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ALERT

FCC Seeks Further Comment on Proposed Media Ownership Rules

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On April 15, 2014, the Federal Communications Commission (FCC or Commission) released a Further Notice of Proposed Rulemaking (FNPRM) that simultaneously initiates the 2014 Quadrennial Review of its media ownership rules and seeks to resolve the still-pending 2010 Quadrennial Review proceeding.[1] As summarized and then explained more fully below, the FNPRM proposes to extend the media ownership rules already in place or adopted by the Commission in its 2006 Review with only minor changes. The FCC adopted the FNPRM by a 3-2 vote on March 31, 2014, with Republican-appointed Commissioners Michael O'Rielly and Ajit Pai strongly dissenting.

Summary

The FNPRM proposes to:

- Retain the current local television ownership rule, but substitute noise limited service contours for Grade B contours;
- Retain the current local radio ownership rule without modification;
- Remove the restriction on newspaper/radio cross-ownership;
- Maintain the general prohibition on newspaper/television cross-ownership but implement a waiver standard to allow newspaper/television cross-ownership in certain circumstances;
- Remove the restriction on radio/television cross-ownership;
- Retain the dual network rule without modification; and
- Reinstate the revenue-based "eligible entity" standard and apply it to certain measures specified in the 2008 Diversity

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Local Television Ownership Rule

Based on the record compiled in the 2010 Quadrennial (which the Commission incorporates into the 2014 proceeding), the Commission tentatively concludes in the FNPRM that the current local television ownership rule remains necessary in the public interest and should be retained with only limited modification. The Commission justifies retention of the rule on competition grounds, tentatively finding that "competition from [ ] video programming providers is currently of limited relevance for the purposes of our [market competition] analysis." In addition, because "broadcast television stations remain the primary source of local news and public interest programming," the Commission tentatively concludes that "the record continues to support a local television ownership rule designed to promote competition among broadcast television stations."

The current local TV ownership rule allows an entity to own up to two TV stations in the same Designated Market Area (DMA) if either: (1) the Grade B service areas of the stations do not overlap; or (2) at least one of the stations is not ranked among the top four stations in the DMA, and at least eight independently owned TV stations would remain in the market after the proposed combination. In recognition of the fact that Grade B contours were a product of analog broadcasting that ceased to exist following the digital transition in 2009, the Commission proposes to substitute digital noise limited service (NLS) contours for Grade B contours in determining compliance with the rule. The FCC also tentatively concludes that existing ownership combinations that would exceed the numerical limits under the revised contour approach should be grandfathered. Grandfathered stations could not, however, be transferred or assigned intact unless the combination complied with the local television ownership rule in effect at the time of the transfer/assignment.

Top-Four Prohibition

In addition, the FCC proposes to retain the top-four prohibition, which prohibits mergers between two of the top-four rated stations in a local market. The Commission proposes to justify retention of the prohibition on the basis that it "remains necessary to promote competition." The Commission also tentatively concludes that the top-four prohibition should be applied to so-called "affiliation swaps" wherein a station acquires the network affiliation of another same-market station through the execution of an agreement or series of agreements. If the change in network affiliations would result in the licensee of the new affiliate directly or indirectly owning or controlling two of the top-four rated TV stations in the DMA, the Commission proposes that it would find the transaction to be "in violation of the top-four prohibition and subject to enforcement action" even though the stations involved did not change hands.

Eight-Voices Test

The Commission also tentatively concludes that mergers between two same-market stations with overlapping NLS contours should be permitted only where at least eight independently owned commercial and noncommercial television stations would remain in the market post-merger, and where at least one of the merging stations is not a top-four station. The eight-voices test remains necessary, the agency tentatively concludes, to promote competition in local television markets.

Multicasting and Dual Affiliation

In the FNPRM, the Commission tentatively declines to use multicasting as a basis to tighten the local television ownership rule's numerical limits. The Commission concludes that, based on evidence in the 2010 record, "broadcasting on a multicast stream does not—at present—produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station." Relatedly, the Commission proposes to decline to regulate dual affiliations made possible by multicasting because even dual affiliations involving two Big Four networks "are generally—if not exclusively—limited to smaller markets with an insufficient number of full-power commercial television stations to accommodate each Big Four network or where other unique marketplace factors are responsible for creating the dual affiliation arrangements."

