ownership rules; and (5) the dual network rule.

Local Television Ownership Rules (Television Duopoly Rules)

Local television ownership rules (known as the television duopoly rules) limit common ownership of television stations serving the same geographic region. 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" (described below). The FCC uses broadcast television signals to determine when the rules are triggered, and uses television markets to count the voices.

The FCC initially adopted a TV duopoly rule in 1941, barring a single entity from owning two or more broadcast television stations that "would substantially serve the same area."[43] In 1964, the

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federal agencies may comment on the new information collection requirements. OMB will evaluate the new rule to determine whether (1) it is necessary for the proper performance of a function of the agency requiring the disclosure (i.e., the FCC), including whether it will be practically useful; (2) it minimizes the burden upon those affected by the rules; and (3) maximizes the usefulness and public benefit that could be derived from the information. 44 U.S.C. §3504; §3507(g). The FCC has placed its notice in the *Federal Register* seeking comment to the change in its rules to require disclosure of shared service agreements. Federal Communications Commission, "Information Collection Being Reviewed by the Federal Communications Commission, Notice and Request for Comments," 81 *Federal Register* 78591, November 8, 2016. The comment period will close January 9, 2017. Ibid.

[42] 2014 Quadrennial Review 2nd R&O, p. 10012.

[43] Federal Communications Commission, "Part 4—Broadcast Services Other Than Standard Broadcast," 6 *Federal Register* 2282, 2284-2285, May 6, 1941. This was the year that commercial television service first became available in the United States.

FCC adopted the signal overlap component of the rules.[44] The FCC sought to limit "future ownership to a maximum of two stations in most states and, thus ... act indirectly to curb regional concentrations of ownership as well as overlap itself."[45]

In 1999, the FCC adopted the "top four ranked/eight voice" component of these rules, as well as the waiver criteria.[46] 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. The rules apply to the stations' ranking at the time they apply for common ownership.

Taking into account geographically large DMAs where viewers on the outskirts of a DMA may not receive the signal of some broadcasters in the DMA, the FCC, in a reconsideration order of January 19, 2001, determined to count toward the eight voices only those stations whose analog signal contours overlap.[47] The "eight voices" test effectively limits duopolies to larger television markets, which have more separately owned television stations than smaller markets.

Table 1 summarizes the rules.

[44] Federal Communications Commission, "Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 64-445," 29 *Federal Register* 7535, 7537, June 12, 1964.

[45] Ibid.

[46] Federal Communications Commission, "Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Report and Order, FCC 99-209," 14 *FCC Record* 12903, 12931-12941, August 6, 1999 (1999 Media Ownership R&O).

[47] Federal Communications Commission, "Review of the Television Satellite Stations Review of Policy and Rules, Memorandum Opinion and Order on Reconsideration, FCC 00-406," 14 *FCC Record* 1067, 1072-1073, January 19, 2001 (2001 Media Ownership Reconsideration). (The FCC adopted the modification in 2000.)

Table 1. Local TV Ownership (Duopoly) Rules

Permitted Combinations of TV Stations in a Market

Top 4/8 Voices Test	Signal Overlap	Waiver Criteria	Notes
(1) At least one of the stations is not among the four highest-ranked stations in the DMA, *and* (2) 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	The digital noise limited service contours (NLSC) of the stations do not overlap	On a case-by-case basis, the FCC will consider waivers if (1) one station failed/is failing. Applicants must demonstrate that an in-market buyer is the only entity ready, willing, and able to operate the station, and that sale to a buyer outside of the market would result in an artificially depressed price.[a] *or* (2) the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.	Stations cannot switch broadcast network affiliations if the switch would result in one party directly or indirectly owning, operating, or controlling two of the top-four-rated television stations within the DMA at the time of the agreement.

Sources: 47 C.F.R. §73.3555(b); 47 C.F.R. §73.3555, Note 7; 2014 Quadrennial Review 2nd R&O.

a. A station is considered "failed" if it has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application. A station is considered to be "failing" if it has an all-day audience share of no more than 4% and has had negative cash flow for three consecutive years immediately prior to the application.

Modifications

Signal Overlap Redefined

In August 2016, the FCC changed the applicable signal contours to the digital NLSC to reflect stations' transition to digital television. The FCC found that this modification "accurately reflects current digital service areas while minimizing any potential disruptive impact."[48] In addition, the FCC found that retaining the DMA and contour overlap approach promotes local television service in rural areas by enabling station owners in rural areas to build or purchase an additional station in remote portions of the DMA, as long the digital NTSC contours do not overlap.

[48] 2014 Quadrennial Review 2nd R&O, pp. 9876-9877.

