

# CRS Report for Congress

## FCC Media Ownership Rules: Current Status and Issues for Congress

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# FCC Media Ownership Rules: Current Status and Issues for Congress

## Summary

On June 2, 2003, the Federal Communications Commission (FCC) modified five of its media ownership rules, easing restrictions on the ownership of multiple television stations (nationally and in local markets) and on local media cross ownership, and tightening restrictions on the ownership of multiple radio stations in local markets. Those rules have never gone into effect. Sec. 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199) instructed the FCC to modify its new National Television Ownership rule to allow a broadcast network to own and operate local broadcast stations that reach, in total, at most 39% of U.S. television households. On June 24, 2004, the United States Court of Appeals for the Third Circuit (“Third Circuit”), in *Prometheus Radio Project vs. Federal Communications Commission*, found that the FCC did not provide reasoned analysis to support its specific local ownership limits, and also that the FCC failed to address the impact of its new rules on minority ownership of broadcast stations, and therefore remanded portions of the new local ownership rules back to the FCC and extended its stay of those rules.

In June 2006, the FCC adopted a Rulemaking seeking comment on how to address the issues raised by the Third Circuit and initiating a statutorily required quadrennial review of all of its media ownership rules. On December 18, 2007, the FCC adopted an order that modified only one of its media ownership rules — the newspaper-broadcast cross-ownership rule. Under the new rule, it would be presumptively in the public interest, in the 20 largest markets, for a major daily newspaper to own a single television or radio station, so long as the television station is not among the four highest-rated stations in the market and after the transaction there are at least eight independently owned and operating major media voices. A bipartisan group of 25 senators informed the FCC of its intention to pass a joint resolution of disapproval to revoke the rule. S. 2332 and H.R. 4835 would require the FCC, before adopting any new broadcast ownership rule after October 1, 2007, to give 90 days notice for public comment, and to initiate, conduct, and complete a separate rulemaking to promote the broadcast of local programming and content. They also would require the FCC to establish an independent Panel on Women and Minority Ownership of Broadcast Media and to conduct a full and accurate census of the race and gender of broadcast owners. H.R. 4167 would eliminate the newspaper-broadcast radio cross-ownership prohibition.

In the summer of 2007, the FCC adopted a Second Further Notice of Proposed Rulemaking seeking comment on 34 proposals for increasing minority ownership of broadcast stations. On December 18, 2007, the FCC adopted an order that implemented 12 of those proposals, although eligibility was not limited to minority or socially and economically disadvantaged businesses, but rather was available to all small businesses. A companion Notice of Proposed Rulemaking sought comment on eligibility criteria and on how best to improve FCC collection of data regarding the gender, race, and ethnicity of broadcast licensees. This report will not be updated. For activities after 2007 relating to media ownership, see CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*.

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# FCC Media Ownership Rules: Current Status and Issues for Congress

## Overview of Current Status

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

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

On December 18, 2007, the FCC adopted an order that modified the broadcast cross-ownership rule,<sup>3</sup> making it presumptively in the public interest, in the 20 largest

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

<sup>2</sup> *Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 435 (3<sup>rd</sup> Circuit 2004) (*Prometheus*). The decision also is available at [<http://www.ca3.uscourts.gov/opinarch/033388p.pdf>], viewed on November 16, 2007. For a legal perspective on the *Prometheus* decision, see CRS Report RL32460, *Legal Challenge to the FCC's Media Ownership Rules: An Overview of Prometheus Radio v. FCC*, by Kathleen Ann Ruane.

<sup>3</sup> "FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule," FCC News (continued...)

local markets (DMAs), for a major daily newspaper to own a single television or radio station, so long as the television station is not among the four highest-rated stations in the market, and after the transaction there are at least eight independently owned and operating major media voices. With several exceptions, in all other situations any newspaper-broadcast cross-ownership would be presumptively not in the public interest. That negative presumption would be reversed, however, if

- the applicant can qualify for a “failed station” waiver by showing that the newspaper or broadcast station had ceased publication or gone dark at least four months before the filing or an application, or was in bankruptcy proceedings; or
- the applicant can qualify for a “failing station” waiver by showing that (a) the broadcast station has had an all-day audience share of 4% or lower; (b) the newspaper or broadcast station has had a negative cash flow for the previous three years; (c) the combination will produce public interest benefits; and (d) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the newspaper or station; or
- a proposed transaction would result in a new source of local news in a market, specifically when a combination would initiate at least seven hours of new local news programming per week on a broadcast station that previously has not aired local news.

In any situation, the commission would be required to make a public interest finding and, in so doing, consider, among other factors, whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; whether each affected media outlet in the combination will exercise its own independent news judgment; the level of concentration in the DMA; and the financial condition of the newspaper, and if the newspaper is in distress, the owner’s commitment to invest significantly in newsroom operations. Thus, under the proposed rule, a newspaper-broadcast combination in a top-20 market could be rejected by the commission, and a newspaper-broadcast combination in a smaller market could be approved.

The new rule, which is likely to be appealed both by parties opposing any loosening of the FCC’s newspaper-broadcast cross-ownership rule and parties seeking greater loosening of the rule, cannot take effect until approved by the Third Circuit. It is likely that an affected party that favors the rule change will petition the court to end the stay and allow the rule to go in effect pending court review.

The current status of the FCC’s broadcast media ownership rules is as follows:

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<sup>3</sup> (...continued)

Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf)], viewed on December 20, 2007. The text of the order has not yet been released.

- **National Television Ownership:** a broadcast network may own and operate local broadcast stations that reach, in total, up to 39% of U.S. television households; entities that exceed the 39% cap must divest as needed to come into compliance within two years; the FCC may not forbear on applying the 39% cap; and the FCC is prohibited from performing the quadrennial review of the 39% cap.<sup>4</sup> In calculating a network's reach, UHF stations continue to be treated as if they reach only 50% of the households in the market.<sup>5</sup>
- Until the FCC crafts new rules approved by the Third Circuit, the ownership rules in effect prior to June 2, 2003 remain in effect:<sup>6</sup>
  - **Local Television Multiple Ownership:** a company can own two television stations in the same Designated Market Area ("DMA")<sup>7</sup> if the stations' Grade B contours<sup>8</sup> do not overlap *or* if only one is among the four highest-ranked (in terms of audience) in the market and at least eight independent television stations would remain in the market after the proposed combination.<sup>9</sup> An existing licensee of a failed, failing, or unbuilt television station can seek a waiver of the rule if it can demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market

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<sup>4</sup> This is required by the FY2004 Consolidated Appropriations Act (P.L. 108-109, 118 Stat. 3 et seq.), Section 629. The relevant FCC rule is 47 C.F.R. 73.3555(d)(1).

<sup>5</sup> The Third Circuit concluded that challenges to the FCC's decision to retain the 50% UHF "discount" were moot "because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit ... [which] would undermine Congress's specification of a precise 39% cap." (*Prometheus*, 373 F.3d at 396). The relevant FCC rule is 47 C.F.R. 73.3555(d)(2)(i).

<sup>6</sup> "The stay currently in effect will continue pending our review of the Commission's action on remand, over which the panel retains jurisdiction." (*Prometheus*, 373 F.3d at 435)

<sup>7</sup> Designated Market Areas are geographic designations developed by Nielsen Media Research. A DMA is made up of all the counties that get the preponderance of their broadcast programming from a given television market. The Nielsen DMAs are both complete (all counties in the United States are in a DMA) and exclusive (DMAs do not overlap).

<sup>8</sup> Grade B is a measure of signal intensity associated with acceptable reception. The FCC's rules define this contour, often a circle drawn around the transmitter site of a television station, in such a way that 50 percent of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90 per cent of the time. Although a station's predicted signal strength increases as one gets closer to the transmitter, there will still be some locations within the predicted Grade B contour that do not receive a signal of Grade B intensity.

<sup>9</sup> 47 C.F.R. 73.3555(b).

buyer would result in an artificially depressed price for the station.<sup>10</sup>

- **Local Radio Multiple Ownership:** the number of radio stations that a company can own in a local market varies according to the total number of stations in the market, as follows: in a radio market with 45 or more full power commercial and noncommercial radio stations, a party may own, operate or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM); in a market with between 30 and 44 (inclusive) full power commercial and noncommercial stations, a party may own, operate, or control up to seven commercial radio stations, not more than four of which are in the same service; in a market with between 15 and 29 (inclusive) full power commercial and noncommercial radio stations, a party may own, operate, or control up to six commercial radio stations, not more than four of which are in the same service; and in a radio market with 14 or fewer full power commercial and noncommercial radio stations, a party may own, operate, or control up to five commercial radio stations, not more than three of which are in the same service, except that a party may not own, operate, or control more than 50% of the stations in any market.<sup>11</sup>
- **Broadcast-Newspaper Cross-Ownership:** pending court approval of the new rule adopted by the FCC on December 18, 2007, common ownership of a full-service broadcast station and a daily newspaper is prohibited when the broadcast station's service contour encompasses the newspaper's city of publication. Combinations that pre-date 1975 are grandfathered,<sup>12</sup> and companies may seek waiver of the rule.
- **Television-Radio Cross-Ownership:** An entity may own up to 2 television stations (provided it is permitted under the Local Television Multiple Ownership rule) and up to 6 radio stations (provided it is permitted under the Local Radio Multiple Ownership rule) in a market where at least 20 independently owned media voices would remain post-merger.

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<sup>10</sup> 47 C.F.R. 73.3555 n. 7.

<sup>11</sup> As explained below, the Third Circuit, in rehearing, lifted its stay of the portion of the FCC rules that modified the methodology used to define local radio markets, and thus the current rule language, 47 C.F.R. 73,3555(a), is as it appears in Appendix H of the Report and Order. The statutory language and FCC rule also provide an exception to these ownership limits whereby the FCC may permit a person or entity to own, operate, or control, or have a cognizable interest in radio broadcast stations that exceed the limit if that will result in an increase in the number of radio broadcast stations in operation.

<sup>12</sup> 47 C.F.R. 73.3555(d) as it existed prior to the FCC's June 2, 2003 Order.

Where entities may own a combination of 2 television stations and 6 radio stations, the rule allows an entity alternatively to own 1 television station and 7 radio stations. An entity may own up to 2 television stations (as permitted under the Local Television Multiple Ownership rule) and up to 4 radio stations (as permitted under the Local Radio Multiple Ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. A combination of 1 television station and 1 radio station is allowed regardless of the number of voices remaining in the market.<sup>13</sup>

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

- not to retain a ban on newspaper-broadcast cross-ownership;<sup>14</sup>
- to retain some limits on common ownership of different-type media outlets;<sup>15</sup>
- to retain the restriction on owning more than one top-four television station in a market;<sup>16</sup>
- the commission's new definition of local radio markets;<sup>17</sup>
- to include non-commercial stations in determining the size of local radio markets;<sup>18</sup>
- the commission's restriction on the transfer of radio stations;<sup>19</sup>

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<sup>13</sup> 47 C.F.R. 73.3555(c) as it existed prior to the FCC's June 2, 2003 Order. For this rule, media "voices" include independently owned and operating full-power broadcast television stations, broadcast radio stations, English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny, plus any independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron.

<sup>14</sup> *Prometheus*, 373 F.3d at 397-399.

<sup>15</sup> *Ibid.*, at 399-401.

<sup>16</sup> *Ibid.*, at 418.

<sup>17</sup> *Ibid.*, at 425.

<sup>18</sup> *Ibid.*, at 426.

<sup>19</sup> *Ibid.*, at 426-428.



- to count radio stations brokered under a Joint Sales Agreement toward the brokering station’s permissible ownership totals;<sup>20</sup> and
- to use numerical limits in its ownership rules (though not the specific numerical limits adopted by the commission).<sup>21</sup>

Since the Third Circuit had upheld the FCC’s findings as they applied to the methodology underlying the revised local radio ownership rules, the FCC filed a narrowly focused petition for panel rehearing, asking the Third Circuit to reconsider its extension of the stay of the revised Local Radio Multiple Ownership rule, arguing that the “stay prevents the Commission from implementing regulatory changes that this Court has upheld as a reasonable exercise of the Commission’s public interest authority.”<sup>22</sup> The Third Circuit approved a partial lifting of the stay:

Inasmuch as we held in our Opinion and Judgment of June 24, 2004, that certain changes to the local radio ownership rule proposed by the Federal Communications Commission (the “Commission”) in its Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) — specifically, using Arbitron Metro markets to define local markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a Joint Sales Agreement to a brokering station’s permissible ownership totals, and imposing a transfer restriction (collectively, the “Approved Changes”) — are constitutional and/or consistent with the Administrative Procedure Act, 5 U.S.C. Section 706(2), and Section 202(h) of the Telecommunications Act of 1996, the foregoing motion by the Commission is granted to the extent that it requests a partial lifting of the stay to allow the Approved Changes to go into effect. All other aspects of the Commission’s motion, including matters pertaining to numerical limits on local radio ownership and AM “subcap” are hereby denied.<sup>23</sup>

Several media companies and media associations (The Tribune Company, Fox, NBC Universal, Viacom, the National Association of Broadcasters, and the Newspaper Association of America) formally sought appeals of the Third Circuit decision at the Supreme Court.<sup>24</sup> As part of their legal challenge to the *Prometheus* decision, they challenged the continued viability of the spectrum scarcity rationale that the Supreme Court relied upon in its 1969 *Red Lion* decision<sup>25</sup> permitting government regulation of broadcasters. (That Supreme Court decision permits regulations that impose minimally intrusive restrictions on broadcasters’ First Amendment rights on the grounds that the airwaves, which are public assets, are

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<sup>20</sup> Ibid., at 429-430.

