



Legal Challenge to the FCC's Media Ownership Rules: An Overview of *Prometheus Radio v. FCC* and Recent Regulatory Developments

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Summary

In December 2007, the Federal Communications Commission relaxed its newspaper/broadcast ownership ban (order released February 2008). The decision raised concerns in Congress about increasing media consolidation that have long been at the forefront of the debate over ownership restrictions. The Commission's order served to rekindle the discussion of media consolidation and the perceived need to take action to preserve a diversity of voices in the marketplace of ideas. The FCC rule, as this report illustrates, has a history dating back to a previous failed attempt to relax a greater number of broadcast cross-ownership restrictions, and it is worthwhile to examine this previous proceeding in order to understand the current status of the rules.

On June 2, 2003, the FCC adopted a set of comprehensive rules addressing six different aspects of media ownership, including cross-ownership of broadcast and print media, local television and radio ownership, and national television ownership. On June 24, 2004, the United States Court of Appeals for the Third Circuit, in *Prometheus Radio v. FCC*, remanded several of these rules to the Commission for further consideration finding that the Commission failed to adequately justify the numerical limitations used in the rules. This report provides an overview of the Commission's 2002 Biennial Review from which the 2003 rules originated and the *Prometheus* case.

The report also addresses current issues facing the actions taken by the FCC in response to the Third Circuit Court of Appeals' decision in *Prometheus*. On December 18, 2007, the FCC concluded its review of broadcast ownership rules by relaxing the newspaper/broadcast station cross-ownership restrictions in certain markets. All other broadcast ownership rules, however, remain unchanged.

The relaxation of the newspaper/broadcast cross-ownership rule as well as the other ownership rules passed by the FCC in December 2007 have yet to go into effect. Pursuant to the Third Circuit's final order in the *Prometheus* case, the FCC's newest rules may not take effect until the Third Circuit lifts its stay. On June 12, 2009, the Third Circuit decided to keep the stay in place until further order of the court. On October 1, 2009, the FCC filed a status report with the Third Circuit. The FCC argued that the stay should remain in place, because the 2008 order no longer incorporates the views of a majority of the Commissioners and the agency is set to begin a new review of the media ownership rules that should be completed in 2010.

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Introduction

On December 18, 2007, the Federal Communications Commission (“FCC” or “Commission”) concluded a review of its broadcast ownership rules by relaxing the ban on cross-ownership of a newspaper and a broadcast station in certain markets.¹ The order adopted that day ended agency proceedings that had been ongoing for five years.² In 2003, the FCC had adopted a comprehensive order (in its 2002 Biennial Review) revising many of its cross-ownership rules but, as will be discussed below, the United States Court of Appeals for the Third Circuit found insufficient basis for many of the proposed changes in that order and remanded it to the FCC for reconsideration. This report discusses the 2002 Biennial Review, the decision by the Third Circuit that struck many of those rules down, and the FCC’s actions upon remand. The report also addresses the current status of the rules.

The Telecommunications Act of 1996 sought to create a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”³ Among other things, the act eliminated limits on national radio ownership, raised the cap on the percentage of the national audience that a single station owner may reach, set new limits for local radio ownership, and directed the Commission to conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate the local television ownership limitations.⁴ The act also directed the Commission to review its broadcast ownership rules every two years to “determine whether any of such rules are necessary in the public interest as the result of competition.”⁵

The Commission initiated its 2002 Biennial Review in September of 2002 with a Notice of Proposed Rulemaking announcing that it would review four of its broadcast ownership rules: the national audience reach limit; the local television rule; the radio/television cross-ownership (“one-to-a-market”) rule; and the dual network ownership rule.⁶ The Commission had previously initiated proceedings regarding the local radio ownership rule and the newspaper/broadcast cross-ownership rule.⁷ Those proceedings were incorporated into the Biennial Review.

¹ *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate to Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licensees*, MB Docket No. 06-121, MB Docket No. 02-227, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360 (Released February 4, 2008), 2008 FCC LEXIS 1083.