Affiliation Swaps Prohibited

In August 2016, the FCC prohibited "affiliation swaps" that would enable broadcast licensees to obtain control over two of the top four stations in a market through an exchange of network affiliations with other licensees, such as the swap that occurred in Honolulu, HI, in 2011.[49]

Relief from Rules

In 2016, the FCC retained its "failed station/failing station" waiver test. Under this policy, to obtain a waiver of the local television rules, an applicant must demonstrate that (1) one of the broadcast television stations involved in the proposed transaction is either failed or failing; (2) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and (3) selling the station to an out-of-market buyer would result in an artificially depressed price.[50] The FCC declined to relax its criteria for determining whether a station is failing or failed, stating that parties might be able to manipulate the data used to determine the criteria.[51]

The FCC also preserved the failed station solicitation rule (FSSR).[52] The FSSR requires licensees seeking to apply for a failed station/failing station waiver of the television duopoly rules to notify the public that a failed/failing station is for sale, and demonstrate that it was unsuccessful in securing an out-of-market buyer for the station. The FCC reiterated its assessment in 1999 that the rules promote new entry in a local television market by ensuring that entities located outside of the DMA that are interested in purchasing a station, including women and minorities, will have an opportunity to bid.[53] For more on the relationship between the FSSR and the FCC's diversity policies, see "Ownership Diversity."

Local Radio Ownership Rules

The local radio ownership rules limit ownership of radio stations serving the same geographic area. After initially using radio broadcast signals to define the relevant geographic area, the FCC switched to radio markets. The FCC does not have any specific waiver criteria for the local radio ownership rules similar to the failed/failing station criteria it uses for its local television ownership rules.[54]

FCC first adopted rules limiting ownership of FM radio stations serving "substantially the same service area" in 1940.[55] In 1943, the FCC adopted rules limiting ownership of AM radio stations

[49] In addition to switching network affiliations, the parties swapped nonnetwork programming and call signs. 2014 Quadrennial Review FNPRM and R&O, 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.

[50] 47 C.F.R. §73.3555, Note 7.

[51] 2014 Quadrennial Review 2nd R&O, p. 9891.

[52] Ibid., p. 9894, n. 205.

[53] 2014 Quadrennial Review FNPRM and R&O, 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.

[54] Pursuant to §202(b)(2) of the Telecommunications Act of 1996, however, the FCC may, notwithstanding any ownership limits, permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the FCC determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

[55] Federal Communications Commission, "Part 3—Rules Governing Standard and High Frequency Broadcast

"where such station renders or will render primary service to a substantial portion of the primary service area of another [AM] broadcast station."[56] In 1964, the FCC amended the rules to use the service contours of FM and AM stations to define the service area.[57] The FCC first adopted rules limiting ownership of AM and FM stations serving the same area in 1970 and amended them in 1989.[58]

In 1992, to address the fact that many radio stations were facing difficult financial conditions, the FCC relaxed the radio ownership rules to establish numerical limits on radio station ownership based on the total number of commercial stations within a market, rather than on whether their signals overlapped.[59] In 1996, as part of the Telecommunications Act of 1996, Congress directed the FCC to revise the rules; the caps specified in Section 202(b) of the Telecommunications Act of 1996, described in **Table 2**, remain in place today. In 2016, FCC retained the local radio ownership rules without modification, but adopted some clarifications.[60]

Table 2. 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).

Note: An entity may not own more than 50% of the stations in markets with 14 or fewer total stations, except that an entity may always own a single AM and single FM station in combination.

Clarifications

The FCC clarified certain aspects of its local radio ownership rules to assign radio stations to Nielsen Audio Metros for the purpose of determining whether a radio station complies with its

Stations," 5 *Federal Register* 2382, 2384, June 25, 1940.

[56] Federal Communications Commission, "Part 3—Rules Governing Standard and High Frequency Broadcast Stations: Multiple Ownership of Standard Broadcast Stations," 8 *Federal Register* 16065-16066, November 27, 1943.

[57] Federal Communications Commission, "Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 64-445," 29 *Federal Register* 7535- 7537, June 12, 1964. At the time, the FCC used a 1 mv/m signal contour for both AM and FM stations in its local radio ownership rules, arguing that the standards for both services were roughly comparable, because a 1 mv/m signal provided adequate levels of service in less-populated areas where overlap between co-owned stations was more likely to occur.

[58] Federal Communications Commission, "Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 70-310, First Report and Order," 5 *FCC Reports* 306, March 25, 1970 (1970 Cross Ownership R&O). Federal Communications Commission, "Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Report and Order, FCC 88-343," 4 *FCC Record* 1723, February 22, 1989.

[59] Federal Communications Commission, "Revision of Radio Rules and Policies, Report and Order, FCC 92-97," 7 *FCC Record* 2755, 2756-2757, 2757-2779, April 10, 1992.

[60] 2014 Quadrennial Review 2nd R&O, p. 9897.

local radio ownership rules.[61] The FCC stated that in Puerto Rico, the FCC will use radio station signal contour overlaps, rather than the Nielsen Audio Metro, to apply local radio ownership rules due to topographical and market conditions.[62]

Radio/Television Cross-Ownership Rules

The radio/television cross-ownership rules limit ownership of broadcast radio and television stations serving the same geographic area. The rules specify conditions regarding the proximity of radio and television stations that trigger the application of the rules, and how to count the number of media voices in a market, including television stations, radio stations, newspapers, and cable systems. The FCC uses broadcast signals to determine when the rules are triggered and a combination of broadcast signals and markets to determine how to count the voices.