<sup>21</sup> Ibid., at 426-433.

<sup>22</sup> *Prometheus Radio Project v. Federal Communications Commission*, Petition of the FCC and the United States for Panel Rehearing, August 6, 2004.

<sup>23</sup> USCA3 Docket Sheet for 03-3388, *Prometheus Radio v. FCC*, 9/3/04.

<sup>24</sup> See Tania Panczyk-Collins, “Media Group Asks Supreme Court to Hear Ownership Case,” *Communications Daily*, January 31, 2005, at pp. 4-5, and also *Communications Daily*, February 2, 2005, at p. 8.

<sup>25</sup> *Red Lion Broadcasting Co, Inc. v. Federal Communications Commission*, Supreme Court of the United States, 395 U.S. 367, decided June 9, 1969.

scarce and thus licensees can be subject to requirements to serve in “the public interest.”) The media companies claimed that the FCC acknowledges that the prior cross-ownership rule and local ownership restrictions inhibit diversity of viewpoints, that the FCC’s order confirms that broadcast channels are no longer uniquely important sources of information, and that actions of Congress and the FCC signal that industry conditions have changed sufficiently to justify reconsideration of whether broadcast speech deserves lesser First Amendment protection.<sup>26</sup> On June 13, 2005, the Supreme Court declined to consider the appeals.

The FCC adopted on June 21, 2006, and released on July 24, 2006, a Further Notice of Proposed Rulemaking that sought comment on how to address the issues raised by the Third Circuit’s *Prometheus* decision.<sup>27</sup> The Further Notice also initiated a comprehensive quadrennial review of all of its media ownership rules, as required by statute.<sup>28</sup> The Further Notice did not propose any specific rules; rather, the FCC sought comment on the following rules: the local television ownership limit, the local radio ownership limit, the newspaper-broadcast cross-ownership ban, the radio-television cross-ownership limit, the dual network ban, and the UHF discount on the national television ownership limit. Two of the commissioners dissented in part from the order adopting the Further Notice,<sup>29</sup> criticizing the absence of specific proposed rules and the lack of discussion of proposals to foster minority ownership.<sup>30</sup>

On November 22, 2006, the FCC announced that it had commissioned (or had begun conducting internally) 10 economic studies as part of its review of the media

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<sup>26</sup> Tania Panczyk-Collins, “Media Group Asks Supreme Court to Hear Ownership Case,” *Communications Daily*, January 31, 2005, at p. 4.

<sup>27</sup> *In the Matter of 2006 Quadrennial Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules 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*, MB Dockets No. 06-121 and 02-277 and MM Dockets No. 01-235, 01-317, and 00-244, Further Notice of Proposed Rulemaking, adopted June 21, 2006, and released July 24, 2006.

<sup>28</sup> Section 629 of the FY2004 Consolidated Appropriations Act, P.L. 108-199, modifies the Communications Act to instruct the FCC to perform a quadrennial review of all of its media ownership rules, except the National Television Ownership rule.

<sup>29</sup> “Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part,” June 21, 2006, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-266033A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266033A3.pdf)], viewed on November 6, 27, 2007, and “Statement of Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part,” June 21, 2006, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-266033A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266033A4.pdf)], viewed on November 6, 2007.

<sup>30</sup> In footnote 59 of the *Prometheus* decision, the Third Circuit had instructed the FCC to address in its rulemaking process proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting that the Minority Media and Telecommunications Council (MMTC) had submitted in the proceeding in 2003. (*Prometheus*, 373 F.3d at 421.)

ownership rules.<sup>31</sup> The two commissioners who had dissented in part from the order adopting the Further Notice each issued statements raising questions about the transparency of the process by which the contractors were selected and the peer review process that would be used.<sup>32</sup> On July 31, 2007, the FCC released the 10 studies, making them available on its website, and giving the public 60 days to submit comments (and then 15 additional days to submit reply comments).<sup>33</sup> These studies consist of hundred of pages of text and very large data sets. The studies then underwent a peer review process that is required by the Office of Management and Budget (OMB) of all influential scientific information on which a federal agency relies in a rulemaking proceeding.<sup>34</sup> The two dissenting commissioners issued a joint

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<sup>31</sup> “FCC Names Economic Studies to be Conducted as Part of Media Ownership Rules Review,” FCC Public Notice, November 22, 2006, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268606A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268606A1.pdf)], viewed on November 6, 2007. The ten studies are: (1) “How People Get News and Information,” by Nielsen Research; (2) “Ownership Structure and Robustness of Media,” by C. Anthony Bush, Kiran Duwadi, Scott Roberts, and Andrew Wise, of the FCC; (3) “Effects of Ownership Structure and Robustness on the Quantity and Quality of TV Programming,” by Gregory Crawford of the University of Arizona; (4) “News Operations,” by Kenneth Lynch, Daniel Shiman, and Craig Stroup of the FCC; (5) “Station Ownership and Programming in Radio,” by Tasneem Chipty of CRAI; (6) “News Coverage of Cross-Owned Newspapers and Television Stations,” by Jeffrey Milyo of the University of Missouri; (7) “Minority Ownership,” by Arie Bersteau and Paul Ellickson of Duke University; (8) “Minority Ownership,” by Allen Hammond of Santa Clara University and Barbara O’Connor of the California State University at Sacramento; (9) “Vertical Integration,” by Austin Goolsbee of the University of Chicago; and (10) “Radio Industry Review: Trends in Ownership, Format, and Finance,” by George Williams of the FCC.

<sup>32</sup> “Commissioner Michael J. Copps Comments on the FCC’s Media Ownership Studies,” FCC News, November 22, 2006, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268611A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268611A1.pdf)], viewed on November 6, 2007, and “Commissioner Jonathan S. Adelstein Says Public Notice on Media Ownership Economic Studies is ‘Scant’ and ‘Undermines Public Confidence’,” FCC News, November 22, 2006, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268616A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268616A1.pdf)], viewed on November 7, 2007.

<sup>33</sup> “FCC Seeks Comment on Research Studies on Media Ownership,” MB Docket No. 06-121, FCC Public Notice, DA-07-3470, released July 31, 2007, available at [[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf)], viewed on November 6, 2007. The studies were made available at [<http://www.fcc.gov/ownership/studies.html>]. Subsequently, the FCC released a public notice extending the comment period to October 22, 2007, and the reply comment period to November 1, 2007. See, “Media Bureau Extends Filing Deadlines for Comments on Media Ownership Studies,” MB Docket No. 06-121, FCC Public Notice, DA-07-4097, released September 28, 2007, available at [[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-4097A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-4097A1.pdf)], viewed on November 6, 2007.

<sup>34</sup> The OMB requirement appears in the OMB Peer Review Bulletin, 70 Fed. Reg. 2664. In these peer reviews, the reviewer is instructed to evaluate and comment on the theoretical and empirical merit of the information, by considering, among other things: (1) whether the methodology and assumptions employed are reasonable and technically correct; (2) whether the methodology and assumptions are consistent with accepted economic theory and econometric practices; (3) whether the data used are reasonable and of sufficient quality for  
(continued...)

statement criticizing the shortness of the public comment period and raising questions about the peer review process.<sup>35</sup> On September 5, 2007, the FCC released the peer reviews of these studies.<sup>36</sup>

On August 1, 2007, the FCC adopted and released a Second Further Notice of Proposed Rulemaking in its media ownership proceeding,<sup>37</sup> setting forth in detail and seeking public comment on 34 proposals for increasing minority ownership of broadcast stations. The Commission took this action in response to a motion filed on August 23, 2006 by the Diversity and Competition Supporters (a coalition of organizations representing minority and women's communities that is often referred to in short-hand as MMTC, for one of the member organizations, the Minority Media and Telecommunications Council) to withdraw the commission's initial Further Notice of Proposed Rulemaking. The MMTC motion claimed the Further Notice did not meet one of the requirements of the *Prometheus* decision because it failed to identify and describe minority ownership proposals that MMTC had submitted in the proceeding in 2003.<sup>38</sup> Footnote 59 of the *Prometheus* decision stated:

We also note that the Commission deferred consideration of the MMTC's other proposals for advancing minority and disadvantaged businesses and for

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<sup>34</sup> (...continued)

purposes of the analysis; and (4) whether the conclusions, if any, follow from the analysis. The reviewer is instructed not to provide advice on policy or to evaluate the policy implications of the study. The peer review is not anonymous; the reviewer will be identified and the review will be placed in the public record. Also, the federal agency must assess whether potential peer reviewers have any potential conflicts of interest.

<sup>35</sup> "Joint Statement by FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Studies," FCC News, released July 31, 2007, available at [[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-275674A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-275674A1.pdf)], viewed on November 6, 2007.

<sup>36</sup> The peer reviews are available at [[http://www.fcc.gov/mb/peer\\_review/peerreview.html](http://www.fcc.gov/mb/peer_review/peerreview.html)], viewed on November 6, 2007.

<sup>37</sup> *In the Matter of 2006 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Dockets Nos. 06-121, 02-277, and 04-228 and MM Docket Nos. 01-235, 01-317, and 00-244, Second Further Notice of Proposed Rule Making, adopted and released August 1, 2007.

<sup>38</sup> As part of its review of the local television rule, in its 2003 order the FCC had repealed the Failed Station Solicitation Rule (FSSR) (47 C.F.R. 73.3555 n. 7), which required a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell the failed, failing, or unbuilt television station to an in-market buyer. In its *Prometheus* decision, the Third Circuit found that the FCC's repeal of the FSSR without any discussion of the effect of its decision on minority television station ownership, "amounts to arbitrary and capricious rulemaking," and remanded the decision. (*Prometheus*, 373 F.3d at 421.)

promoting diversity in broadcasting.... The Commission's rulemaking process in response to our remand order should address these proposals at the same time.

The two commissioners who had earlier dissented in part once again dissented in part, claiming that the 60 day comment period was too short.<sup>39</sup>

On October 22, 2007, Consumers Union, Consumer Federation of America, and Free Press (Consumer Commenters) submitted to the FCC very detailed comments on the 10 FCC-commissioned media ownership studies.<sup>40</sup> The Consumer Commenters identify a number of alleged specification errors — some raised by the peer reviewers, some by the Consumer Commenters themselves — in the major statistical studies commissioned by the FCC, and then present statistical results from re-running the models in those studies, applying the same empirical data to models revised to correct for the specification errors. These revised models yield very different statistical results that, according to the Consumer Commenters, demonstrate that loosening the media ownership rules would not be in the public interest.<sup>41</sup> The 10 FCC-commissioned studies, the peer reviews, and the studies submitted by the Consumer Commenters are discussed in detail in CRS Report RL34271, *The FCC's*

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<sup>39</sup> “Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan A. Adelstein Approving in Part, Dissenting in Part,” FCC-07-136, released August 1, 2007, available at [[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-136A2.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-136A2.pdf)], viewed on November 6, 2007.

<sup>40</sup> *In the Matter of 2006 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Docket Nos. 06-121, 02-277, and 04-228 and MM Docket Nos. 01-235, 01-317, and 00-244, Further Comments of Consumers Union, Consumer Federation of America, and Free Press, October 22, 2007.

<sup>41</sup> The Consumer Commenters' submission also includes a weblink [<http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf>] to a 27-page internal FCC memorandum by then-FCC chief economist Leslie M. Marx, dated June 15, 2006 and entitled “Summary of Ideas on Newspaper-Broadcast Cross-Ownership,” which they obtained through a freedom of information act request and which they allege demonstrates that the FCC's process for commissioning media ownership studies was biased. The opening sentence of the memorandum states: “This document is an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper-broadcast cross-ownership restrictions.” At p. 14, the memorandum states: “In this section I discuss some studies that might provide valuable inputs to support a relaxation of newspaper-broadcast cross-ownership limits.” (footnote omitted). Although Ms. Marx was no longer the chief economist when the FCC announced that it had commissioned the 10 media ownership studies (an August 21, 2006 FCC News Release announced that Michelle P. Connolly had been named FCC chief economist), several of the studies suggested in Ms. Marx's memorandum were among those later commissioned by the FCC. The memorandum lists a number of media ownership-related hypotheses that are of interest to policy makers and thus might merit analysis, but it also lists for each a finding that would support loosening the cross-ownership limits, thus suggesting a preferred outcome. The memorandum also provides a list of possible authors for the studies.

*10 Commissioned Economic Research Studies on Media Ownership: Policy Implications*, by Charles B. Goldfarb.

As explained earlier, on December 18, 2007, the FCC adopted an order, with Commissioners Copps and Adelstein dissenting, that modified the broadcast cross-ownership rule,<sup>42</sup> making it presumptively in the public interest, in the 20 largest local markets (DMAs), for a major daily newspaper to own a single television or radio station, so long as the television station is not among the four highest rated stations in the market and after the transaction there are at least eight independently owned and operating major media voices. With several exceptions, in all other situations any newspaper-broadcast cross-ownership would be presumptively not in the public interest. The new rule, which is likely to be appealed both by parties opposing any loosening of the FCC's newspaper-broadcast cross-ownership rule and parties seeking greater loosening of the rule, cannot take effect until approved by the Third Circuit. It is likely that an affected party that favors the rule change will petition the court to end the stay and allow the rule to go in effect pending court review.

On December 17, 2007, a bipartisan group of 25 senators had sent a letter to FCC Chairman Martin indicating that if he proceeded with the December 18, 2007, vote on the new newspaper-broadcast cross-ownership rule, they would introduce a Joint Resolution of Disapproval to revoke the rule.<sup>43</sup> It is expected that a similar resolution will be introduced in the House.