² *Id.* The FCC consolidated the proceeding remanded by the Third Circuit in the *Prometheus* case with its quadrennial review of its broadcast ownership rules and other broadcast ownership proceedings.

³ S.Rept. 104-230, pp. 1-2 (1996).

⁴ Telecommunications Act of 1996, P.L. 104-104 (1996).

⁵ P.L. 104-104, Sec. 202(h).

⁶ *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 FCC Rcd 18503 (2002).

⁷ See 16 FCC Rcd 19861 (2001) and 16 FCC Rcd 17283 (2001).

On June 2, 2003, the Commission adopted a Report and Order modifying its ownership rules.⁸ In the Order, the Commission concluded that “neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the ‘newspaper/broadcast cross-ownership rule’) nor a cross-service restriction on common ownership of radio and television outlets in the same market (the ‘radio-television cross-ownership rule’) [remained] necessary in the public interest.”⁹ The Commission found that “the ends sought can be achieved with more precision and with greater deference to First Amendment interests through [its] modified Cross Media Limits (‘CML’).”¹⁰ The Commission also revised the market definition and the way it counted stations for purposes of the local radio rule, revised the local television multiple ownership rule to permit the common ownership of up to three stations in large markets, modified the national television ownership cap to raise the national audience reach limit to 45%, and retained the dual network rule.

Following the publication of the Commission’s Order, several organizations filed petitions for review of the new rules. The petitions for review were consolidated and heard by the United States Court of Appeals for the Third Circuit. After an initial hearing on September 3, 2003, the court entered a stay for the effective date of the proposed rules, preventing their enforcement, and ordered that the prior ownership rules remain in effect pending resolution of the proceedings.¹¹ On February 14, 2004, the court heard oral arguments and issued its opinion on June 24, 2004.¹²

2002 Biennial Review

As noted above, on June 2, 2003, the Commission approved a Report and Order modifying its media ownership rules to provide a “new, comprehensive framework for broadcast ownership regulation.”¹³ The Commission determined that new technologies necessitated new rules and that the prior rules “inadequately [accounted] for the competitive presence of cable, [ignored] the diversity-enhancing value of the Internet, and [lacked] any sound basis for a national audience reach cap.”¹⁴ According to the Commission, the newly adopted rules were “not blind to the world around them, but reflective of it,” and “necessary in the public interest.”¹⁵

National Ownership Rules

With respect to the ownership of broadcast stations on a nationwide level, the Commission determined that while “a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities,” the evidence demonstrated that a 35%

⁸ *In the Matter of 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003). Hereinafter, cited as Report and Order. For more information on the Commission’s media ownership rules, see CRS Report RL34416, *The FCC’s Broadcast Media Ownership Rules*, by (name redacted).

⁹ *Id.* at ¶ 2.

¹⁰ *Id.*

¹¹ *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3rd Cir. 2003).

¹² *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

¹³ Report and Order, ¶ 3.

¹⁴ *Id.* at ¶ 4.

¹⁵ *Id.* at ¶ 8.

cap was not necessary to “preserve that balance” and raised the limit to 45%.¹⁶ Under the new rule, a single entity was prohibited from owning stations that would allow it to reach more than 45% of the national audience. The Commission also elected to retain the “UHF discount,” which attributes UHF stations with only 50% of the households in their DMA, despite many cable operators now carrying UHF stations.

While it modified the national television ownership cap, the Commission determined that its dual network rule, which prohibits common ownership of the top four television networks, remained necessary in the public interest and did not attempt to repeal or modify it.¹⁷

Local Ownership Rules

In the 2002 Biennial Review, the Commission either modified or repealed its local ownership rules. The cross-ownership rules prohibiting the common ownership of a full-service broadcast television station and a daily newspaper in the same community and limiting the ownership of television and radio combinations by a single entity in a given market were both repealed.¹⁸ The Commission determined that neither rule remained necessary in the public interest and replaced both rules with a single set of cross-media limits based on market size. In large markets, defined as those with more than eight television stations, cross-ownership was unrestricted.