The FCC first adopted such rules in 1970, characterizing them as an extension of the local radio and television ownership rules.[63] In evaluating when to trigger the rule, FCC used contour limits that were less restrictive than those it adopted in 1964 for the local television and radio ownership rules.[64] In other words, the stations had to be closer together for their joint ownership to be a violation of the rules.[65]

In 1999, the FCC added the "media voice" component of the rule.[66] The FCC also adopted the failed station waiver standard it uses for the TV duopoly rule, but declined to adopt a standard for "failing" or "dark" stations.[67] The FCC did not believe that these additional waivers were necessary given its relaxation of the radio/television cross-ownership rules, and the relaxation of radio ownership limits in the 1996 Telecommunications Act. In contrast to the waivers for local television ownership rules, FCC did not apply a FSSR for radio/TV cross-ownership waivers.

The rules use Nielsen's DMAs as the geographic regions for counting the number of independently owned and operated voices (i.e., television stations, daily newspapers with circulations exceeding 5% of the households within the DMA, and cable systems).[68] The rules count broadcast television stations with overlapping signals as a single television voice.

To count the number of radio voices, the rules specify that the FCC include the number of independently owned radio stations that are in the radio Metro (as defined by a nationally recognized national radio service, such as Nielsen Audio) of (1) the television stations' communities of license, or (2) the radio stations' communities of license.

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[61] 2014 Quadrennial Review 2nd R&O, pp. 9905-9906.

[62] Ibid., p. 9907. Nielsen considers Puerto Rico to be a single radio market.

[63] 1970 Cross Ownership R&O, p. 307.

[64] Federal Communications Commission, "Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 64-445," 29 *Federal Register* 7535- 7537, June 12, 1964. At the time, the FCC used a 1 mv/m signal contour for both AM and FM stations in its local radio ownership rules, arguing that the standards for both services were roughly comparable, because a 1 mv/m signal provided adequate levels of service in less-populated areas where overlap between co-owned stations was more likely to occur.

[65] 1970 Cross Ownership R&O, p. 315.

[66] 1999 Media Ownership R&O, pp. 12949-12954.

[67] Ibid., pp. 12954-12955.

[68] 47 C.F.R. §73.3555(c)(3).

In 2001, the FCC amended the rules to incorporate larger analog signal contour limits of television stations for the purposes of counting voices.[69] In 2016, the FCC retained its radio/television cross-ownership rules, with some modifications, after considering their repeal.[70]

Modifications

Applicable Television Signals Redefined

The FCC uses two different types of broadcast television signals for the purpose of (1) triggering the radio/television cross-ownership rules, and (2) counting the number of independent television voices within a DMA. In 2016, the FCC redefined the applicable broadcast television signal contours to reflect stations' transition to digital television. The FCC uses the smaller digital PCC for the rules' trigger, and the larger digital NLSC for the television voice count.

When explaining why it would use the digital PCC (rather than a digital NLSC) for triggering the rules, the FCC stated that "a television station's [digital] PCC ensures reliable service for the community of license, is already defined in the [FCC's] rules, and can be verified easily in the event of a dispute."[71] The FCC stated that using the digital NLSC to count the number of independent voices is consistent with its approach to the television duopoly rule.[72]

The FCC prohibits common ownership of a broadcast television station and an FM radio station if

- the digital PCC of the television station encompassed the entire community of license of the FM radio station, or
- the 1 mv/m contour of the FM station encompassed the entire community of license of the broadcast television station.[73]

The FCC prohibits common ownership of a broadcast television station and an AM radio station if

- the digital PCC contour of the television station encompassed the entire community of license of the AM radio station, or
- the 2 mv/m contour of the AM station encompassed the entire community of license of the broadcast television station.[74]

[69] 2001 Media Ownership Reconsideration, p. 1073.

[70] 2014 Quadrennial Review 2nd R&O, pp. 9944-9952.

[71] Ibid., pp. 9951-9952.

[72] 2014 Quadrennial Review 2nd R&O, p. 9951.

[73] Ibid., p. 10026.

[74] Ibid.

Table 3 further describes the rules.

Table 3. 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	Waiver Criteria
20	1	7	On a case-by-case basis, the FCC will consider waivers if one station failed.[a] Applicants must demonstrate that an in-market buyer is only entity ready, willing, and able to operate the station, and that sale to a buyer outside of the market would result in an artificially depressed price.
20	2	6	
10	2	4	

Sources: 47 C.F.R. §73.3555(c)(2); 47 C.F.R. §73.3555, Note 7; 2014 Quadrennial Review 2nd R&O.

Note: The rules do not apply to noncommercial stations, but noncommercial broadcast and radio stations are counted among the post-merger media voices.

a. The definition of a "failed station" is the same as that used for the television duopoly rule. In contrast to the television duopoly rule, however, there is no "failing station" waiver standard.