On November 13, 2007, Representative Stearns had introduced H.R. 4167, which would instruct the FCC to eliminate the newspaper-broadcast radio cross-ownership restriction.

On December 4, 2007, the Senate Commerce, Science, and Transportation Committee had approved by unanimous consent S. 2332 (which had been introduced by Senator Dorgan on November 8, 2007), which would modify Section 202 of the 1996 Telecommunications Act by adding three provisions that would (1) require the FCC to publish in the Federal Register any proposal to modify, revise, or amend any of its regulations related to broadcast ownership at least 90 days before voting to add the proposal, providing at least 60 days for public comment and 30 days for reply comments; (2) require the FCC to initiate, conduct, and complete a separate rulemaking proceeding to promote the broadcast of local programming and content by broadcasters, including radio and television broadcast stations, and newspapers,

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<sup>42</sup> "FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule," FCC News Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf)], viewed on December 20, 2007. The text of the order has not yet been released. "Statement of Commissioner Michael J. Copps, Dissenting," December 18, 2007, is available at [[http://hraunfoss.fcc.gov/docs\\_public/attachmatch/DOC-278932A3.pdf](http://hraunfoss.fcc.gov/docs_public/attachmatch/DOC-278932A3.pdf)], viewed on December 20, 2007. "Statement of Commissioner Jonathan S. Adelstein, Dissenting," December 18, 2007, is available at [[http://hraunfoss.fcc.gov/docs\\_public/attachmatch/DOC-278932A3.pdf](http://hraunfoss.fcc.gov/docs_public/attachmatch/DOC-278932A3.pdf)], viewed on December 20, 2007.

<sup>43</sup> See, for example, Cheryl Bolen, "Quarter of Senate Writes FCC Threatening to Revoke Media Rule," *BNA, Inc. Daily Report for Executives*, December 18, 2007.

before voting on any change in the broadcast and newspaper ownership rules, and require the FCC to conduct a study to determine the overall impact of television station duopolies and newspaper-broadcast cross-ownership on the quantity and quality of local news, public affairs, local news media jobs, and local cultural programming at the market level; and (3) establish an independent Panel on Women and Minority Ownership of Broadcast Media to make recommendations to the FCC for specific Commission rules to increase the representation of women and minorities in the ownership of broadcast media, and require the FCC to conduct a full and accurate census of the race and gender of individuals holding a controlling interest in broadcast station licenses, provide the results of the census to the Panel, study the impact of media market concentration on the representation of women and minorities in the ownership of broadcast media, and act on the Panel's recommendations before voting on any changes in its broadcast and newspaper ownership rules. The first provision would apply to any rule modification, revision, or amendment made after October 1, 2007. On December 18, 2007, Representative Inslee introduced H.R. 4835, which has the same provisions as S. 2332.

On December 18, 2007, the FCC adopted a Report on Broadcast Localism and Notice of Proposed Rulemaking<sup>44</sup> that reached tentative conclusions regarding three proposals for which it sought comment:

- Qualified low-power television stations should be granted Class A status, which requires them to provide three hours per week of locally produced programming;
- Licensees should establish permanent advisory boards (including representatives of underserved community segments) in each station community of license with which to consult periodically on community needs and issues; and
- The Commission should adopt renewal application processing guidelines that will ensure that all broadcasters provide some locally oriented programming.

Commissioners Copps and Adelstein dissented in part, criticizing the Commission for failing to adopt final rules to foster localism.<sup>45</sup>

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<sup>44</sup> "FCC Adopts Localism Proposals to Ensure Programming is Responsive to Needs of Local Communities," FCC News Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279043A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279043A1.pdf)], viewed on December 20, 2007. The text of the Report and the Notice of Proposed Rulemaking are not yet available.

<sup>45</sup> See "Statement of Commissioner Michael J. Copps, Concur in Part, Dissent in Part," December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279043A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279043A3.pdf)], viewed on December 20, 2007 and "Statement of Commissioner Jonathan S. Adelstein, Concur in Part, Dissent in Part," December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279043A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279043A4.pdf)], viewed on December 20, 2007.

On December 18, 2007, the FCC also adopted an order that implemented 12 of the 34 proposals to foster minority ownership of broadcast stations that the Commission had put out for comment in its August 1, 2007, Second Further Notice of Proposed Rulemaking,<sup>46</sup> although eligibility for these programs was not limited to minority or socially and economically disadvantaged businesses, but rather was available to all small businesses.<sup>47</sup> A companion Notice of Proposed Rulemaking sought comment on eligibility criteria and on how best to improve FCC collection of data regarding the gender, race, and ethnicity of broadcast licensees.

In the interim, the commission continues to consider waiver requests from media companies that wish to do transactions that do not meet the rules currently in place<sup>48</sup> and to make determinations on requests for the extension of temporary waivers that have expired.

On November 30, 2007, the FCC issued a Memorandum Opinion and Order, with two commissioners dissenting,<sup>49</sup> granting the applications to transfer control of Tribune Company and its licensee subsidiaries from the existing shareholders to Sam Zell, the Tribune Employee Stock Ownership Plan, and EGI-TRB, LLC. The transferees had requested temporary, but indefinite, waiver of the newspaper-broadcast cross-ownership rule to permit common ownership pending the outcome of the Media Ownership proceeding of: KTLA(TV), Los Angeles, and the *Los Angeles Times*; WPIX(TV), New York, and *Newsday*; WGN-TV and WGN(AM), Chicago, and the *Chicago Tribune*; WSFL(TV), Miami, and the Ft. Lauderdale *South Florida Sun-Sentinel*; and WTIC(TV), Hartford, WTTX(Waterbury), and the *Hartford Courier*. The FCC denied the requested waivers in all the markets except Chicago, requiring the Transferees to come into compliance with newspaper-

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<sup>46</sup> “FCC Adopts Rules to Promote Diversification of Broadcast Ownership,” FCC News Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A1.pdf)], viewed on December 18, 2007. The text of the order and accompanying Notice of Proposed Rulemaking is not yet available.

<sup>47</sup> Commissioners Copps and Adelstein dissented in part from the order because they were concerned that people of color and women would not benefit appreciably from, and might be harmed by, these programs if eligibility is not specifically targeted to socially and economically disadvantaged businesses. See “Statement of Commissioner Michael J. Copps, Concur in Part, Dissent in Part,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf)], viewed on December 20, 2007, and “Statement of Commissioner Jonathan S. Adelstein, Concur in Part, Dissent in Part,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A4.pdf)], viewed on December 18, 2007.

<sup>48</sup> See, for example, Brigitte Greenberg and Tania Panczyk-Collins, “Ferree Sees Issues That Could Interest the Supreme Court,” *Communications Daily*, July 1, 2004, at pp. 1-4.

<sup>49</sup> *In the Matter of Shareholders of Tribune Company, Transferors and Sam Zell, et al., Transferees, for Consent to the Transfer of Control of the Tribune Company and Applications for the Renewal of License of KTLA(TV), Los Angeles, California, et al.*, MB Docket No. 07-119 and File Nos. BRCT-20060811ASH, *et al.*, Memorandum Opinion and Order, adopted and released November 30, 2007. The Memorandum Opinion and Order and the statements of four commissioners, including the two dissenting commissioners, is available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-211A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-211A1.pdf)], viewed on December 10, 2007.



broadcast cross-ownership rule in all the markets except Chicago within six months. However, the order noted that the commission was scheduled to vote on a revised newspaper-broadcast cross-ownership rule at its December 18, 2007, meeting, and therefore took the following three steps:

- The six-month clock for coming into compliance with the newspaper-broadcast cross-ownership rule in New York, Los Angeles, Miami, and Hartford will not begin running until January 1, 2008.
- Should the FCC adopt a revised newspaper-broadcast cross-ownership rule before January 1, 2008, that six-month clock will not begin to run. Rather, the applicants will receive a two-year waiver of the rule for the New York, Los Angeles, Miami, and Hartford markets.
- Should the applicants choose to challenge the denial of waivers in court, they are granted a temporary waiver of the newspaper-broadcast cross-ownership rule for the New York, Los Angeles, Miami, and Hartford markets that will last either for two years or until six months after the conclusion of the litigation, whichever is longer.

The applicants did file an appeal on December 3, 2007, of the denial of its request for indefinite waivers in the U.S. Court of Appeals court.<sup>50</sup>

In dissenting from the FCC decision, Commissioner Michael Copps stated:

If the majority simply granted a two-year waiver to Tribune — which would have been the straightforward thing to do — Tribune would have been unable to go to court because a party cannot file an appeal if their waiver request is granted. So what this Order do? It *denies* the waiver request but offers an automatic (and unprecedented) waiver extension as soon as Tribune runs to the courthouse door, lasting for two years or until the litigation concludes — whichever is *longer*. Presto! Tribune gets at least a two-year waiver plus the ability to go to court immediately and see if they can get the entire rule thrown out. And most important, Tribune is *not* required to seek a hearing before the very court which expressly retained jurisdiction when it remanded the general newspaper-broadcast cross-ownership ban. Instead, Tribune can end run the Third Circuit and petition for review before what it may hope is a more sympathetic court. (emphasis in original.)<sup>51</sup>

Although the commission continues to consider waiver applications and extend existing permanent or temporary waivers, the Third Circuit's remand and extended

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<sup>50</sup> See, for example, "Tribune appeals FCC ruling," *Hollywood Reporter*, December 7, 2007.

<sup>51</sup> *Ibid.*, Dissenting Statement of Commissioner Michael J. Copps.

stay of the FCC rules nonetheless appear to have retarded merger activity in the media sector until final rules are approved by the courts.<sup>52</sup>

To date, H.R. 4167, S. 2332, and H.R. 4835, discussed earlier, have been the only legislation introduced in the 110<sup>th</sup> Congress that directly address the FCC's media ownership rules. But the three major policy goals of competition, diversity, and localism that the media ownership rules are intended to foster might be affected by other legislative proposals. For example, H.R. 600 and H.R. 3003 each would amend the Internal Revenue Code of 1986 to provide for a deferral of tax on capital gains from the sale of telecommunications businesses in specific circumstances or to create a tax credit and other incentives with the goal of promoting diversity of ownership in telecommunications businesses. Also, S. 1675 and H.R. 2802 would eliminate existing statutory minimum distance separation requirements for low power FM radio stations, thereby significantly increasing the number of such stations that could broadcast programming. H.R. 983 would prohibit satellite radio providers from providing services that are locally differentiated or that result in programming being delivered to consumers in one geographic market that is different from the programming that is delivered to consumers in any other geographic market.

## **Underlying Issues: Standard of Review and Bright Line Tests**

In 2001-2003, the commission had to revisit several of its broadcast ownership rules as a result of rulings by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") that the commission had failed to provide sufficient justification for specific thresholds incorporated into its National Television Ownership and Local Television Multiple Ownership rules.<sup>53</sup> In addition, pursuant to Section 202(h) of the 1996 Act, the FCC had to conduct a biennial review of all of its broadcast ownership rules and repeal or modify any regulation it determined to be no longer in the public interest.<sup>54</sup>

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<sup>52</sup> For example, Mark Fratrick, vice president of BIA Financial Network, reportedly stated that "Until the ownership rules are finally resolved, television station sales activity will continue to be weak." See *Communications Daily*, August 18, 2004, at pp. 10-11. More recently, an analyst for Deutsche Bank reportedly has claimed that the Hearst Corp.'s recent decision to take Hearst-Argyle private may have been motivated by uncertainty about its ability to obtain regulatory approval for the purchase of broadcast stations that would create duopolies in local markets. See Josh Wein, "Ownership Rules May Have Spurred Hearst Bid for TV Group," *Communications Daily*, August 29, 2007, at pp. 5-6.

<sup>53</sup> *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1044 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d (D.C. Cir. 2002) ("*Fox Television Re-Hearing*") (addressing the National Television Ownership rule) and *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F.3d 148 (D.C. Circuit) ("*Sinclair*") (addressing the Local Television Ownership rule).

<sup>54</sup> The 1996 Act, § 202(h), as in effect at the time the FCC undertook its rulemaking, stated: "The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the (continued...)"

The FCC's 2002 Biennial Review was initiated on September 12, 2002;<sup>55</sup> review of the commission's broadcast-newspaper cross-ownership rule and waiver policy was initiated on September 13, 2001;<sup>56</sup> and review of the commission's local radio ownership rule and radio market definition rule was initiated on November 8, 2001.<sup>57</sup> The FCC sought comment on whether each specific rule continued to serve the commission's goals of diversity, competition, and localism — and if the rule served some purposes while disserving others, whether the balance of the effects argued for maintaining, modifying, or eliminating the rule.<sup>58</sup>

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

## Standard of Review

There has been some controversy surrounding the standard to be used in reaching a public interest determination about the existing rules. The D.C. Circuit, in *Fox Television*, stated “Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”<sup>59</sup> Further, in response to petitions for rehearing, the D.C. Circuit stated “[T]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”<sup>60</sup> But in the same decision, the D.C. Circuit stated that “[t]he Court's decision did not turn at all upon interpreting ‘necessary in the public interest’ to mean more than ‘in the public interest’” and added “we think it better to leave unresolved

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<sup>54</sup> (...continued)

Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.” Subsequently, Congress passed the FY2004 Consolidated Appropriations Act (P.L. 108-199), Sec. 29 of which changes the biennial review to a quadrennial review.

<sup>55</sup> Notice of Proposed Rule Making, *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, released September 23, 2002.

<sup>56</sup> Order and Notice of Proposed Rule Making, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235 and *Newspaper/Radio Cross-Ownership Waiver Policy*, MB Docket No. 96-197, released September 20, 2001.