The Commission combined an earlier remand from the D.C. Circuit Court of Appeals¹⁹ of its modified “duopoly rule” with the 2002 Biennial Review and adopted a new rule that would permit common ownership of two commercial television stations in markets that have seventeen or fewer full-power commercial and noncommercial stations, and common ownership of three commercial stations in markets that have eighteen or more stations.²⁰ These limitations are subject to a further restriction on the common ownership of stations that are ranked among the market’s largest four stations based on audience share. The Commission also elected to repeal the “Failed Station Solicitation Rule” related to the sale of failed, failing, or unbuilt stations, which required notice of the sale to be provided to out-of-market buyers.

With respect to local radio ownership, the FCC modified its prior rule by adopting a new method for determining the size of a local market, but retaining the rule’s prior numerical limits on station ownership.²¹ The Commission’s prior regulations defined the local market by using the “contour-

¹⁶ *Id.* at ¶ 507.

¹⁷ *Id.* at ¶ 592.

¹⁸ *Id.* at ¶ 327.

¹⁹ *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Telecommunications Act of 1996 directed the FCC 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.” P.L. 104-104, Sec. 202(c)(2). In response to this directive, the Commission modified its rules in 2000 to allow an entity to own two television stations in a DMA (designated market area), provided that (1) the Grade B field strength contours of the stations do not overlap; and (2) at least one of the stations is not ranked among the top four highest-ranked stations in the DMA, and at least eight “independent voices” would remain in the DMA after the proposed combination. The United States Court of Appeals for the D.C. Circuit reviewed this rule, and remanded it to the Commission to justify its definition of “voices,” which included only broadcast television stations and not other types of non-broadcast media. The Commission consolidated the *Sinclair* remand with its 2002 Biennial Review leading to this challenge.

²⁰ Report and Order, ¶ 186.

²¹ *Id.* at ¶ 235 *et seq.* For more information, CRS Report RL31925, *FCC Media Ownership Rules: Current Status and* (continued...)

overlap methodology,”²² which the Commission abandoned in favor of the “geography-based market definition used by Arbitron, a private entity that measures local radio audiences for its customer stations.”²³ The Arbitron markets include both commercial and noncommercial stations. While it changed the definition of local market, the Commission retained its numerical limits, which allow a single entity to own as many as eight radio stations in markets of 45 or more commercial stations.²⁴

An additional modification to the local radio ownership rule created a new system for the attribution of joint sales agreements (JSAs).²⁵ Generally, a JSA authorizes a broker to sell advertising time for the brokered station in return for a fee paid to the licensee. The Commission noted that because the broker station normally assumes much of the market risk with respect to the station it brokers, it typically has the authority to make decisions with respect to the sale of advertising time on the station. Under the prior rules, JSAs were not attributable to the brokering entity and were not counted toward the number of stations the brokering licensee may own in a local market. The new rules made the JSAs attributable to the brokering entity for the purpose of determining the brokering entity’s compliance with the local ownership limits if the brokering entity owns or has an attributable interest in one or more stations in the local market, and the joint advertising sales amount to more than 15% of the brokered station’s advertising time per week.

The Court’s Decision

Several organizations filed petitions for review of the new rules upon their publication. The numerous petitions for review were consolidated and the case was heard by the United States Court of Appeals for the Third Circuit in Philadelphia. As noted above, after an initial hearing, the court entered a stay for the effective date of the proposed rules.²⁶ On February 14, 2004, the court heard oral arguments and issued its opinion on June 24, 2004.²⁷

With respect to the national ownership rules, the court did not address the Commission’s decision to raise the national audience reach cap from 35% to 45% citing Congress’s modification of the rule in the 2004 Consolidated Appropriations Act.²⁸ Section 629 of the act directed the

(...continued)

Issues for Congress, by (name redacted).