Local Radio Ownership Rule

The Commission tentatively finds, based on the record compiled in the 2010 Quadrennial Review, that "the current local radio ownership rule remains necessary in the public interest and should be retained without modification." Accordingly, the ownership limits based on market size tiers (determined according to the number of commercial and noncommerical radio stations in the market) would be retained, as would the AM/FM "subcaps." In so proposing, the Commission tentatively finds that the radio listening market is the "relevant market" for the purpose of the local radio ownership rule and that "non-broadcast sources of audio programming are not yet meaningful substitutes for broadcast radio stations with respect to either listeners or advertisers."

Newspaper/Broadcast Cross-Ownership (NBCO) Rule

Noting that newspapers and local television stations (along with their affiliated websites) remain "the dominant sources consumers rely on for local news," the Commission "continues to believe that some restriction on newspaper/broadcast cross-ownership is necessary to protect and promote viewpoint diversity in local markets." However, consistent with the conclusions reached in the 2006 and 2010 Quadrennial Reviews, the Commission also concedes that a blanket prohibition is "overly broad" and does not allow for certain cross-ownership that may carry public interest benefits. Accordingly, the Commission proposes to jettison the newspaper/radio cross-ownership prohibition and seeks comment on two possible waiver standards aimed at permitting newspaper/TV cross-ownership in certain circumstances.

Newspaper/Radio

The FCC seeks further comment on whether the restriction on newspaper/radio cross-ownership should be eliminated from the NBCO rule. The Commission suggests that the prohibition should indeed be eliminated because the viewpoint diversity goal upon which the Commission has historically justified the prohibition no longer applies. Accordingly, the FNPRM calls for comment on the Commission's tentative conclusions that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other outlets for local news and information. The Commission also acknowledges that it "has found repeatedly that the restriction does not promote its localism or competition goals" and tentatively reaffirms those findings.

Newspaper/Television

The Commission is "disinclined to impose a bright-line rule" permitting newspaper/TV combinations in all or some subset of markets and seeks comment on two waiver standards that would maintain the general ban on newspaper/television combinations but would allow applicants an opportunity to seek approval of particular transactions.

The first waiver standard upon which the FCC seeks comment is a "pure case-by-case approach" under which the Commission would evaluate the totality of the circumstances for each individual transaction without reference to any set of defined criteria or automatic presumptions. This approach would allow the Commission maximum flexibility, but "might not promote consistency and certainty in the marketplace." The second waiver standard proposed by the FCC is a "case-by-case approach with presumptions," similar to that advanced by former FCC Chairmen Martin and Genachowski. Under this standard, the Commission would presume that a waiver is consistent with the public interest for markets ranked among the top 20 DMAs if: (1) the proposed merger does not involve a television station ranked among the top-four TV stations in the DMA; and (2) at least eight media voices would remain in the DMA following the transaction. The Commission notes that "presumptive guidelines could save a waiver applicant time and money and improve its chances for a successful outcome" but could also "lead to unintended consequences in specific situations..."

The Commission proposes to eliminate the Grade A contour encompassment trigger for its newspaper/TV restrictions and apply the rule to daily newspapers and television stations when: (1) the community of license of the television station and the community of publication of the newspaper are in the same DMA, and (2) the digital Principal Community Contour of the television station encompasses the entire community in which the newspaper is published. Both conditions would need to be met in order for the cross-ownership prohibition to be triggered.

The Commission also seeks comment on its tentative conclusion that, to the extent that an existing newspaper/television combination would become newly non-compliant as a result of its proposed modification of the NBCO rule, such combinations should be grandfathered in order to avoid market disruption and penalizing licensees for the switch from an analog contour to a digital contour. Relatedly, comment is sought on the Commission's view that grandfathered combinations would have to be broken up upon sale to a third party.

Radio/Television Cross-Ownership Rule

Consistent with the NPRM, the Commission proposes to repeal the radio/television cross-ownership rule and seeks comment on whether it remains necessary to promote the public interest. The Commission observes that the record in the 2010 Quadrennial Review "demonstrates that consumers rely primarily on local television stations and daily newspapers ... for their local news, and not on radio stations" and asks whether viewpoint diversity would be harmed by repealing the restriction. The agency also anticipates that elimination of the rule "would have no effect on the number of television stations an entity may own" because the existing local television ownership rule already effectuates such a restriction. The Commission tentatively concludes that the radio/television cross-ownership rule is not necessary to promote its competition or localism goals.