<sup>57</sup> Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Market*, MM Docket No. 01-317 and *Definition of Radio Markets*, MM Docket No. 00-244, released November 9, 2001.

<sup>58</sup> See, e.g., 67 FR 65751, ¶ 75.

<sup>59</sup> 280 F.3d at 1048.

<sup>60</sup> 293 F.3d 539.

precisely what § 202(h) means when it instructs the Commission first to determine whether a rule is ‘necessary in the public interest’ but then to ‘repeal or modify’ the rule if it is simply ‘no longer in the public interest.’”<sup>61</sup>

In its June 2, 2003 Order, the commission majority took this language to mean that the commission must overcome a high burden to retain any ownership rule. Responding to a question from Senator McCain in the June 4, 2003 Senate Commerce Committee hearing, then-chairman Powell stated that the D.C. Circuit interprets the act to be “biased toward deregulation” and added that for the commission to be in concert with that interpretation it “cannot re-regulate.” In response to a question from Senator Dorgan, Commissioner Abernathy stated that the D.C. Circuit’s interpretation directs the commission to minimize regulation as competition develops, not to regulate to maximize the number of voices.

At that same hearing, all five commissioners and several Senators agreed that it would be useful for Congress to provide both the Court and the commission guidance on the standard to use for reviewing ownership rules and on whether the act allows the commission to re-regulate broadcast ownership.<sup>62</sup>

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

While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act, *see Fox I*, 280 F.3d at 1033; *Sinclair*, 284 F.3d at 159, we do not accept that the “repeal or modify in the public interest” instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both “modify” and the requirement that the Commission act “in the public interest.” ...

Rather than “upending” the reasoned analysis requirement that under the APA ordinarily applies to an agency’s decision to promulgate new regulations (or modify or repeal existing regulations), *see State Farm*, 463 U.S. at 43, § 202(h) *extends* this requirement to the Commission’s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission’s rulemaking authority to contravene “traditional administrative law principles.”<sup>63</sup>

## Bright Line Tests and the Diversity Index

In its June 2, 2003 Order, the FCC reviewed the advantages and disadvantages of implementing bright line rules that incorporate specific limits on the number of media outlets a company can own in a local market, without regard to the market-specific share of the post-merger company vs. implementing flexible, yet quantifiable

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<sup>61</sup> 293 F.3d 540.

<sup>62</sup> In markup of two bills introduced during the 108<sup>th</sup> Congress, amendments were added that would have clarified that in its periodic review of ownership rules, the FCC is authorized to re-regulate as well as deregulate. But neither of those bills was enacted.

<sup>63</sup> *Prometheus*, 373 F.3d at 394 (emphasis in original).

rules that would allow for case-by-case reviews that more readily take into account market-specific or company-specific market shares and characteristics.

The Commission chose the bright line approach, in large part because it identified regulatory certainty as an important policy goal in addition to the three traditional goals of diversity, competition, and localism.<sup>64</sup> The Commission stated:

Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.<sup>65</sup>

It concluded that the adoption of bright line rules rather than case-by-case analysis provides certainty to outcomes, conserves resources, reduces administrative delays, lowers transactions costs, increases transparency of process, and ensures consistency in decisions, all of which foster capital investment in broadcasting. The Commission conceded that bright line rules preclude a certain amount of flexibility.

It is not clear how the commission would weigh the goal of regulatory certainty vis-à-vis the traditional goals of diversity, competition, and localism, if the former were to be in conflict with one or more of the latter. On one hand, the commission stated that it would continue to have discretion to review particular cases, and would have an obligation to take a hard look both at waiver requests (where a bright line ownership limit would proscribe a particular transaction) and at petitions to deny a license transfer (where a bright line ownership limit would allow a particular transaction). At the same time, however, it suggested it would not look favorably upon some petitions:

Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.<sup>66</sup>

Once it determined that a bright line test is preferable to case-by-case review, the commission created bright line tests for its media cross-ownership and local ownership rules by constructing a “Diversity Index” that it used as the basis for

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<sup>64</sup> Report and Order at ¶ 80-85. In the section on Policy Goals, there are four subsections — Diversity, Competition, Localism, and Regulatory Certainty.

<sup>65</sup> Ibid., at ¶ 83, footnote omitted.

<sup>66</sup> Ibid., at ¶ 453, fn. 980.

setting the threshold ownership limits in its new rules.<sup>67</sup> The Diversity Index is intended to measure “viewpoint concentration” and thereby identify “at risk” markets where limits on media ownership should be retained. It is constructed by

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

A larger Diversity Index value denotes greater viewpoint concentration (less diversity of viewpoints). The Commission calculated the Diversity Index for a sample of large, medium, and small markets, as well as the Diversity Index for those markets if certain mergers were allowed to occur (for example, a television station purchasing a newspaper or a television station purchasing a radio station) to determine which markets were “at risk” for significant loss of diversity if particular ownership combinations were allowed. It concluded that in markets with three or fewer television stations there was significant danger of loss of viewpoint diversity if a television station were allowed to combine with a newspaper or a radio station and therefore maintained the cross-ownership ban in those markets. It also concluded that certain combinations would unduly harm viewpoint diversity in markets with four to eight television stations and therefore set certain cross-ownership restrictions in those markets as well.<sup>68</sup> The Commission also used the Diversity Index as the basis for setting its limits on local television multiple ownership.<sup>69</sup>

The Commission stated that its Diversity Index was “inspired by” the Herfindahl-Hirschmann Index (HHI)<sup>70</sup> used by the Department of Justice and Federal Trade Commission to identify those proposed mergers that, based on historical merger experience, might have a deleterious effect on competition in the affected markets and therefore merit additional scrutiny. (Proposed mergers that would result in markets exceeding the HHI threshold levels automatically trigger further review.) Analogously, the Diversity Index is intended to identify those markets in which

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<sup>67</sup> Ibid., at ¶¶ 391-481.

<sup>68</sup> These limits are discussed in the sections on the specific rules below.

<sup>69</sup> See Report and Order at ¶¶ 192 ff.

<sup>70</sup> Ibid., at ¶ 396.

additional concentration in media ownership might have a deleterious effect on viewpoint diversity in the affected market. The Diversity Index, like the HHI, is calculated by squaring the market shares of each market participant. But there are three significant differences between these two indices and how they are applied.

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

Second, the antitrust agencies apply the HHI directly to the proposed merger, on a case-by-case basis, to determine if further scrutiny is merited. The actual market shares of each of the market participants are calculated — and squared — and the resulting HHI is compared to threshold levels to determine if additional scrutiny is required. In contrast, the FCC does not intend to apply the Diversity Index to any specific proposed change in media ownership. Rather, it used the Diversity Index (calculated for sample markets by assuming that each media outlet within the same media category, for example, television stations, has the same “diversity market share”) as the basis for setting the maximum number (or combination) of media outlets that *any* provider could own in a market. A proposed media merger then would be approved or disapproved based on the number (or combination) of media outlets the post-merger company would have in the market, regardless of its actual post-merger diversity market share.<sup>71</sup>

Third, the threshold levels of the HHI that trigger antitrust agency scrutiny were based on many years of Department of Justice and Federal Trade Commission experience reviewing mergers and a body of economic literature about the relationship between market structure and market conduct. The FCC used those HHI trigger points as the starting point for scrutinizing viewpoint concentration, but without a historical record or body of literature demonstrating that the same trigger points for economic concentration are applicable to viewpoint concentration.

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

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<sup>71</sup> As indicated earlier, although the commission maintained processes for firms that would not meet a bright line test to seek a waiver and for interested parties that wanted to challenge a merger that met a bright line test to file a petition to deny a license transfer, it stated that it would not look favorably upon some petitions.

not object in principle to the Commission’s reliance on the Department of Justice and Federal Trade Commission’s antitrust formula, the Herfindahl-Hirschmann Index (“HHI”), as its starting point for measuring diversity in local markets.<sup>72</sup>

Moreover, the Third Circuit found that the commission’s decision to retain a numerical limits approach to radio station ownership regulation is “rational and in the public interest.”<sup>73</sup> (In the case of the commission’s Local Cross-Ownership and Local Television Multiple Ownership rules, it did not explicitly conclude that the numerical limits approach was rational and in the public interest, but did frame its remand of the numerical limits adopted in terms of the specific limits chosen, not of the concept of numerical limits.)

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

[the Commission’s] decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational.<sup>74</sup>

The Commission’s decision to assign equal market shares to outlets within a media type does not jibe with the Commission’s decision to assign relative weights to the different media type themselves, about which it said “we have no reason to believe that all media are of equal importance.” *Order* ¶ 409; *see also Id.* ¶ 445. (“Not all voices, however, speak with the same volume.”) It also negates the Commission’s proffered rationale for using the HHI formula in the first place — to allow it to measure the actual loss of diversity from consolidation by taking into account the actual “diversity importance” of the merging parties, something it could not do with a simple “voices” test. *Id.* ¶ 396.<sup>75</sup>

Although the Commission is entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets’ Diversity Index scores, we do not affirm the seemingly inconsistent manner in which the line was drawn.... [T]he Cross-Media Limits allow some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed.<sup>76</sup>

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<sup>72</sup> *Prometheus*, 373 F.3d at 402-403.

<sup>73</sup> *Ibid.*, at 431.

<sup>74</sup> *Ibid.*, at 405. The Court found it inconsistent that the FCC chose not to include cable television as an alternative local news and information voice because most of that news was actually provided by the local television broadcast stations carried on the cable systems and yet chose to include the Internet as a significant alternative local news and information voice despite the fact that most local news and information found on the Internet is on the websites of the local television stations and newspapers. (*Ibid.*, at 406.)

<sup>75</sup> *Ibid.*, at 408.

<sup>76</sup> *Ibid.*, at 411.



In remanding the rules, the Court has given the commission the opportunity “to justify or modify its approach to setting numerical limits.”<sup>77</sup>

Then-chairman Powell reportedly stated in an interview after the Court decision was released,

It may not be possible to line-draw. Part of me says maybe the best answer is to evaluate on a case-by-case basis. The commission may end up getting more pushed in that direction.<sup>78</sup>

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

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

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

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<sup>77</sup> Ibid., at 435.

<sup>78</sup> Frank Ahrens, “Powell Calls Rejection of Media Rules a Disappointment,” *Washington Post*, June 29, 2004, at pp. E1 and E5.

further scrutiny (of explicitly identified diversity criteria) for any proposed license transfer that would result in a Diversity Index between 1000 and 1800 or result in an increase in the Diversity Index of between 200 and 400; and prohibit any proposed license transfer that would result in a Diversity Index that exceeded 1800 or that increased by more than 400.<sup>79</sup>

Some aspects of the data collected and analyzed in the FCC's 10 commissioned media ownership studies suggest that it might be difficult to construct bright-line numerical limits or that such numerical limits might not always be effective in fostering diversity, localism, and competition.<sup>80</sup>

## Specific Media Ownership Rules

### National Television Ownership (% Cap)

#### Current Status.

In practice, the National Television Ownership rule applies to the major broadcast networks, limiting them to ownership and operation of local broadcast stations that reach, in total, the prescribed percentage of U.S. television households. Section 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199, 118 Stat. 3 et seq.) instructs the FCC to modify its National Television Ownership rule by setting a 39% cap,<sup>81</sup> requires entities that exceed the 39% cap to divest as needed to come into compliance within two years, prohibits the FCC from forbearing on application of the 39% cap,<sup>82</sup> requires the FCC to review its rules every four years instead of two years, and excludes the 39% cap from that periodic review.

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

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<sup>79</sup> The Diversity Index levels used in this example are intended to be descriptive only and should not be construed as endorsement by CRS of any particular approach. If it were to choose to construct a rule of this sort, the FCC would have to provide an empirical basis for the threshold levels in its rules.

<sup>80</sup> These are discussed in the section entitled "Public Policy Implications" in CRS Report RL34271, *The FCC's 10 Commissioned Economic Research Studies on Media Ownership: Policy Implications*, by Charles B. Goldfarb.

<sup>81</sup> By setting the cap at 39%, two entities — Viacom (CBS) and News Corp. (Fox) — that had recently acquired stations that gave them total national audience reach of approximately 39% and 38% respectively did not have to divest themselves of any of their stations.

<sup>82</sup> Section 10 of the Communication Act of 1934 (47 U.S.C. 160) allows the FCC to forbear from applying some regulations and provisions to a telecommunications carrier, telecommunications service, or class of telecommunications services under certain conditions. It is unlikely that this section of the act would apply to broadcast stations, in any case, because broadcasters are not telecommunications carriers and broadcasting is not a telecommunications service.

of two million households, that audience would only be counted as one million households when calculating the entity's market reach.

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

Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% are moot.<sup>83</sup>

Although the 2004 Consolidated Appropriations Act did not expressly mention the UHF discount, challenges to the Commission's decision to retain it are likewise moot.<sup>84</sup>

But the UHF discount portion of the FCC's June 2, 2003 National Television Ownership rule included a section stating that when the transition to digital television is complete, the UHF discount would be eliminated for those stations owned by the four largest broadcast networks.<sup>85</sup> This section presumably would be moot, based on the following language in the *Prometheus* decision requiring the rules adopted in the FCC's biennial review proceeding to adhere to the 39% cap mandated by Congress:

because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.<sup>86</sup>

At the same time, the Third Circuit, aware that the FCC has sought public comment on its authority going forward to modify or eliminate the UHF discount through a proceeding that is outside the proscribed quadrennial review,<sup>87</sup> stated that

we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount outside the context of Section 202(h) [the mandatory quadrennial review of ownership rules that Congress has prohibited the FCC from performing on the National Television Ownership rule].<sup>88</sup>

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<sup>83</sup> *Prometheus*, 373 F.3d at 396.