²² For a description of the “contour-overlap methodology,” see *supra* note 6 at Appendix F.

²³ The Telecommunications Act of 1996 did not define local markets using any particular methodology.

²⁴ The Telecommunications Act of 1996 established the current numerical limits. Under the ‘96 Act, in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market. P.L. 104-104, Sec. 202(b).

²⁵ Report and Order, ¶ 317.

²⁶ *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3rd Cir. 2003).

²⁷ *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

²⁸ P.L. 108-199, Sec. 629.

Commission to modify the rule by setting a 39% cap on national audience reach.²⁹ The court determined that because the Commission was 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 were moot.”³⁰

Additional challenges to the UHF discount provisions in the rule were also deemed moot even though the UHF discount rules were not mentioned in the 2004 Consolidated Appropriations Act. The court determined that the UHF discount was intrinsically linked to the 39% national audience reach cap because “reducing or eliminating the discount for UHF stations audiences would effectively raise the audience reach limit.”³¹ The court also noted with respect to the UHF discount that the 2004 Consolidated Appropriations Act specifically provided that the periodic review provisions set forth in the amendment did not apply to “any rules relating to the 39% national audience limitation,” and as a rule “relating to” the national audience limitation, Congress intended to insulate the UHF discount from review.

None of the parties bringing the *Prometheus* case challenged the retention of the dual network rule, so this was not addressed by the court.

With respect to the Commission’s local ownership rules, the court agreed with the Commission’s decision to modify these rules in many respects. However, the court found fault with the numerical limits set by the FCC in each of the local ownership rules. The court stated that “[t]he 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.”³²

The court determined that the Commission’s decision to repeal the ban on broadcast/newspaper cross-ownership was justified and supported by evidence in the record and found that the Commission’s decision to retain some limits on common ownership was constitutional and not in violation of the Communications Act.³³ However, the court found that the FCC failed to provide reasoned analysis to support the specific limits that it chose with respect to the new “cross-media” rules, stating that the limits “employ several irrational assumptions and inconsistencies.”³⁴ The court rejected the Commission’s use of a “diversity index,”³⁵ because of what the court saw as the fallacies upon which it was based and because the Commission failed to provide adequate notice of the new methodology in the rulemaking proceedings leading up to the 2002 Order.³⁶ The court

²⁹ Section 629 also amended section 202(h) of the Telecommunications Act of 1996 to change the review period from a biennial review to a quadrennial review, and it exempted the 39% cap on national audience reach from review.

³⁰ *Prometheus*, 373 F.3d at 396.

³¹ *Id.*

³² *Id.* at 435.

³³ *Id.* at 397 - 401.

³⁴ *Id.* at 402.

³⁵ The Commission’s diversity index was not based on the actual market shares of companies, but rather on the assumption that each television station in a market provides the same diversity impact regardless of the actual size of its audience, and the same for each newspaper, each radio station, etc. The court rejected the contention that each outlet provides the same diversity impact, saying that “[a] diversity index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.” *Prometheus*, 373 F.3d at 408.

³⁶ *Id.* at 411-413.

remanded the cross-media limits and advised the Commission to make any “new metric for measuring diversity and competition in a market ... subject to public notice and comment before it is incorporated into a final rule.”³⁷

The court in *Prometheus* upheld the restriction on common ownership of the market’s top four broadcast television stations, but remanded the numerical limits “for the Commission to harmonize certain inconsistencies and better support its assumptions and rationale.”³⁸ In making its decision, the court found that the Commission had presented evidence in the record to adequately support the “top-four restriction,”³⁹ while failing to justify the market share assumptions used as the basis for the numerical limits. The court stated that “[n]o evidence supports the Commission’s equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share.”⁴⁰ The court also remanded the Commission’s repeal of the Failed Station Solicitation Rule, finding that the Commission failed to consider “the effect of its decision on minority television station ownership,” and thus failed “to consider an important aspect of the problem’ [amounting] to arbitrary and capricious rulemaking.”⁴¹