Newspaper/Broadcast Cross-Ownership Rules

The newspaper/broadcast cross-ownership (NBCO) rules limit ownership of broadcast stations and newspapers serving the same geographic area. In 2016, the FCC modified the rules to consider radio and television markets as well as broadcast signals to determine when the rules are triggered. In contrast to the local television and radio/television cross-ownership rules, the NBCO rules do not include a voice test.

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."[75] 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 first adopted NBCO rules in 1975.[76] In evaluating when to trigger the rules, FCC used signal contour limits that were parallel to those it adopted for the radio/television cross-ownership rules.[77] The FCC prohibited common ownership of broadcast stations and newspapers where these signals encompassed the locality of a newspaper.

[75] C.F.R. §73.3555, Note 6.

[76] Federal Communications Commission, "Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 75-104, Second Report and Order," 50 *FCC Reports, Second Series* 1046, January 31, 1975 (1975 Cross Ownership 2nd R&O).

[77] Ibid., p. 1075.

The FCC stated that television and radio stations could be expected, through public affairs programming, to provide coverage of problems of the communities encompassed by the city grade signals, including the newspaper's locality.[78] The FCC stated that it was unreasonable to expect stations to serve the needs of communities located outside of their city grade signal contours, "and it would be unfair to impose any such burden on them to attempt it."[79] Therefore, the FCC did not base its criteria on the overall viewing patterns of a station, but instead on whether the station could "provide meaningful attention to local problems and issues."[80]

Modifications: Geographic Scope

In 2016, the FCC retained its radio/newspaper cross-ownership (NBCO) rules after considering their repeal.[81] It also retained the general prohibition on the cross-ownership of newspapers and television stations. In addition, the FCC (1) replaced the analog television signal contours specified in the rules with digital signals, and (2) revised the trigger of the NBCO rules to consider the relevant television and radio markets of the stations as well as their signals.

Signal Overlap Redefined for Triggering of Rule

Similar to the radio/television cross-ownership rules—but in contrast to the television duopoly rules—the FCC uses the digital PCC for the NBCO rules' trigger.[82] The FCC stated that a television station's [digital] PCC "can be verified in a straightforward manner, which ensures reliable service for the [broadcast television station's] community of license."[83]

Markets

In 2016, the FCC modified the geographic scope of the NBCO rules by incorporating television DMAs into the rules governing cross-ownership of newspapers and television stations, and Nielsen Audio Metro markets in the rules governing cross-ownership of newspapers and radio stations.[84]

Specifically, the FCC prohibits cross-ownership of a full-power television station and a daily newspaper when

- the community of license of the television station and the community of publication of the newspaper are in the same Nielsen DMA, and
- the digital PCC of the television station encompasses the entire community in which the newspaper is published.

The FCC stated that the DMA requirement ensures that the newspaper and television station serve the same media market, and the contour requirement ensures that they actually reach the same communities and consumers within that large geographic market.[85]

[78] Ibid., p. 1082.

[79] Ibid.

[80] Ibid.

[81] Ibid., pp. 9912-9944.

[82] 2014 Quadrennial Review 2nd R&O, p. 9931.

[83] Ibid., p. 9931, n. 485.

[84] Ibid., pp. 9931-9933.

[85] Ibid., p. 9931.

The FCC prohibits cross-ownership of a full-power radio station and a daily newspaper, in areas designated as Nielsen Audio Markets, when

- the community of license of the radio station and the community of publication of the newspaper are in the same Nielsen Audio Metro market, and
- the service contour of the radio station (i.e., the 1 mV/m contour of an FM station, the 2 mV/m contour of an AM station) encompasses the entire community in which the newspaper is published.

When both the community of license of the radio station and the community of publication of the newspaper are not located in the same Nielsen Audio Metro market, then only the second condition applies.

The FCC stated that it believes that Nielsen's determination of a radio market's boundaries is useful in considering whether particular communities rely on the same media voices. It further stated that it believes that such a determination, combined with the actual service areas of the respective facilities, gives a stronger picture of the relevant market and instances in which the FCC should prohibit common ownership.[86] **Table 4** further illustrates the rules.

Table 4. Newspaper/Broadcast Cross-Ownership Rules

Prohibited Combinations Based on Signal and Market Overlap

Broadcast Outlet	Signal Overlap[a]	Markets	Exceptions/ Waiver Criteria
Full-power television station	Digital PCC service contour	The TV station's community of license and the newspaper's community of publication are located within the same DMA.	Exception to NBCO rules apply if one station or newspaper failed/is failing.[b] Applicants must demonstrate that an in-market buyer is the only entity ready, willing, and able to operate the station, and that sale to a buyer outside of the market would result in an artificially depressed price. FCC may issue waivers on a case-by-case basis. Applicants must demonstrate proposed mergers would not harm viewpoint diversity.
Full-power FM radio station	1 mv/m signal contour	The FM station's community of license and the newspaper's community of publication are located within the same Nielsen Audio Metro market (if applicable).	
Full-power AM radio station	2 mv/m signal contour	The AM station's community of license and the newspaper's community of publication are located within the same Nielsen Audio Metro market (if applicable).	