<sup>84</sup> *Ibid.*, at 396.

<sup>85</sup> Report and Order at ¶ 591.

<sup>86</sup> *Prometheus*, 373 F.3d at 396.

<sup>87</sup> "Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap," FCC Media Bureau Public Notice, DA 04-320, MB Docket No. 02-277, February 19, 2004. The deadline for receipt of reply comments was March 29, 2004; the commission has not yet taken any action relating to issues for which comment was sought in the Public Notice.

<sup>88</sup> *Prometheus*, 373 F.3d at 397.

## Recent History.

The FCC has limited the national ownership reach of television broadcast stations since 1941, modifying its rules several times since then. In 1984, the commission repealed its rule, and instituted a six-year transitional ownership limit of 12 television stations nationwide. In 1985, on reconsideration, the commission affirmed its conclusion, but eliminated the sunset provision, retaining the 12-station limit and, in addition, prohibiting an entity from reaching more than 25% of the country's television households through the stations it owned.<sup>89</sup>

In 1996, the commission adopted a 35% cap in response to the directive in the 1996 Telecommunications Act to raise the cap from 25% to 35% and to eliminate the rule that any entity could not own more than 12 stations nationwide.<sup>90</sup> The Commission subsequently affirmed the 35% cap as part of the 1998 biennial review of media ownership rules.<sup>91</sup> This decision was challenged by several broadcast networks and in 2002 the D.C. Circuit, in *Fox Stations*, remanded the rule to the commission on the grounds that the commission had failed to provide a justification for the 35% level.<sup>92</sup>

In its June 2, 2003 Order, the commission modified its National Television Ownership rule<sup>93</sup> by increasing the maximum aggregate national audience reach of an entity owning multiple television stations from 35% to 45%. In addition to increasing the cap, the commission retained the UHF discount. This discount initially was implemented because UHF signals tend to have a smaller geographic reach than, and are of inferior quality to, VHF signals. The Commission explicitly retained the UHF discount, finding that UHF stations continue to face a technical and market disadvantage.<sup>94</sup>

In the Report and Order, the commission determined that a national television ownership rule is not relevant to its competition goal in the three relevant economic markets it investigated: the national television advertising market, the national program acquisition market, and the local video delivery market.<sup>95</sup> But it determined that a national television ownership rule is needed to protect localism by allowing a body of network affiliates to negotiate collectively with the broadcast networks on

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<sup>89</sup> Report and Order at ¶ 502.

<sup>90</sup> *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374 (1996).

<sup>91</sup> *1998 Biennial Review Report*, 15 FCC Rcd 11072-75 ¶¶ 25-30.

<sup>92</sup> See *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3rd 1027 (DC Cir. 2002).

<sup>93</sup> 47 C.F.R. 73.3555(d)(1), previously 47 C.F.R. 73.3555(e)(1).

<sup>94</sup> Report and Order at ¶ 586.

<sup>95</sup> Report and Order at ¶ 508-509.

network programming decisions.<sup>96</sup> It found that the 35% level did not strike the right balance of promoting localism and preserving free over-the-air television for several reasons:

- the 35% cap did not have any meaningful effect on the negotiating power between individual networks and their affiliates with respect to program-by-program preemption levels;<sup>97</sup>
- the broadcast network owned-and-operated stations served their local communities better with respect to local news production. Network-owned stations aired more local news programming, and higher quality local news programming, than did affiliates.<sup>98</sup>
- the public interest is served by regulations that encourage the networks to keep expensive programming, such as sports, on free, over-the-air television.<sup>99</sup>

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

- locally owned and operated stations are more likely to be responsive to local needs and interests than network owned and operated stations (for example, they are more likely to preempt network programming when non-network programming of special local interest, such as a local sports event, is available or when network programming does not meet community standards);
- if there are fewer independently owned and operated affiliates, they will be under much greater pressure from the networks not to preempt network programming even if programming of special local interest is available;

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<sup>96</sup> Ibid., at ¶ 501.

<sup>97</sup> One measure of the relative balance of negotiating strength between networks and affiliates is the rate at which affiliates preempt network programming to show alternative programming. The Commission found that there was no difference in the preemption rates among those network affiliates affiliated to networks whose audience reach was less than the 35 percent cap and those network affiliates affiliated to the two networks whose audience reach exceeded the 35 percent cap. Report and Order at ¶ 558.

<sup>98</sup> Report and Order at ¶ 575-576.

<sup>99</sup> The broadcast networks had claimed in their comments that broadcast networks are less profitable than local broadcast stations, so to help broadcast networks compete against cable networks for rights to expensive sports programming (and keep such programming free to the public), the networks must be able to own and operate more local broadcast stations. The dissenting FCC commissioners questioned broadcast network needs given the record \$9.4 billion in advertising revenues for the 2003-2004 season, an increase of 13%, they contracted for in the four-day “up-front” market in May of this year. (See Steve McClellan, “Extraordinary: Fast and furious, network advertisers spend record \$9.4B,” *Broadcasting & Cable*, May 26, 2003.)

- some broadcast networks that also own cable networks have refused to give local cable systems permission to retransmit their local broadcast stations' signals unless they also carried the integrated company's cable networks; if these broadcast networks could own and operate additional local broadcast stations, they could extend this practice to those stations.

In its Report and Order, the commission did not provide quantitative analysis in support of adoption of the 45% cap. It explained that the available data demonstrated no difference in behavior between the two networks that reach just under 40% of national television households and the other networks that reach fewer than 35% of national television households. At the same time, the commission found that preserving a balance of power between the broadcast television networks and their affiliates serves local needs by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities. The 45% cap thus represented the balancing of competing interests.<sup>100</sup> At the June 4, 2003 Senate Commerce Committee hearing, Chairman Powell reflected that while the commission believes its order provides a justification for the 45% cap, given the very high standard set by the Court he could not have total confidence the commission's rule would survive judicial review and that if Congress believed a specific percentage cap is "inviolable," it should codify that percentage in the act.

Some parties have called for elimination of the UHF discount. They claim that the UHF discount in effect raises the current cap to as high as 70% and if retained while the cap was increased to 45% would raise the effective cap to as high as 90%.<sup>101</sup> The provision in the Balanced Budget Act of 1997 relating to digital television requires all analog television stations, both those on the VHF band and those on the UHF band, to convert to digital transmission by December 31, 2006 unless certain conditions are not met. When the digital transition is complete, both VHF and UHF stations will have the same transmission capabilities and therefore UHF stations will no longer be at a disadvantage with respect to audience reach. The Commission's decision took this into account by ruling that when the transition to digital television is complete, the UHF discount would be eliminated for the stations owned by the four largest broadcast networks.<sup>102</sup> It chose to retain the UHF discount in other situations because it believes the discount could foster creation of additional broadcast networks. But as mentioned above, although the Third Circuit's *Prometheus* decision maintained the UHF discount, it also did not foreclose the commission from reviewing that discount outside the scope of the biennial review of ownership rules.

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<sup>100</sup> Report and Order at ¶ 501.

<sup>101</sup> The dissenting FCC commissioners stated that the commission's new cross-ownership and television ownership rules do not provide a 50% discount for UHF stations and that this inconsistent weighting of UHF in different rules cannot be justified.

<sup>102</sup> Report and Order at ¶ 591.

## Dual Network Ownership

In its June 2, 2003 Order, the FCC retained the existing Dual Network Ownership rule, which prohibits the four major networks — ABC, CBS, Fox, and NBC — from merging with one another.<sup>103</sup> The Commission found that the rule continues to be necessary to promote competition in the national television advertising and program acquisition markets, and that the rule promotes localism by preserving the balance of negotiating power between networks and affiliates.

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

At the June 4, 2003 Senate Commerce Committee hearing, Commissioner Adelstein stated that while he supported retention of the prohibition on mergers among the four major broadcast networks, he dissented from the rule because the commission should have expanded it to provide a similar merger prohibition on Spanish language broadcast networks, which are currently experiencing consolidation.

## Local Television Multiple Ownership

### Current Status.

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

- either the Grade B contours of the stations do not overlap,
- or (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, *and* (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination were consummated.<sup>104</sup> This second option is sometimes referred to as the “top four ranked/eight voices test.”

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<sup>103</sup> The rule “permits broadcast networks to provide multiple program streams (program networks) simultaneously within local markets, and prohibits only a merger between or among [the four major networks].” 67 FR 65751 at ¶ 156.

<sup>104</sup> 47 C.F.R. 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08, ¶ 8.

The rule also includes a standard for approving a waiver of the ownership limits where a proposed combination involves at least one station that is failed, failing, or unbuilt.<sup>105</sup> For each type of waiver, the waiver applicant must demonstrate that the “in-market” buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.<sup>106</sup> Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets the Local Television Multiple Ownership rule or one of the three waiver standards at the time of transfer.<sup>107</sup>

### **Recent History.**

The FCC adopted a rule prohibiting common ownership of two television stations with intersecting Grade B contours in 1964. In the 1996 Telecommunications Act, Congress directed the commission to “conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.”<sup>108</sup> In 1999, the commission performed a review and modified the rule, creating the television duopoly rule that is in effect today. In 2002, that local ownership rule was remanded to the commission by the D.C. Circuit,<sup>109</sup> which ruled that the commission failed to justify why it only included TV stations among the voices in the voice test, excluding other media.

The FCC modified the rule in its June 2, 2003 Order, to set the following ownership limits:<sup>110</sup>

- In markets with five or more TV stations, a company may own two TV stations, but only one of these stations can be among the top four in ratings;

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<sup>105</sup> A “failed” station is one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. Under the standard for “failing” stations, a waiver is presumed to be in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had all-day audience share of 4% or lower; (2) the financial condition of one of the merging stations is poor; (3) and the merger will produce public interest benefits. Under the standard for “unbuilt” stations, a waiver is presumed to be in the public interest if an applicant meets each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. (47 C.F.R. 73.3555, Note 7 (1) and *Local Television Ownership Report*, 14 FCC Rcd at 12941 ¶ 86.

<sup>106</sup> 47 C.F.R. 73.3555, Note 7.

<sup>107</sup> *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

<sup>108</sup> 1996 Act, § 202(c)(2).

<sup>109</sup> See *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F.3rd 148 (DC Cir. 2002)

<sup>110</sup> 47 C.F.R. 73.3555(b).



- In markets with 18 or more stations, a company may own three TV stations, but only one of these stations can be among the top four in ratings;
- In deciding how many stations are in the market, both commercial and non-commercial TV stations are counted;
- There is an eased waiver process for markets with 11 or fewer TV stations in which two top-four stations seek to merge.<sup>111</sup> The FCC will evaluate on a case-by-case basis whether such stations would better serve their local communities together rather than separately.
- Under the waiver standard that applies for all markets, the FCC will consider permitting otherwise banned two-station combinations or three-station combinations if one station is “failed, failing, or unbuilt.” The standard is liberalized by removing the requirement that an applicant for such a waiver “demonstrate that it has tried and failed to secure an out-of-market buyer for the failed station.”

In its June 2, 2003 Order, the commission determined that the 1999 Television Duopoly rule could not be justified based on diversity or competition grounds.<sup>112</sup> It found that Americans rely on a variety of media outlets, not just broadcast television, for news and information. In addition, it determined that the prior rule could not be justified as necessary to promote competition because it failed to reflect the significant competition now faced by local broadcasters from cable and satellite TV services.

The Commission concluded that the new rule permits television combinations that are proven to enhance competition in local markets<sup>113</sup> and to facilitate the transition to digital television<sup>114</sup> through economic efficiencies. It determined that the new rule’s continued ban on mergers among the top-four stations will have the

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<sup>111</sup> In markets with 11 or fewer stations, the FCC will consider waivers of the “top-four” restriction if the proposed combination meets one or more of the following criteria: reduces a “significant competitive disparity between the merging stations and the dominant station” in the market; facilitates the stations’ transition from analog to digital broadcasting; produces such public interest benefits as more news and local programming; involves a UHF station or two; or the stations’ outer, or “grade B,” signals do not overlap and have not been carried, via direct broadcast satellite or cable, to any of the same geographic areas within the past year. *See* Report and Order at ¶¶ 221-232. Combinations achieved by waiver of the “top-four” restriction, however, could not be transferred or assigned to another party without obtaining another waiver. LIN Television lobbyist Greg Schmidt reportedly criticizes this requirement for a second waiver, claiming that television owners will lose one of the major justifications for expending capital to buy and improve a second station if the return on that investment cannot be recouped by selling the stations as a pair. *See* Bill McConnell, “FCC Does the Waive,” *Broadcasting & Cable*, July 7, 2003, at p. 1.

<sup>112</sup> Report and Order at ¶ 133.

<sup>113</sup> *Ibid.*, at ¶ 147.

<sup>114</sup> *Ibid.*, at ¶ 148.

effect of preserving viewpoint diversity in local markets.<sup>115</sup> The record showed that the top four stations each typically produce an independent local newscast. The Commission also concluded that because viewpoint diversity is fostered when there are multiple independently owned media outlets, the rules also advance the goal of promoting the widest dissemination of viewpoints.