In addition to upholding the Commission’s restriction on common ownership of a market’s top four broadcast television stations, the court upheld the Commission’s new definition of local markets with respect to radio finding that the Commission’s decision was “in the public interest” and that it was a “rational exercise of rulemaking authority.”⁴² The court also found that the Commission justified the inclusion of noncommercial stations in the new definition. However, with respect to the numerical limits retained by the Commission, the court concluded that while the numerical limits approach was rational and in the public interest, the Commission failed to support its decision to retain these particular limits with “reasoned analysis.”⁴³ The court rejected the Commission’s contention that five equal-sized competitors would ensure that local markets are competitive, and found that even if it were to justify the “five equal-sized competitors” benchmark, that it failed to sufficiently demonstrate that under the existing numerical limits five equal-sized competitors would actually emerge.⁴⁴ The court remanded the numerical limits to the Commission “to develop numerical limits that are supported by a rational analysis.”⁴⁵

With respect to the new rules providing for the attribution of joint sales agreements, the court affirmed the Commission’s decision, finding that the Commission changed its rules as the result of “reasoned decisionmaking,” and that such a change was “necessary in the public interest” due to “the potential for brokering entities to influence the brokered stations.”⁴⁶

³⁷ *Id.* at 412.

³⁸ *Id.* at 412.

³⁹ *Id.* at 418.

⁴⁰ *Id.* at 420.

⁴¹ *Id.* at 421.

⁴² *Id.* at 425.

⁴³ *Id.* at 426.

⁴⁴ *Id.* at 432-433.

⁴⁵ *Id.* at 434.

⁴⁶ *Id.* at 429-430.

Post-Prometheus

On September 3, 2004, the Third Circuit granted the Commission's motion requesting a partial lifting of the stay to allow those parts of the rules approved by the court in its June 24 decision to go into effect. Specifically, the stay was lifted with respect to the use of Arbitron metro markets to define local markets, the inclusion of noncommercial stations in determining the size of a market, the attribution of stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and the imposition of a transfer restriction. The stay remained in place pending FCC action on remand with respect to all other aspects of the Biennial Review Order.⁴⁷

On January 27, 2005, the United States Solicitor General and the FCC decided not to appeal the Third Circuit's decision.⁴⁸ However, several media companies filed a formal appeal with the Supreme Court asking for a review of the Third Circuit's decision.⁴⁹ On June 13, 2005, the Supreme Court denied certiorari in all relevant appeals.⁵⁰

2007 Broadcast Ownership Rules

On July 24, 2006, the FCC issued a Further Notice of Proposed Rulemaking (FNPR) in the Broadcast Media Ownership proceedings that had been remanded to the Commission in 2003.⁵¹ The FNPR sought comment for new ownership rules that would comport with the Third Circuit's decision in *Prometheus*.⁵² Specifically, the FCC sought comment suggesting new rules that would foster "localism;" increase opportunities for ownership among minorities and women; revise the numerical limits placed on cross ownership of local television stations and local radio stations; revise the Diversity Index used to calculate the availability of outlets that contribute to diversity of viewpoints in local media markets; and other suggestions for improvement of existing and proposed rules.⁵³ The FCC also commissioned multiple studies on media ownership and sought comment on these studies to determine whether and to what extent to take the studies into account in the final ownership rules.⁵⁴ The reply comment period on the ownership studies closed November 1, 2007.⁵⁵

⁴⁷ *Prometheus Radio v. FCC*, 03-3388 (3rd Cir., September 3, 2004).

⁴⁸ *Feds Leave Broadcasters Alone in FCC Media Ownership Appeal*, Communications Daily, January 28, 2005.

⁴⁹ *Media Group Asks Supreme Court to Hear Ownership Case*, Communications Daily, January 31, 2005.

⁵⁰ *Media Gen., Inc. v. FCC*, 2005 U.S. LEXIS 4807 (June 13, 2005).

⁵¹ *In the Matter of 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (July 24, 2006).