Sources: 47 C.F.R. §73.3555(d); 2014 Quadrennial Review 2nd R&O, pp. 9930-9934.

a. For the rules to be triggered, the signals must encompass the entire community in which the newspaper is published.

b. To qualify as failing, the applicant must show that (1) if a broadcast television station, that it had an all-day audience share of 4% or lower, (2) the newspaper or broadcast station had negative cash flow for the previous three years, and (3) the combination will produce public-interest benefits.

[86] Ibid., pp. 9932-9933.

Relief from Rules

In 2016, the FCC described three ways licensees can seek relief from the NBCO rules: (1) qualifying for an outright exception to the rules by demonstrating that the broadcast station or newspaper is financially failing or has failed; (2) applying for a waiver by demonstrating, on a case-by-case basis, that the waiver would not unduly harm viewpoint diversity; and (3) qualifying for grandfathered status as a result of the FCC's changes to the geographic scope of the rules.

Exception

The FCC adopted an exception, rather than a waiver standard, to the rules for proposed mergers involving a failed or failing broadcast station or newspaper, and stated that it would consider waivers of the rules on a case-by-case basis, if the applicants can show the proposed mergers would not harm viewpoint diversity.

In adopting the failed/failing station or newspaper exception, the FCC stated the following:

> It stands to reason that a merger involving a failed or failing newspaper or broadcast station is not likely to harm viewpoint diversity in the local market. If the entity is unable to continue as a standalone operation, and thus contribute to viewpoint diversity, then preventing its disappearance from the market potentially can enhance, and will not diminish, viewpoint diversity.[87]

For granting exceptions to the NBCO rules, FCC adopted the same failed/failing criteria it uses for its case-by-case waivers of the television duopoly rules. Applicants need not show, either at the time of their application or during subsequent license renewals, that the tangible and verifiable public interest benefits of the combination would outweigh any harm. The FCC explained that it would not require a public interest showing because it was creating an exception to the NBCO rule, rather than a waiver. The FCC stated that "recognizing that an absolute ban on newspaper/broadcast cross-ownership is overly broad, we believe it is appropriate to provide greater flexibility and certainty in the context of this rule."[88] The FCC did not impose an FSSR requirement for parties seeking to take advantage of this exception to the NBCO rules.

Waivers

The FCC adopted a case-by-case approach to considering waivers of the NBCO rules.[89] The FCC plans to evaluate waiver requests by assessing "the totality of the circumstances for each individual transaction" without measuring it against a set of defined criteria or awarding the applicant an automatic presumption based on a prima facie showing of particular elements.[90] An applicant will need to show the grant of the waiver would not unduly harm viewpoint diversity in the local market.

The FCC stated that it believed a case-by-case waiver approach would give it flexibility to allow due consideration of all factors relevant to a case, and enable it to home in quickly on the most important considerations of the proposed transaction and approach them with an openness that might not occur with a set framework. As a result, the FCC stated, it will be able to determine

[87] Ibid., p. 9933.

[88] Ibid., p. 9934. In contrast to the radio/television cross-ownership rules, the newspaper/broadcast cross-ownership rules specify "Nielsen Audio" rather than "Arbitron [which changed its name after Nielsen acquired it] or another nationally recognized audience rating service." Therefore, if Nielsen Audio is acquired by another firm, the FCC would need to update this rule.

[89] Ibid., pp. 9938-9941.

[90] Ibid., p. 9938.

more accurately and precisely whether a proposed combination would have an adverse impact on viewpoint diversity in the relevant local market. Moreover, the FCC stated that

> specifically allowing for a waiver of the NBCO Rule[s] in cases where applicants can demonstrate that the proposed combination will not unduly harm viewpoint diversity, we signal our recognition that there may be instances where enforcing the prohibition against ownership of a newspaper and broadcast station is not necessary to serve the rule's purpose of promoting viewpoint diversity in the local market. Indeed, it is our determination herein that the public interest would not be served by restricting specific combinations that do not unduly harm viewpoint diversity.[91]

To enable a timely public response to waiver requests, the FCC will require broadcast and radio station licensees to file their requests prior to a newspaper acquisition, and commission staff will place the waiver requests on public notice.[92]

Grandfathering

The FCC will grandfather, to the extent required, any existing newspaper-broadcast combinations that no longer comply with the NBCO rules as a result of the FCC's 2016 changes but will not allow licensees to transfer grandfathered newspaper-broadcast combinations, including those subject to permanent waivers.[93] In addition, the FCC will continue to allow all combinations currently in existence that have been grandfathered or approved by permanent waiver to the extent that grandfathering/permanent waivers are still necessary to permit common ownership.

The FCC stated that this policy is consistent with long-standing precedent of requiring transferees or assignees of properties to comply with FCC rules in effect at the time of the transaction. In addition, the FCC stated the policy will drive the broadcast industry toward compliance with current rules when owners voluntarily decide to sell their properties, while minimizing hardships on licensees who would otherwise be forced to sell properties as a result of the FCC's modifications.