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

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

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

- limiting local television station ownership is not duplicative of antitrust regulation;<sup>116</sup>
- media other than broadcast television may contribute to viewpoint diversity in local markets;<sup>117</sup>
- consolidation can improve local programming;<sup>118</sup> and
- the commission's decision to retain the restriction on owning more than one of the top-four television stations in a market is supported by record evidence.<sup>119</sup>

But the Third Circuit remanded:

- the specific numerical limits on television station ownership in local markets, because the record evidence does not support reliance on an assumption of all stations having an equal market share and the

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<sup>115</sup> *Ibid.*, at ¶ 196-200.

<sup>116</sup> *Prometheus*, 373 F.3d at 413.

<sup>117</sup> *Ibid.*, at 414.

<sup>118</sup> *Ibid.*, at 415.

<sup>119</sup> *Ibid.*, at 416.

commission provided no reasonable explanation for its decision to disregard actual market shares;<sup>120</sup> and

- the repeal of the requirement in its waiver standard that the applicant demonstrate that the “in-market” buyer is the only reasonably available entity willing and able to operate the subject station, because the commission failed to address the original purpose of the requirement — to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled, and consequently more affordable, stations were for sale.<sup>121</sup>

## Local Radio Multiple Ownership

### Current Status.

The ownership limits currently in place are those that the commission adopted in 1996 to codify the language in Section 202(b)(1) of the 1996 Act, *but*, as a result of the Third Circuit agreeing in rehearing to lift the portion of its stay relating to the FCC’s new methodology for defining local radio markets, those markets are defined using that new methodology. Specifically, the current rules provide that:

- in a radio market with 45 or more full power commercial and noncommercial radio stations, a party may own, operate, or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM);
- in a radio market with between 30 and 44 (inclusive) full power commercial and noncommercial radio stations, a party may own, operate, or control up to seven commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with between 15 and 29 (inclusive) full power commercial and noncommercial radio stations, a party may own, operate, or control up to six commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with 14 or fewer full power commercial and noncommercial radio stations, a party may own, operate, or control up to five commercial radio stations, not more than three of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.<sup>122</sup>

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<sup>120</sup> *Ibid.*, at 418-419.

<sup>121</sup> *Ibid.*, at 420-421.

<sup>122</sup> Section 202(b) also provides that the commission may permit a party to exceed these limits “if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation.” 1996 Act, § 202(b)(2), 110 Stat. at 10-11.

These numerical limits are applied to geographic markets that are defined according to Arbitron rating boundaries, which are based on market factors rather than on the signal transmission contours that previously were used to define markets.<sup>123</sup> Since Arbitron boundaries do not cover small radio markets, the FCC adopted a notice of proposed rule making to determine how to define geographic markets in those small markets for which there are no Arbitron market definitions and adopted procedures (involving a modified version of the FCC’s historic signal transmission contour rule) to follow during the interim.<sup>124</sup>

Also, under current rules, when a “brokering” station has a Joint Sales Agreement (JSA) with a “brokered” station — typically this authorizes one station acting as a broker to sell advertising time for the brokered station in return for a fee — the brokered stations counts toward the number of stations the brokering licensee may own in a local market.<sup>125</sup>

The FCC, however, has discontinued following its old policy of “flagging” public notices of proposed radio station transactions that, based on an initial analysis by the staff, would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in the market.<sup>126</sup> Previously, those flagged transactions were subject to further competitive analysis.<sup>127</sup>

Most observers believe that the overall effect of these changes will be to reduce radio merger opportunities.<sup>128</sup>

### **Recent History.**

Until 1992, entities were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped. In 1992, the FCC relaxed the Local Radio Multiple Ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market.

<sup>123</sup> Report and Order at ¶ 239.

<sup>124</sup> *Ibid.*, at ¶ 239.

<sup>125</sup> *Ibid.*, at ¶ 239.

<sup>126</sup> See *Application of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communication, Inc. (Transferee)*, 15 FCC Rcd 16062, 16066 ¶ 7 n. 10 (2000).

<sup>127</sup> The scope of that analysis is embodied in the interim policy set forth in the FCC’s *Local Radio Ownership Notice of Proposed Rulemaking*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

<sup>128</sup> At the July 8, 2003 Senate Commerce Committee hearing on radio consolidation, Lewis Dickey, Jr., Chairman, President, and CEO of Cumulus Broadcasting, Inc., and Alex Kolobielski, President and CEO of First Media Radio, testified that the new methodology for defining radio markets would restrict opportunities for acquisitions and therefore harm competition. Mr. Dickey claimed that it would restrict radio groups from growing as large as market leader Clear Channel was able to grow under the old methodology and thus would deny competitors the opportunity to compete on an equal footing. Mr. Kolobielski claimed that it would not allow small companies to put together clusters of stations in small markets to exploit economies of scale.

Under the 1992 rules, an entity could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market.<sup>129</sup>

In the 1996 Telecommunications Act, Congress directed the commission to revise those numerical limits to provide the limits that are in place today.<sup>130</sup> The act also repealed national limits on radio station ownership.<sup>131</sup>

In its June 2, 2003 Order, the commission retained the numerical limits in the 1996 Act, finding that those numerical ownership limits continue to be needed to promote competition among local radio stations;<sup>132</sup> that competitive radio markets ensure that local stations are responsive to local listener needs and tastes; and that the rule, by guaranteeing a substantial number of independent radio voices, also will promote viewpoint diversity among local radio owners.

The commission did, however, make several changes to the then-current rules:

- It replaced its complex signal contour methodology for defining local radio geographic markets with a market-based approach using Arbitron rating boundaries.<sup>133</sup>
- It modified its market definition methodology to include non-commercial as well as commercial radio stations in its count of stations in a market.<sup>134</sup>
- It counted stations brokered under a Joint Sales Agreement toward the brokering station's permissible ownership totals as long as (1) the brokering entity owns or has an attributable interest in one or more stations in the local market, and (2) the joint advertising sales amount to more than 15% of the brokered station's advertising time per week.
- It grandfathered existing radio combinations that would not meet the limits under the new market definitions, but prohibited the future transfer or sale of these grandfathered combinations except to certain "eligible entities" that qualify as small businesses.

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<sup>129</sup> See 47 C.F.R. 73.3555(a)(1) (1995).

<sup>130</sup> 1996 Act, § 202(b).

<sup>131</sup> *Ibid.*, § 202(a).

<sup>132</sup> Report and Order at ¶ 239.

<sup>133</sup> Report and Order at ¶ 239. It also adopted a notice of proposed rule making to determine how to define geographic markets in those small markets for which there are no Arbitron market definitions and adopted procedures to follow during the interim.

<sup>134</sup> *Ibid.*, at ¶ 239.

- It eliminated its policy of (a) “flagging” those radio station transactions that, based on an initial analysis by the staff, would result in one entity controlling 50% or more of the radio advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of such advertising revenues; (b) conducting further competitive review of the flagged transaction; and (c) inviting interested parties to file comments addressing the competitive impact of the proposed merger.<sup>135</sup>

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

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

In its rulemaking proceeding, the commission found the overlapping signal contour methodology used to define radio markets had yielded several anomalous situations with very expansive geographic market definitions that included distant stations and therefore allowed concentration to occur in more narrowly — but also more accurately — defined markets. For example, under the market definition methodology, a single entity was able to own all 6 of the commercial radio stations in Fargo, North Dakota because a long chain of rural stations with overlapping signal contours were included in the geographic market definition.<sup>136</sup> The FCC therefore

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<sup>135</sup> *Ibid.*, at ¶ 300-301.

<sup>136</sup> Jennifer Lee, “On Minot, N.D., Radio, a Single Corporate Voice,” *New York Times*, March 29, 2003. To understand how this occurred, it may be simplest to think of a station’s principal community contours as being, as an approximation, a circle around the station’s transmitter. Radio stations’ transmitters and principal community contours, though concentrated to some extent in urbanized areas, are geographically dispersed. A geographic market defined by overlapping contours can result in a series of contours overlapping one another to create a very extended market — sort of a daisy chain effect. Thus, the contours of stations in Fargo overlapped with stations in several directions outside Fargo, all in an extended chain, resulting in a such a large number of stations being included in the market that a single entity was allowed to own 6 of them, all located in close proximity to one another rather than being spread across the large geographic market created by the overlapping contour methodology.

chose to replace the overlapping contour methodology with a methodology based on market-driven factors identified by Arbitron.

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

- upheld the commission's use of market-based Arbitron Metro markets instead of the contour-overlap methodology to define local radio markets;<sup>137</sup>
- upheld the inclusion of noncommercial radio stations when performing the station count in a market;<sup>138</sup>
- found the FCC's transfer restriction is in the public interest;<sup>139</sup>
- affirmed the attribution of Joint Sales Agreements, counting stations brokered under a JSA toward the brokering station's permissible ownership totals;<sup>140</sup> and
- found the FCC's numerical limits approach rational and in the public interest.<sup>141</sup>

But, the Third Circuit

- remanded the specific numerical limits in the rule to the commission for further justification;<sup>142</sup> and
- found the commission did not justify its decision to retain "sub-caps" on the number of AM and number of FM stations an entity could own in a local market.<sup>143</sup>

In particular, the Third Circuit found that the commission failed to provide a justification for basing its bright line numerical benchmark on the use of a Diversity Index based on the assumption of five equal-sized competitors, rather than on actual market shares.<sup>144</sup>

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<sup>137</sup> *Prometheus*, 373 F.3d at 423-426.

<sup>138</sup> *Ibid.*, at 426-427.

<sup>139</sup> *Ibid.*, at 427-428.

<sup>140</sup> *Ibid.*, at 429-430.

<sup>141</sup> *Ibid.*, at 431-432.

<sup>142</sup> *Ibid.*, at 432-435.

<sup>143</sup> *Id.*, at 434-435.

<sup>144</sup> *Id.*, at 432.

Since the Third Circuit had upheld the FCC's findings as they applied to the methodology underlying the revised local radio ownership rules, the FCC filed a narrowly focused petition for panel rehearing, asking the Third Circuit to reconsider its extension of the stay of the revised Local Radio Multiple Ownership rule, arguing that the "stay prevents the Commission from implementing regulatory changes that this Court has upheld as a reasonable exercise of the Commission's public interest authority."<sup>145</sup> The Third Circuit approved a partial lifting of the stay:

Inasmuch as we held in our Opinion and Judgment of June 24, 2004, that certain changes to the local radio ownership rule proposed by the Federal Communications Commission (the "Commission") in its Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) — specifically, using Arbitron Metro markets to define local markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and imposing a transfer restriction (collectively, the "Approved Changes") — are constitutional and/or consistent with the Administrative Procedure Act, 5 U.S.C. Section 706(2), and Section 202(h) of the Telecommunications Act of 1996, the foregoing motion by the Commission is granted to the extent that it requests a partial lifting of the stay to allow the Approved Changes to go into effect. All other aspects of the Commission's motion, including matters pertaining to numerical limits on local radio ownership and AM "subcap" are hereby denied.<sup>146</sup>

The Third Circuit was silent on the FCC's elimination of its policy to "flag" and conduct further competitive review to those radio station transactions that would result in one entity controlling 50% or more of the radio advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of such advertising revenues. The Commission no longer flags those transactions.

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

### **Current Status.**

As explained earlier, on December 18, 2007, the FCC adopted an order that modified the broadcast cross-ownership rule,<sup>147</sup> making it presumptively in the public interest, in the 20 largest local markets (DMAs), for a major daily newspaper to own a single television or radio station, so long as the television station is not among the four highest-rated stations in the market and after the transaction there are at least eight independently owned and operating major media voices. With several exceptions, in all other situations any newspaper-broadcast cross-ownership would

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<sup>145</sup> *Prometheus Radio Project v. Federal Communications Commission*, Petition of the FCC and the United States for Panel Rehearing, August 6, 2004.

<sup>146</sup> USCA3 Docket Sheet for 03-3388, *Prometheus Radio v. FCC*, 9/3/04.

<sup>147</sup> "FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule," FCC News Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf)], viewed on December 20, 2007. The text of the order has not yet been released.



be presumptively not in the public interest. That negative presumption would be reversed, however, if:

- the applicant can qualify for a “failed station” waiver by showing that the newspaper or broadcast station had ceased publication or gone dark at least four months before the filing or an application, or was in bankruptcy proceedings; or
- the applicant can qualify for a “failing station” waiver by showing that (a) the broadcast station has had an all-day audience share of 4% or lower; (b) the newspaper or broadcast station has had a negative cash flow for the previous three years; (c) the combination will produce public interest benefits; and (d) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the newspaper or station.
- a proposed transaction would result in a new source of local news in a market, specifically, when a combination would initiate at least seven hours of new local news programming per week on a broadcast station that previously has not aired local news.

In any situation, the Commission would be required to make a public interest finding and, in so doing, consider, among other factors: whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; whether each affected media outlet in the combination will exercise its own independent news judgment; the level of concentration in the DMA; and the financial condition of the newspaper, and if the newspaper is in distress, the owner’s commitment to invest significantly in newsroom operations. Thus, under the proposed rule, a newspaper-broadcast combination in a top 20 market could be rejected by the Commission and a newspaper-broadcast combination in a smaller market could be approved.

The new rule, which is likely to be appealed both by parties opposing any loosening of the FCC’s newspaper-broadcast cross-ownership rule and parties seeking greater loosening of the rule, cannot take effect until approved by the Third Circuit. It is likely that an affected party that favors the rule change will petition the court to end the stay and allow the rule to go in effect pending court review.

Pending Third Circuit review and approval of the new rule, however, as a result of that court’s *Prometheus* decision remanding and extending its stay of the Cross-Media rule that the FCC adopted on June 2, 2003, the Newspaper-Broadcast Cross-Ownership rule and the Television-Radio Cross-Ownership rule that were in force on June 2, 2003 remain in place.