⁵² *Id.*

⁵³ *Id.* For a thorough discussion of the rules proposed in 2002 and the current state of the FCC's media ownership rules, see CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*, by (name redacted).

⁵⁴ FCC Seeks Comment on Research Studies on Media Ownership, Public Notice, MB Docket No. 06-121 (July 31, 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf.

⁵⁵ Media Bureau Extends Filing Deadline for Comments on Media Ownership Studies, Public Notice, MB Docket No. 06-121 (September 28, 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-4097A1.pdf.

On August 1, 2007, the FCC issued a Second Further Notice of Proposed Rulemaking (SFNPR) in its ongoing review of the broadcast ownership rules.⁵⁶ The SFNPR sought comments on new initiatives specifically related to encouraging minority and female ownership of broadcast stations proposed by the Minority Media and Telecommunications Council (MMTC), as well as potential constitutional issues related to race specific classifications.⁵⁷ Reply comments were due for the SFNPR on October 16, 2007.⁵⁸

On November 13, 2007, following the close of all comment and reply comment periods, FCC Chairman Martin proposed that the review of broadcast ownership rules should conclude by adopting a relaxation of the ban on newspaper and broadcast cross-ownership.⁵⁹ The proposal also indicated that no changes would be made in the local television “duopoly” rule, the local radio ownership rule, or the local radio-television cross-ownership rule already in force.

The FCC adopted a revised version of Chairman Martin’s proposal to ease the ban on newspaper/broadcast cross-ownership on December 18, 2007.⁶⁰ The Report and Order in the proceeding was released on February 4, 2008.⁶¹ The new rule establishes the presumption that newspaper/radio broadcast station cross-ownership in the top 20 largest DMAs is in the public interest, and that newspaper/television broadcast station cross-ownership in the top 20 largest DMAs is in the public interest when the television station is not among the top four ranked stations in the market and at least eight “major media voices” would remain in the DMA post-merger.⁶² For all other DMAs, the new rule establishes the presumption that newspaper/broadcast station cross-ownership is not in the public interest, except in two circumstances (discussed below).⁶³ Applicants attempting to overcome a presumption that the proposed combination is not in the public interest will have to demonstrate, through clear and convincing evidence, that the merged entity will increase the diversity of independent news outlets and increase competition

⁵⁶ *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*, Second Further Notice of Proposed Rule Making, 2007 FCC LEXIS 5775 (August 1, 2007).

⁵⁷ *Id.*

⁵⁸ *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*, Second Further Notice of Proposed Rule Making, 2007 FCC LEXIS 5775 (August 1, 2007).

⁵⁹ Press Release, Federal Communications Commission, Chairman Kevin J. Martin Proposes Revision to Newspaper/Broadcast Cross-Ownership Rule (November 13, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf.

⁶⁰ Press Release, Federal Communications Commission, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (December 18, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf.

⁶¹ *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate to Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licensees*, MB Docket No. 06-121, MB Docket No. 02-227, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360 (Released February 4, 2008), 23 FCC Rcd 2010.

⁶² *Id.* at ¶¶ 20, 53-62.

⁶³ *Id.* at ¶¶ 20, 63-75.

among independent news sources in the relevant market.⁶⁴ The FCC also has laid out four factors to help inform its evaluation of these proposed combinations.⁶⁵

The new rules identify two circumstances in which the presumption that cross-ownership is not in the public interest will be reversed.⁶⁶ The first circumstance adapts the FCC's failed or failing station waivers to newspaper/broadcast combinations.⁶⁷ Therefore, when either the broadcast station or the newspaper involved in a proposed combination is "failed" or "failing," the FCC will presume that the proposed combination is in the public interest.⁶⁸ The presumption that a combination is not in the public interest also will be reversed when the proposed combination will result in a new source of local news in a market, specifically defined as a combination that would initiate at least seven hours of new local news programming per week on a broadcast station that previously has not aired local news.⁶⁹ All other cross-ownership rules and restrictions will remain unchanged.⁷⁰