Dual Network Rule

The dual network rule (described in detail at 47 C.F.R. §73.658(g)) prohibits common ownership of two of the "top four" networks but otherwise permits common ownership of multiple broadcast networks.[94] Generally, the four broadcast networks covered by this definition are ABC, CBS, Fox, and NBC.

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[91] Ibid., p. 9940.

[92] Ibid., p. 9938. Such a prohibition mirrors antitrust laws, which prohibit the premature combining of parties ("gun jumping"). 15 U.S.C §18 (prohibiting mergers that would substantially lessen competition); 15 U.S.C. §18a (requiring parties exceeding certain size thresholds that plan to engage in transactions exceeding certain dollar values to report their plans to the Federal Trade Commission and the DOJ for review prior to the transaction's completion); 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.

[93] 2014 Quadrennial Review 2nd R&O, pp. 9941-9942.

[94] The rules provide the following: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in Section 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)." 47 C.F.R. §73.658(g).

The FCC first adopted this rule, which originally prohibited ownership of any two networks, with respect to radio in 1941, as part of the *Chain Broadcasting Report*.[95] The FCC directed the rule at NBC, the only company at that time with two radio networks. The FCC found that the operation of two networks gave NBC excessive control over its affiliated broadcast radio stations, and an unfair competitive advantage over other broadcast radio networks.[96] The FCC extended the dual network rule to television networks in 1946.[97]

Section 202(e) of the Telecommunications Act of 1996 directed the FCC to revise its dual network rule to prohibit a party from affiliating with an entity if that entity controlled more than one of the four largest networks—ABC, CBS, Fox, and NBC—or with an entity that controlled one of these four networks and either of two emerging networks in existence at that time.[98] In 2001, the FCC revised the rule to permit one of the four major networks to jointly own one of those emerging networks, which have since merged into the CW network.[99] Today, the CBS Corporation has a partial ownership interest in the CW broadcast network.[100] In 2016, the FCC retained the "dual network" rule without modification, in order to foster its goals of preserving competition and localism.[101] **Table 5** summarizes the public-interest rationales for each of the rules.

[95] Federal Communications Commission, *Report on Chain Broadcasting*, Order No. 37, Docket No. 5060, May 1941, pp. 91-92, https://babel.hathitrust.org/cgi/pt?id=uc1.$b78643;view=1up;seq=8.

[96] Ibid., pp. 70-73. The FCC repealed the rules for radio in 1977. Federal Communications Commission, "Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, Report, Statement of Policy, and Order, FCC 77-206," 63 *FCC Reports, Second Series* 674, March 23, 1977.

[97] Federal Communications Commission, "Part 3—Rules Governing Television Broadcast Stations," 11 *Federal Register* 33, 37, January 1, 1946.

[98] P.L. 104-104 §202(e).

[99] Federal Communications Commission, "Amendment of Section 73.658(g) of the Commission's Rules—The Dual Network Rule," 16 *FCC Record* 11114, May 15, 2001.

[100] CBS Corporation, "Our Portfolio: The CW," https://www.cbscorporation.com/portfolio/the-cw/.

[101] 2014 Quadrennial Review R&O, pp. 9952-9960.

Table 5. Summary of Public-Interest Rationales for Media Ownership Rules

	Local TV	Local Radio	Radio/TV Cross	Newspaper / Broadcast Cross	Dual Network
Necessary to promote competition?	Yes; for viewers and revenues	Yes; broadcast radio unique product market	No	No	Yes
Necessary to promote localism?	Consistent with; competition stimulates localism	No, but consistent with; may promote	No	No	Yes; preserves balance of bargaining power between networks and affiliates, enabling affiliates to influence networks' programming decisions in manner that serves affiliates' communities
Necessary to promote viewpoint diversity?	Will promote; ensures presence of independently owned TV stations	No, but consistent with; may promote	Yes	Yes	Silent
Necessary to promote minority/female ownership of broadcast stations?	Consistent with; competition can indirectly promote; FSSR promotes	Consistent with; competition can indirectly promote	Consistent with; rules preserve ownership opportunities for new entrants	Helps promote; preserves ownership opportunities for new entrants	No; no meaningful impact

Source: 2014 Quadrennial Review 2nd R&O.

Ownership Diversity

In 2004, 2011, and 2016, 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. Specifically, the U.S. Court of Appeals ordered the FCC to consider a range of standards for defining entities that would be eligible for exceptions to its media ownership rules, and what the exceptions might be.

As evidence of the FCC's "statutory obligation to promote minority and female broadcast ownership," the Third Circuit cited two sections of the Communications Act of 1934. Due to the manner in which the FCC licenses new broadcast stations, however, it is possible that only one of these two sections currently applies.