- **Newspaper-Broadcast Cross-Ownership:** common ownership of a full-service broadcast station and a daily newspaper is prohibited when the broadcast station’s service contour encompasses the newspaper’s city of publication. When it adopted the rule in 1975, the commission not only prohibited future newspaper-broadcast combinations, but also required existing combinations in highly

concentrated markets to divest holdings to come into compliance within five years. The Commission grandfathered combinations in less concentrated markets, so long as the parties to the combination remained the same. The Commission adopted a policy of waiving the rule, for existing or future combinations, if (1) a combination could not sell a station; (2) a combination could not sell a station except at an artificially depressed price; (3) separate ownership and operation of a newspaper and a station could not be supported in a locality; or (4) for whatever reason, the purposes of the rule would be disserved.<sup>148</sup>

- **Television-Radio Cross-Ownership:** An entity may own up to 2 television stations (provided it is permitted under the Local Television Multiple Ownership rule) and up to 6 radio stations (provided it is permitted under the Local Radio Multiple Ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. Where entities may own a combination of 2 television stations and 6 radio stations, the rule allows an entity alternatively to own 1 television station and 7 radio stations. An entity may own up to 2 television stations (as permitted under the Local Television Multiple Ownership rule) and up to 4 radio stations (as permitted under the Local Radio Multiple Ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. A combination of 1 television station and 1 radio station is allowed regardless of the number of voices remaining in the market.<sup>149</sup>

As indicated earlier, H.R. 4167 would instruct the FCC to eliminate the newspaper-broadcast radio cross-ownership prohibition (but not the newspaper-broadcast television prohibition). Also, S. 2332, which passed by unanimous consent in the Senate Commerce Committee, and H.R. 4835 would not allow the FCC to modify any of its media ownership rules until it completed a separate rulemaking proceeding to promote the broadcast of local programming and content, established an independent Panel on Women and Minority Ownership of Broadcast Media, and conducted a full and accurate census of the race and gender of broadcast owners.

In the interim, as explained in the Overview section above, the commission continues to consider waiver requests from media companies that wish to do

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<sup>148</sup> *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, *Second Report and Order*, 50 FCC 2d at 1085.

<sup>149</sup> 47 C.F.R. 73.3555(c) as it existed prior to the FCC's June 2, 2003 Order. For this rule, media "voices" include independently owned and operating full-power broadcast television stations, broadcast radio stations, English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny, plus any independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron.

transactions that do not meet the rules currently in place<sup>150</sup> and to make determinations on requests for the extension of temporary waivers that have expired.

### Recent History.

The newspaper-broadcast cross-ownership ban has been in place since 1975. In 1970, the commission restricted the combined ownership of radio and television stations in local markets.<sup>151</sup> In 1989 the commission adopted a liberalized waiver policy for stations in the top 25 markets, and Section 202(d) of the 1996 Telecommunications Act instructed the commission to extend its liberalized waiver policy to the top 50 markets. In 1999, the commission modified the television-radio cross-ownership rule to its current form.<sup>152</sup>

In its June 2, 2003 Order, the FCC replaced its rules prohibiting newspaper-broadcast cross-ownership and limiting television-radio cross-ownership within a market with a single rule on cross media limits:<sup>153</sup>

- In markets with three or fewer television stations, no cross-ownership is permitted among television, radio, and newspapers.<sup>154</sup>
- In markets with between four and eight television stations, combinations are limited to one of the following:
  - One daily newspaper, one television station, and up to half of the radio station limit under the local radio ownership rule for that market (for example, if the radio limit in the market is six, the company can only own three); OR
  - One daily newspaper, and up to the radio station limit under the Local Radio Multiple Ownership rule for that market, but no television stations; OR
  - Two television stations (if permissible under the Local Television Multiple Ownership rule) and up to the radio station limit under the Local Radio Multiple Ownership rule for that market, but no daily newspapers.

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<sup>150</sup> See, for example, Brigitte Greenberg and Tania Panczyk-Collins, “Ferree Sees Issues That Could Interest the Supreme Court,” *Communications Daily*, July 1, 2004, at pp. 1-4.

<sup>151</sup> *Amendment of Section 73.35, 73.340, and 73.630 of the Commission’s Rule Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 22 F.C.C.2d at 306 ff.

<sup>152</sup> Report and Order at ¶¶ 372-373.

<sup>153</sup> 47 C.F.R. 73.3555(c), replacing the old 47 C.F.R. 73.3555(c) and 47 C.F.R. 73.3555(d).

<sup>154</sup> A company may obtain a waiver of this ban if it can show that the television station does not serve the area served by the cross-owned property.

- In markets with nine or more television stations, the FCC eliminated the newspaper-broadcast cross-ownership ban and the television-radio cross-ownership ban.

The Commission determined that neither the newspaper-broadcast prohibition nor the television-radio cross-ownership limitations could be justified for large markets in light of the abundance of sources that citizens rely on for news.<sup>155</sup> It also found that the old rules did not promote competition because radio, television, and newspapers generally compete in different economic markets.<sup>156</sup> Moreover, the FCC found that greater participation by newspaper publishers in the television and radio business would improve the quality and quantity of news available to the public.<sup>157</sup>

The Commission therefore replaced the old rules with the new cross media limits intended to protect viewpoint diversity by ensuring that no company, or group of companies, can control an inordinate share of media outlets in a local market. The Commission developed a Diversity Index to measure the availability of key media outlets in markets of various sizes. It concluded that there were three tiers of markets in terms of “viewpoint diversity” concentration, each warranting different regulatory treatment:<sup>158</sup>

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

The arguments of proponents of retaining the old rules included

- any cross-ownership reduces the number of independent voices in the community, especially in small markets with only a small number of voices;

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<sup>155</sup> Report and Order at ¶ 365.

<sup>156</sup> *Ibid.*, at ¶ 332.

<sup>157</sup> *Ibid.*, at ¶ 342.

<sup>158</sup> *Ibid.*, at ¶ 443 ff.

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

Commissioner Adelstein stated that he could have supported modification of the cross-ownership rules if the new rule had employed a diversity index applied on a case-by-case basis by measuring the actual diversity impact of individual media voices in the market under scrutiny.<sup>159</sup> But the commission majority rejected such case-by-case merger review because it would add uncertainty in the market and would impose an administrative burden on the commission.

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

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

- the commission's decision not to retain a ban on newspaper/broadcast cross-ownership is justified;<sup>160</sup> and
- the commission's decision to retain some limits on common ownership of different-type media outlets was constitutional and in the public interest;<sup>161</sup> but

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<sup>159</sup> "Statement of Commissioner Jonathan S. Adelstein Dissenting," FCC News Release, June 2, 2003, available at [[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A8.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf)], viewed on November 20, 2007.

<sup>160</sup> *Prometheus*, 373 F.3d at 398-400.

<sup>161</sup> *Ibid.*, at 400-402.

- the commission did not provide reasoned analysis to support the specific cross media limit it chose.<sup>162</sup>

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

## Transferability of Ownership

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

These transfer restrictions were appealed both by parties that claimed the transfer restrictions were an unconstitutional holding and by parties that claimed the transfers should have been restricted to socially and economically disadvantaged businesses rather than to small businesses. The National Association of Black Owned Broadcasters and other critics of this commission rule complained that the rule will not foster minority or female ownership because (1) the large radio groups are unlikely to sell their clusters as long as they receive grandfathered rights, and (2) even if these clusters were placed on sale, they are likely to command such a high price that minority- or female-owned small businesses are unlikely to be able to obtain the financing needed to make the acquisitions.

The Third Circuit upheld the transfer restriction set by the FCC as "in the public interest,"<sup>163</sup> and in rehearing explicitly allowed the FCC to implement the transfer restriction.<sup>164</sup>

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<sup>162</sup> Ibid., at 402-405.

<sup>163</sup> Ibid., at 426-428.

<sup>164</sup> USCA3 Docket Sheet for 03-3388, *Prometheus Radio v. FCC*, September 3, 2004.

## Legislative Policy Issues

To date, S. 2332, H.R. 4835, and H.R. 4167 are the only bills directly addressing the FCC's media ownership rules that have been introduced in the 110<sup>th</sup> Congress. H.R. 4167 would instruct the FCC to eliminate the rule prohibiting newspaper-broadcast radio cross-ownership. S. 2332 and H.R. 4835 would modify Section 202 of the 1996 Telecommunications Act by adding three provisions that would (1) require the FCC to publish in the Federal Register any proposal made after October 1, 2007, to modify, revise, or amend any of its regulations related to broadcast ownership at least 90 days before voting to add the proposal, providing at least 60 days for public comment and 30 days for reply comments; (2) require the FCC to initiate, conduct, and complete a separate rulemaking proceeding to promote the broadcast of local programming and content by broadcasters, including radio and television broadcast stations, and newspapers, before voting on any change in the broadcast and newspaper ownership rules, and require the FCC to conduct a study to determine the overall impact of television station duopolies and newspaper-broadcast cross-ownership on the quantity and quality of local news, public affairs, local news media jobs, and local cultural programming at the market level; and (3) establish an independent Panel on Women and Minority Ownership of Broadcast Media to make recommendations to the FCC for specific Commission rules to increase the representation of women and minorities in the ownership of broadcast media, and require the FCC to conduct a full and accurate census of the race and gender of individuals holding a controlling interest in broadcast station licenses, provide the results of the census to the Panel, study the impact of media market concentration on the representation of women and minorities in the ownership of broadcast media, and act on the Panel's recommendations before voting on any changes in its broadcast and newspaper ownership rules.

On December 17, 2007, a bipartisan group of 25 senators sent a letter to FCC Chairman Martin indicating that if he proceeded with the December 18, 2007, vote on the new newspaper-broadcast cross-ownership rule, they would introduce a Joint Resolution of Disapproval to revoke the rule.<sup>165</sup> The commission adopted the rule change on December 18, 2007. On December 19, 2007, Senator Dorgan announced that he would introduce a Resolution of Disapproval.<sup>166</sup> It is expected that a similar resolution will be introduced in the House. On December 18, 2007, John Dingell, chairman of the House Committee on Energy and Commerce, released a statement critical of the FCC action.<sup>167</sup>

The FCC's media ownership rules are intended to foster the three major policy goals of competition, diversity, and localism. Since there are other public policies

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<sup>165</sup> See, for example, Cheryl Bolen, "Quarter of Senate Writes FCC Threatening to Revoke Media Rule," *BNA, Inc. Daily Report for Executives*, December 18, 2007.

<sup>166</sup> See Cheryl Bolen, "Dorgan Takes FCC to Task for Vote, Will Push Resolution of Disapproval," *BNA, Inc. Daily Report for Executives*, December 20, 2007.

<sup>167</sup> "Dingell on the FCC Media Ownership Decision," Statement of Congressman John D. Dingell, Chairman, Committee on Energy and Commerce, December 18, 2007, available at [[http://energycommerce.house.gov/Press\\_110/110st120.shtml](http://energycommerce.house.gov/Press_110/110st120.shtml)], viewed on December 20, 2007.

also intended to foster competition, diversity, and localism — for example, utilizing the spectrum more efficiently to create additional voices, fostering the development and deployment of new technologies that may provide additional voices, maintaining public interest obligations on existing broadcast licensees to foster localism and diversity of voices, tax deferrals and credits to encourage diversified ownership — one part of the debate has been how the ownership rules and these other policies can work to reinforce, supplement, or substitute for one another.

Two bills introduced in the 110<sup>th</sup> Congress would amend the Internal Revenue Code of 1986 with the intention of fostering diversity of voices by promoting the diversity of ownership of telecommunications businesses. H.R. 600, introduced by Representative Rush, would, subject to specific limitations, defer or exclude from capital gains taxation certain sales of telecommunications businesses to economically and socially disadvantaged businesses and would create a tax credit for certain telecommunications businesses that locate in designated empowerment zones. H.R. 3003, introduced by Representative Rangel, would defer from capital gains taxation certain sales of broadcast stations to a person with a qualified interest in 10 or fewer broadcast stations and would create a loan guarantee program for qualified businesses to encourage diversity of ownership of telecommunications businesses.

Policies aiming to utilize the spectrum more efficiently in order to create additional voices also can foster the policy goals of diversity, localism, and competition, and perhaps reduce the need for ownership limits. For example, in January 2000, the FCC, recognizing that there was broadcast spectrum going unused that could provide locally oriented programming, created a new low power FM radio service, limited to noncommercial operations and to maximum radiated power of 100 watts.<sup>168</sup> In response to complaints from existing broadcasters that the new low power FM stations might create harmful radio interference to the reception of existing FM stations, in December 2000 Congress enacted Section 632 of the FY2001 District of Columbia Appropriations Act,<sup>169</sup> which required the FCC to impose third-adjacent channel minimum distance separation requirements on low power FM stations,<sup>170</sup> and also to conduct independent field tests and an experimental program to determine whether the elimination of these third-adjacent channel protection requirements would result in low power FM stations causing harmful interference to existing FM stations operating on third-adjacent channels.<sup>171</sup> The FCC hired the Mitre Corporation to perform the study. Mitre delivered its final report to the FCC on June 2, 2003, with the finding that third adjacent locations without distance separation requirements would not create harmful interference. The FCC sought comment on the Mitre report. The National Association of Broadcasters (NAB) filed comments critical of the report and its findings. Based on the Mitre

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<sup>168</sup> Rules were adopted on January 20, 2000 and appeared in the Federal Register on February 15, 2000.

<sup>169</sup> P.L. 106-55, § 632, 114 Stat. 2762, 2762A-111 (2000).