The FCC also adopted rules in December 2007 to promote diversification of broadcast ownership in a separate order from the newspaper/broadcast station cross-ownership rule. The new rules are intended to allow "eligible entities" to more easily access financing and spectrum by, for example, modifying the distress sale policy to allow a licensee whose licenses were designated for a revocation hearing to sell its station to an eligible entity prior to the commencement of the hearing, revising the FCC's equity/debt plus attribution standard to facilitate investment in eligible entities, and giving priority to any entity financing an eligible entity in certain duopoly situations.⁷¹ "Eligible entities" are defined as "entities that would qualify as a small business consistent with Small Business Administration standards, based on revenue."⁷² The FCC is seeking further comment on whether it can expand the definition of "eligible entity" to include other business.⁷³

Recent Court Proceedings

The relaxation of the newspaper/broadcast cross-ownership rule as well as the other ownership rules promulgated by the FCC in December 2007 have yet to go into effect. Pursuant to the Third

⁶⁴ *Id.* at ¶ 68.

⁶⁵ *Id.*

⁶⁶ *Id.* at ¶ 65.

⁶⁷ *Id.* at ¶¶ 65-66.

⁶⁸ *Id.*

⁶⁹ *Id.* at ¶ 67.

⁷⁰ *Id.* at ¶ 1.

⁷¹ *In the Matter of Promoting Diversification of Ownership in Broadcasting Services, 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2002 Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Ways to Further Section 257 Mandate to Build on Earlier Studies*, MB Docket No. 07-294, MB Docket No. 06-121, MB Docket No. 02-277, MM docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228 adopted December 18, 2007, released March 5, 2008.

⁷² *Id.*

⁷³ *Id.*

Circuit's final order in the *Prometheus* case, the FCC's newest rules may not go into effect until the Third Circuit lifts its stay.⁷⁴ On June 12, 2009, the Third Circuit decided to keep the stay in place until further order of the court and ordered the parties to file status reports regarding whether the stay should remain in place later in the year.⁷⁵

On October 1, 2009, the FCC filed its status report with the Third Circuit. The FCC argued that the stay should remain in place, because the 2008 order no longer incorporates the views of a majority of the Commissioners and the agency is set to begin a new review of the media ownership rules that should be completed in 2010.⁷⁶

On December 18, 2009, the Third Circuit ordered the FCC to show cause as to why the court's stay on the newspaper/broadcast cross-ownership rule changes should not be lifted.⁷⁷ The FCC filed its brief on the issue with the court on January 7.⁷⁸ The parties await the court's decision.

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⁷⁴ *Prometheus*, 373 F.3d at 435 (“The stay currently in effect will continue pending our review of the Commission’s action on remand, over which this panel retains jurisdiction.”).

⁷⁵ Order Continuing Stay, *Prometheus Radio Project v. FCC*, Nos. 08-9078 et al. (June 12, 2009). See also John Eggerton, *Court Won’t Lift Stay on Newspaper/Broadcast Cross-Ownership Rule Change*, BROADCASTING & CABLE, June 12, 2009, available at http://www.broadcastingcable.com/article/279319-Court_Won_t_Lift_Stay_On_Newspaper_Broadcast_Crossownership_Rule_Change.php.

⁷⁶ Status Report of the Federal Communications Commission, *Prometheus Radio Project v. FCC*, No. 08-3078 et al. (October 1, 2009) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293815A1.pdf.

⁷⁷ John Eggerton, Third Circuit to Lift Stay on FCC’s Cross-Ownership Rule Revision, *Multichannel News*, December 18, 2009, http://www.multichannel.com/article/441161-Third_Circuit_to_Lift_Stay_On_FCC_s_Cross_Ownership_Rule_Revision.php.

⁷⁸ John Eggerton, FCC Defends Cross-Ownership Stay, *Multichannel News*, January 7, 2010, http://www.multichannel.com/article/443122-FCC_Defends_Crossownership_Stay.php?rssid=20062.

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