Dual Network Rule

The FCC tentatively finds that the dual network rule remains necessary in the public interest "to foster competition in the provision of primetime entertainment programming and the sale of national advertising time." The Commission suggests that the primetime entertainment programming lineups supplied by the top-four broadcast networks are "distinct products, the availability, price, and quality of which could be restricted, to the detriment of consumers, if two of the top four networks were to merge." The Commission also tentatively concludes that the dual network rule is necessary to promote localism because it preserves "the balance of bargaining power between the top-four networks and their affiliates, thus improving the ability of affiliates to exert influence on network programming decisions in a manner that best serves the interests of their local communities."

Diversity Order

The Commission tentatively concludes to reinstate the revenue-based "eligible entity" standard and apply it to the diversity-enhancing measures specified in the 2008 Diversity Order. As proposed by the FCC, an eligible entity is one that would qualify as a small business consistent with Small Business Administration (SBA) standards for industry grouping based on revenue, including the revenue of parent corporations and affiliates of the parent. In the 2011 *Prometheus Radio Project v. FCC* decision, commonly known as *Prometheus II*, the Third Circuit remanded each of the measures adopted in the 2008 Diversity Order that relied upon a revenue-based eligible entity definition because the Commission did not adequately demonstrate how the definition would specifically assist minorities and women. The FNPRM acknowledges the continued lack of evidence in the record that the revenue-based standard will help minorities and women and instead intends the revenue-based standard to assist small business participation in broadcasting. Specifically, the Commission seeks comment on its conclusion that "a revenue-based eligible entity standard is an appropriate and worthwhile approach for expanding ownership diversity whether or not the standard is effective in promoting ownership of broadcast stations by women and minorities."

The measures to which the eligible entity standard would apply include:

- Exceptions to the FCC's broadcast station construction deadlines that would allow the sale of an expiring construction permit to an eligible entity that pledges to build out the facility: (a) by the time the original permit expires; or (b) within 18 months, whichever is greater;
- Modification of the ownership attribution rule by relaxing the equity/debt plus standard;
- Modification of the "Distress Sale Policy" to allow sale to eligible entities;
- Giving priority to applicants for duopolies that agree to finance or incubate an eligible entity over competing, simultaneously-filed duopoly applications in the same market;
- Extension of the divestiture deadline in certain mergers; and
- Permitting the assignment or transfer of grandfathered radio station combinations.

The Commission seeks comment on its tentative conclusion not to adopt additional measures put forth by Diversity and Competition Supporters, such as blanket waivers of local radio ownership rules for broadcasters that finance or incubate eligible entities or migrating AM radio to VHF channels 5 and 6.

The Commission also proposes to decline to adopt a proposal based on the SBA's definition of a socially disadvantaged business (SDB). The SDB standard explicitly recognizes race and ethnicity of applicants and would trigger strict constitutional scrutiny in judicial review. Though the FCC believes promoting a diversity of viewpoints to be a "compelling interest," it tentatively concludes that it lacks sufficient evidence in the record to make the standard "narrowly tailored" enough to withstand heightened judicial scrutiny. The FCC cites numerous ownership studies that "strengthen the evidence of a link between broadcast diversity and minority ownership" but that "do not demonstrate the 'nearly complete' or 'tightly bound' nexus between diversity of viewpoint and minority ownership that would be required to justify a race-based eligible entity definition." The Commission comes to a similar conclusion regarding a relationship between viewpoint diversity and female ownership. The agency also rejects arguments that the *Prometheus II* decision required it to adopt the SDB standard, arguing instead that *Prometheus II* directed the FCC only to consider adopting it.

Finally, the FNPRM also describes the findings of the Media Bureau's *2*012 323 Report, which analyzes broadcast ownership data submitted as part of the 2009 and 2011 biennial ownership reports. The Commission reiterates "that the report confirms that minority and female ownership levels of broadcast stations remain disproportionately low." In response to comments questioning the validity of the data, the FCC also states that it is taking steps to improve ownership data collection.

Comments and replies are due, respectively, 45 days and 75 days after the FNRPM is published in the Federal Register.

For more information, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed below.

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[1] Also included in the item was a Report and Order discussing attribution of Joint Sales Agreements. The Report and Order, along with the portion of the FNPRM discussing Shared Services Agreements, is addressed in a separate Client Alert and is available here.