<sup>170</sup> If an existing radio station is at 97.1 on the dial, then the first adjacent stations are at 96.9 and 97.3, the second adjacent stations are at 96.7 and 97.5, and the third adjacent stations are at 96.5 and 97.7.

<sup>171</sup> All radio station signals create some level of interference, but in most situations that interference is so limited that it does not affect reception.



study and all the comments filed in the proceeding, the FCC reported back to Congress on February 19, 2004, with the recommendation that Congress eliminate the existing third-adjacent minimum distance separation requirements between low power FM and existing full-service FM stations and FM translators and boosters. This would allow many additional low power FM stations to be constructed. Senators Cantwell and McCain have introduced S. 1675, and Representatives Doyle and Terry have introduced H.R. 2802, which would implement the recommendations of the FCC report by repealing Sec. 632 of the FY2001 District of Columbia Appropriations Act, instructing the FCC to modify its rules to eliminate the third-adjacent minimum distance separation requirements between low power FM stations and full-service FM stations, clarifying that the FCC should retain its rules that provide third-adjacent channel protection for full-power non-commercial FM stations that broadcast radio reading services via a subcarrier frequency from a potential low-power FM station, and requiring the FCC, when licensing FM translator stations, to guarantee that licenses are available to both FM translator stations and low power FM stations and that such decisions are made based on the needs of the local community.

On November 27, 2007, the FCC adopted a wide-range of ownership, eligibility, and technical rules to promote the growth of the low power FM radio service, and sought comment on additional technical matters that could potentially expand low power FM licensing opportunities, in the Low Power FM Third Report and Order and Second Notice of Proposed Rulemaking.<sup>172</sup>

The NAB claims that satellite radio service (formally called digital audio radio service or DARS), although created by the FCC to provide national radio programming, threatens the provision of local programming on traditional broadcast radio stations because the national licensees have begun to offer local weather reports and other informational programming that compete head-on with the programming of local radio broadcasters. The two satellite radio providers (XM and Sirius) claim their local programming is limited in scope and meets the needs of mobile listeners who seek weather reports and other information as they travel from one location to another. Representative Gene Green has introduced H.R. 983, which instructs the FCC to revise its regulations to prohibit satellite radio providers from providing services that are locally differentiated or that result in programming being delivered to consumers in one geographic market that is different from the programming that is delivered to consumers in any other geographic market and to restrict satellite radio repeaters to simultaneously retransmitting the programming transmitted by satellite directly to satellite radio subscribers' receivers, prohibiting the use of those repeaters to distribute any information not also transmitted to all subscribers' receivers. The bill also instructs the FCC to complete a rulemaking proceeding within 270 days to determine whether satellite radio licensees should be permitted to provide locally oriented services on nationally distributed channels, taking into account (1) the impact of locally oriented satellite radio services on the viability of local radio broadcast stations and their ability to provide news and other services to the public; (2) the ability of satellite radio licensees to afford listeners the same emergency and

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<sup>172</sup> *In the Matter of Creation of a Low Power Radio Service*, MM Docket No. 99-25, Third Report and Order and Second Further Notice of Proposed Rulemaking, adopted November 27, 2007, and released December 11, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-204A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-204A1.pdf)], viewed on December 12, 2007.

other information as is afforded listeners of other local broadcast radio stations; (3) whether satellite radio licensees committed to providing only national services in order to obtain authorization for their services; and (4) whether the same level and quality of emergency communications services could be provided to consumers by satellite radio licensees as by local broadcast radio stations.

On February 19, 2007, XM and Sirius announced their plan to merge. Subsequently, both the House Judiciary Committee antitrust task force and the telecommunications Subcommittee of the House Energy and Commerce Committee held hearings to address the radio market in the United States, with a focus on the potential impact of an XM-Sirius merger. In these hearings, representatives of the NAB testified that traditional local broadcast radio is not a sufficiently close substitute to satellite radio to be able to constrain prices for satellite radio and therefore should not be considered to be in the same market.<sup>173</sup> They therefore opposed the merger as anticompetitive. In contrast, in its various filings in the FCC's media ownership rules, the NAB has argued that the ownership restrictions should be eased or eliminated because of widespread intermodal competition for broadcast radio.

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

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<sup>173</sup> Testimony of David Rehr, president of the National Association of Broadcasters, before the Antitrust Task Force of the House Judiciary Committee, February 28, 2007, and Testimony of Peter Smythe, president and CEO of Greater Media Inc., on behalf of Greater Media and the National Association of Broadcasters, before the Telecommunications Subcommittee of the House Energy and Commerce Committee, March 7, 2007.

Under sections 614(b)(3)(A) and 615(g)(1) of the Communications Act,<sup>174</sup> cable operators are required to carry the *primary* signals of qualified local commercial and noncommercial television stations. The FCC has ruled that when a broadcaster transmits multiple video streams, cable systems are required to carry only the broadcaster's primary signal, not all the signals.<sup>175</sup> Broadcasters claim that this ruling will undermine their ability to use multicasting to offer additional local news and weather programming — citing, in particular, the potentially negative impact on a project by ABC affiliates to use a secondary signal to offer ABC News Now, a mix of international, national, and local news, and on NBC Weather Plus, NBC-Universal's new digital 24-hour national and local weather network if cable systems are not required to carry those signals.<sup>176</sup> But in its September 8, 2005 Report to Congress on Retransmission Consent and Exclusivity Rules, the FCC found that “since the Commission’s decision to deny broadcasters the ability to assert dual and multicast must-carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals.”<sup>177</sup>

Some observers have suggested that a more nuanced rule on multicast must carry could help to serve the goals of diversity and localism, and reduce the need for strict ownership limits. For example, policy makers might want to consider the pros and cons of granting multiple must carry rights to those broadcasters whose coverage area overlaps multiple states (a very frequent occurrence since state lines often follow rivers that have large population centers on either side of the river) for each of the multicast channels that provides state-jurisdiction-specific local coverage. That is, an argument in favor of multicast must carry might be that, with associated local programming requirements, it could foster localism.<sup>178</sup> On the other hand, if a local programming requirement is imposed on broadcasters that choose to use digital technology to multicast, this might artificially incent broadcasters to choose to use their spectrum for HDTV or other purposes, rather than multicasting, just to avoid the burden of providing additional local programming.

More broadly, the FCC in 2004 adopted a Notice of Inquiry on broadcast localism,<sup>179</sup> seeking information on broadcasters’ responsibilities with respect to communication with their local communities, the nature and amount of community-

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<sup>174</sup> 47 U.S.C. 534, 535.

<sup>175</sup> *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, adopted February 10, 2005 and released February 23, 2005, at ¶ 3.

<sup>176</sup> See *Communications Daily*, February 4, 2005, at p. 4.

<sup>177</sup> “Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004,” Federal Communications Commission, September 8, 2005, at p. 25, para. 45.

<sup>178</sup> But Supreme Court rulings relating to First Amendment constraints on government regulation of broadcast stations have set heightened scrutiny when the speech to be regulated is content-based rather than content-neutral (*Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622 (1994) at 642-3).

<sup>179</sup> *In the Matter of Broadcast Localism*, Notice of Inquiry, MB. Docket No. 04-233, adopted on June 7, 2004, released on July 1, 2004.

responsive programming, political programming, underserved audiences, disaster warnings, network-affiliation rules, payola and sponsorship identification, voice-tracking, national playlists, and license renewals. On December 18, 2007, the FCC adopted a Report on Broadcast Localism and Notice of Proposed Rulemaking<sup>180</sup> that reached tentative conclusions regarding three proposals intended to foster localism for which it sought comment. S. 2332 instructs the FCC to initiate and complete a proceeding to foster localism before adopting new media ownership rules. It is possible that more stringent or more well-defined localism requirements on all broadcasters might reduce concerns about the impact of media ownership consolidation on local programming.

Some observers have been concerned with the impact of media ownership consolidation on control of programming — and hence on the diversity of voices. When television was dominated by three networks, the FCC had financial syndication and network program ownership rules that restricted the ownership stake that networks could have in the programming they carried. These rules were eliminated in the 1990s, after which the networks integrated backward into program production. Some independent program producers allege that, as a result of that vertical integration, they are not able to control the programming they produce, with the consequence that creative programming has been discouraged. For example, they claim if they produce a program for a network and then the network decides not to air the programming, the independent producer is not allowed to try to sell that programming to another network. The large media conglomerates deny that their vertical reach has any harmful effect on consumers or competition.

On November 27, 2007, the FCC adopted a Report and Order that facilitates the use of leased access channels on cable systems by adopting more specific leased access customer service standards, increasing enforcement of those standards, requiring faster cable operator response times to information requests, lowering leased access rates, expediting the leased access complaint process, and improving the discovery process related to leased access disputes.<sup>181</sup>

Even if the FCC were to meet the requirements of the Third Circuit by constructing broadcast media ownership limits based on the local market shares of the broadcasters and other media outlets, there might be concern that the simple market shares do not reflect actual economic market power or diversity market power. For example, if a locally owned stand-alone television station has the same ratings in a local market as another local station that is owned and operated by a media giant that also owns multiple cable networks that are shown on the cable and satellite systems serving that local market, some observers would argue that the two local stations should not be accorded the same diversity market share. This highlights the conflict between those who argue for case-by-case analysis of all

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<sup>180</sup> “FCC Adopts Localism Proposals to Ensure Programming is Responsive to Needs of Local Communities,” FCC News Release, December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279043A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279043A1.pdf)], viewed on December 20, 2007. The text of the Report and the Notice of Proposed Rulemaking is not yet available.

<sup>181</sup> “FCC Adopts Rules to Promote Video Programming Diversity,” FCC News, November 27, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278453A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278453A1.pdf)], viewed on December 10, 2007. The text of the Report and Order is not yet available.

proposed media ownership transactions in order to have an in-depth picture of the impact on the specific market affected and those who argue that as soon as one gets away from bright line tests and into case-by-case analysis, regulatory uncertainty becomes so great that all merger activity — including mergers that are clearly beneficial to consumers — may be discouraged.

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

In congressional hearings, a number of policies besides ownership limits have been identified that affect the goals of media competition, diversity, and localism.<sup>182</sup> The discussions in those hearings suggested that the ownership rules represented just a subset of those existing policies that were implemented before the widespread occurrence of media consolidation and vertical integration and might merit review. For example, small cable companies and consumer groups claimed that the media conglomerates that own both broadcast television stations and multiple cable networks have taken advantage of their retransmission consent rights to require cable companies to carry their full suite of cable networks in order to have access to their broadcast signals.<sup>183</sup> This may restrict diversity of voices. The small cable operators called on Congress to revise the retransmission consent requirement to prohibit large integrated broadcasters from imposing such tying arrangements.<sup>184</sup> The media giants responded that they do make their broadcast signals available for rebroadcast transmission at a stand-alone price and, moreover, it was the cable companies that originally preferred to offer cable carriage of the conglomerates' cable networks rather than cash to obtain retransmission consent.<sup>185</sup> In the Satellite Home Viewer Extension and Reauthorization Act, Congress instructed the FCC to complete an inquiry and report to Congress by September 8, 2005 regarding the impact of the

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<sup>182</sup> See, for example, prepared testimony and transcripts from the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including an Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004.

<sup>183</sup> See the testimony of Bennett Hooks, chief executive officer, Buford Media Group, before the Telecommunications and the Internet Subcommittee of the House energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004. See, also, American Cable Association *Petition for Inquiry into Retransmission Consent Practices*, filed with Federal Communications Commission on October 1, 2002 (ACA Petition).

<sup>184</sup> See testimony of James M. Gleason, chairman of the American Cable Association and president and chief operating officer of CableDirect, before the Senate Commerce, Science, and Transportation Committee hearing on Media Ownership and Transportation, May 6, 2003.

<sup>185</sup> See, for example, the testimony of Ben Pyne, executive vice president of Disney and ESPN Affiliate Sales and Marketing, before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee hearing on Competition and Consumer Choice in the MVPD Marketplace — Including an Examination of Proposals to Expand Consumer Choice, such as a la Carte and Theme-Tiered Offerings, July 14, 2004.

current retransmission consent rules (and also the current network non-duplication, syndicated exclusivity, and sports blackout rules) on competition in the multi-channel television market, including the ability of rural cable operators to compete with satellite television providers in the provision of digital television signals to consumers.<sup>186</sup> The FCC submitted a report that did “not recommend any changes at this time to the statutory provisions relating to Commission rules under consideration in this Report.”<sup>187</sup>

This legislative policy discussion has at least implicitly assumed that the underlying Supreme Court rationale for government regulation of broadcasting — spectrum scarcity — will remain. As indicated earlier, several broadcasting companies, in seeking to appeal the *Prometheus* decision at the Supreme Court, challenge that rationale. They claim that, even if spectrum is scarce, such scarcity does not restrict the diversity of voices available or the ability of non-licensees to present their views on an alternative medium. On June 13, 2005, the Supreme Court declined to consider the appeal. It is possible that broadcasters or other parties currently subject to broadcast regulation will use that same argument when challenging other rules. If their argument were to prevail, Congress might have to reconsider the legal basis for many of its statutory policies and rules, including those related to media ownership.

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<sup>186</sup> Satellite Home Viewer Extension and Reauthorization Act, passed as Title IX of the FY2005 Consolidated Appropriations Act (H.R. 4818, P.L. 108-447), § 208.

<sup>187</sup> “Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004,” Federal Communications Commission, September 8, 2005, at p. 41, para. 86. For more detailed discussions of the issues surrounding retransmission consent, see CRS Report RL34078, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, by Charles B. Goldfarb.