The first section, Section 309(i)(3)(A) of the Communications Act, states, in the context of applications to the FCC for a *random* selection for licenses or construction permits, that "to further diversify the ownership of the media of mass communications, an additional significant

preference shall be granted to any group controlled by a member or members of a minority group."[102] In 1997, however, as part of the Balanced Budget Act of 1997 (P.L. 105-33), Congress directed the FCC to resolve competing applications for commercial broadcast stations by *competitive bidding*, rather than random selection, and expanded the FCC's competitive bidding authority under Section 309(j) of the Communications Act.[103]

The second section cited by the Third Circuit is Section 309(j)(3)(B) of the Communications Act of 1934, which specifies that in awarding licenses and permits via competitive bidding, one of the FCC's objectives must be promoting opportunities for, among others, "businesses owned by members of minority groups and women."[104] To achieve this goal, Section 309(j)(4)(D) of the Communications Act directs the FCC to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures."[105]

Link with Media Ownership Rules

In 1999, the FCC relaxed several of its media ownership rules.[106] Acknowledging that various parties expressed concern that greater consolidation of broadcast ownership could make it more difficult for new licensees to enter the broadcasting industry, the FCC stated that (1) it was conducting studies that would enable it to address 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, and (2) upon completion of the studies, it would examine steps it could take to expand opportunities for minorities and women to enter the broadcast industry.[107] In addition, as described in "Local Television Ownership Rules (Television Duopoly Rules)," the FCC reasoned that the notification requirement would give minorities and women interested in purchasing a station an opportunity to bid.[108] The commission reiterated that "the [FCC] has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area."[109]

In 2002, the FCC issued an order repealing and/or further relaxing several media ownership rules, including the failed station solicitation rule (FSSR), described in "Local Television Ownership

[102] Congress added this section as part of the Communication Amendments Act of 1982, P.L. 97-259. (47 U.S.C. §309(i)). The conference report stated that the underlying policy goal of this preference was to "promote the diversification of media ownership and consequent diversification of media content" and that such a policy would be served by "assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so." U.S. Congress, *Communications Amendments of 1982*, conference report to accompany H.R. 3239, 97th Cong., 2nd sess., H. Rept. 97-765 (Washington, DC: GPO, 1982), pp. 40, 43.

[103] 47 U.S.C. §309(i)(5). Federal Communications Commission, "Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order, FCC 98-194," 13 *FCC Record* 15920, August 18, 1998 (1998 Commercial Broadcast Competitive Bidding R&O).

[104] 47 U.S.C. §309(j)(3)(B).

[105] 47 U.S.C. §309(j)(4)(D).

[106] 1999 Media Ownership R&O.

[107] 1999 Media Ownership R&O, p. 12910. Adarand Constructors v. Peña, 515 U.S. 200 (1995).

[108] 1999 Media Ownership R&O, p. 12937.

[109] Ibid.

Rules (Television Duopoly Rules)," arguing that "the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market."[110] The FCC deferred consideration of other proposals to advance minority and female ownership, stating that it would address them in a future rulemaking.[111]

In 2004, in *Prometheus Radio Project v. Federal Communications Commission* (shorthanded as *Prometheus I*), the U.S. Third Circuit Court of Appeals remanded the repeal of the FSSR, noting that the FCC did "not explain that preserving minority ownership was the purpose of the FSSR, nor [did] it argue that the FSSR was harmful or ineffective toward this purpose."[112] Also in *Prometheus I*, the Third Circuit directed the FCC to consider proposals to promote minority broadcast ownership at the same time that it addressed other media ownership rules.[113] The FCC reinstated the FSSR as part of the 2006 Quadrennial Review Order, which it adopted in 2007.[114]

Eligible Entity Standard and Measures

In 2003, to help promote diversity of ownership, the FCC established a class of broadcast licensees called "eligible entities" that would be eligible for an exception to its radio/television cross-ownership rules.[115] Specifically, the FCC permitted broadcast licensees to assign or transfer control of a grandfathered combination of radio and television stations to any entity that would qualify as a small business consistent with revenue-based standards for its industry grouping, as established by the Small Business Administration.

In 2008, in response to the Third Circuit's directive in *Prometheus I*, the FCC adopted a range of additional measures designed to promote the diversification of media ownership.[116] The measures enabled eligible entities to abide by less restrictive media ownership and attribution rules, and more flexible licensing policies, than their counterparts. Once again, the FCC used a revenue-based definition. The FCC claimed that the measures would "be effective in creating new opportunities for a variety of small businesses and new entrants, including those owned by women and minorities."[117] It also stated that such a "race- and gender-neutral definition" would enable the FCC to avoid "constitutional difficulties" that might impede timely implementation of its efforts to diversify media ownership.[118]

[110] Federal Communications Commission, "2002 Quadrennial Report and Order and Notice of Proposed Rulemaking, FCC 03-127," 18 *FCC Record* 13620, 13708, July 2, 2003 (2002 Quadrennial R&O and NPRM).

[111] Ibid., pp. 13636-13637.

[112] Prometheus I, 373 F.3d 420 (2004).

[113] Ibid., p. 421.

[114] Federal Communications Commission, "2016 Quadrennial Review Report and Order and Order on Reconsideration, FCC 070216," 23 *FCC Record* 2010, 2068, February 4, 2008.

[115] Federal Communications Commission, "2002 Biennial Review Order, FCC 03-127," 18 *FCC Record* 13620, 13810-13812, July 2, 2003.

[116] The FCC voted on the rules in 2007, but published them in 2008. Federal Communications Commission, "Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-217," 23 *FCC Record* 5922, March 5, 2008 (2008 Diversity Order).

[117] 2008 Diversity Order, p. 5927.

[118] 2008 Diversity Order, p. 5927.

Court Directives

In 2011, in *Prometheus Radio Project v. Federal Communications Commission* (shorthanded as *Prometheus II*), the Third Circuit vacated and remanded each of the measures adopted in the 2008 Diversity Order, ruling that the FCC failed to provide evidence that its revenue-based eligible entity definition would meet its goal of increasing broadcast ownership by minorities and women. The Third Circuit also directed the FCC to consider other proposed definitions for eligible entities, so that the FCC might "adequately justify or modify its approach to advancing broadcast ownership by minorities and women."[119]

In 2016, in *Prometheus Radio Project v. Federal Communications Commission* (shorthanded as *Prometheus III*), the Third Circuit concluded that the FCC had unreasonably delayed action on its definition of an eligible entity, and ordered the FCC to "act promptly."[120]

2016 FCC Diversity Order

In 2016, the FCC adopted rules designed to increase broadcast ownership diversity, and addressed whether the agency believes that it has the constitutional authority to adopt rules specifically targeting minority and female ownership of broadcast stations.

Legal Authority

The FCC found in 2016 that, though there were differing opinions on the interpretation of the case law, the U.S. Supreme Court could deem the FCC's interest in promoting a diversity of viewpoints sufficient to pass its legal tests for regulations targeting minorities and females.[121] However, even if the FCC's interest in promoting viewpoint diversity were deemed sufficient, the FCC concluded that it lacked sufficient evidence to pass other elements of the Supreme Court's tests for such rules.[122] The FCC cited two reasons:

1. The studies it commissioned on media ownership and Hispanic television (based in part on data from its broadcast ownership reports), as well as studies submitted by commenters, did not demonstrate adequately 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 a flexible, nonmechanical way.

[119] Prometheus II, 652 F.3d at 438.

[120] Prometheus III, 824 F.3d at 37.

[121] 2014 Quadrennial Review 2nd R&O, pp. 9989-9994. While there is debate over whether the Supreme Court would recognize viewpoint diversity as a sufficient government interest to support race- or gender-based classifications, the Supreme Court has recognized 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 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. Ibid., pp. 9995- 9999. If sufficient evidence could be discovered, the FCC might be able to justify adopting rules that would rectify past discrimination. See Adarand Constructors v. Peña, 515 U.S. 200 (1995) (racial discrimination); Grutter v. Bollinger, 539 U.S. 306, 329 (2003); United States v. Virginia, 518 U.S. 515 (1996) (gender discrimination).

[122] 2014 Quadrennial Review 2nd R&O, pp. 9989-9994. The FCC conducted a study of Hispanic television viewing that considered (1) the impact of Hispanic-owned television stations on Hispanic-oriented programming and viewership, and (2) the extent of Hispanic-oriented programming on U.S. broadcast television, which it released in May 2016. Ibid., pp. 9967- 9970.

The FCC stated that it did not believe that either Section 257 of the 1996 Telecommunications Act or Section 309(j) of the Communications Act of 1934 requires it to adopt race- or gender-conscious measures in order to promote ownership diversity.[123] The FCC did not discuss Section 309(i) of the Communications Act of 1934.

Revenue-Based Eligible Entity Standard

In 2016, the FCC reinstated the revenue-based eligible entity standard, using the Small Business Administration's definition of a "small business."[124] Entities that own broadcast stations and have total annual revenue of $38.5 million or less qualify for exemption from the media ownership rules.[125] Such a definition could potentially apply to entities that own stations engaged in the joint financial and operational arrangements, described in "Joint Sales Agreements," that the Media Bureau stated it would carefully scrutinize.

Measures Specific to Small Businesses

In 2016 the FCC also reinstated the six measures from its 2008 Diversity Order to enable eligible entities to abide by less restrictive media ownership and attribution rules, and more flexible licensing policies, than their counterparts.[126]

By exempting small businesses from some of its ownership and attribution rules, the FCC could potentially undermine the rationales for retaining and tightening these rules, other portions of the 2014 Quadrennial Review, and the Media Bureau Public Notice.

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[123] 2014 Quadrennial Review 2nd R&O, pp. 9999-10000.

[124] 2014 Quadrennial Review 2nd R&O, pp. 9979-9984.

[125] 2014 Quadrennial Review 2nd R&O, pp. 9983-9984. The FCC stated that it would require 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.

[126] As directed by the Third Circuit in Prometheus II, the FCC discussed additional proposals set forth by commenters in the 2010 Diversity proceeding. The commission declined to adopt them.