

ALERT

FCC Releases NPRM in 2010 Quadrennial Media Ownership Review

December 23, 2011

On December 22, 2011, the Federal Communications Commission (FCC or Commission) released a long-awaited Notice of Proposed Rulemaking (NPRM) as part of the 2010 Quadrennial Review of its media ownership rules, which also seeks comment on issues remanded by the Third Circuit's July 2011 decision in *Prometheus Radio Project v. FCC* (view *Prometheus* summary). In the NPRM, the FCC seeks comment on proposals to presumptively permit waivers of the newspaper/broadcast cross-ownership ban in the 20 largest television markets, to eliminate the radio/television cross-ownership rule, and to leave the local television and radio ownership and dual network rules largely intact. It also seeks comment on issues related to the ownership of broadcast stations by women and minorities and on whether it should consider Local News Service (LNS) agreements and/or Shared Services Agreements (SSAs) to be attributable for purposes of applying its media ownership rules. Parties are also invited to submit comments on the FCC-commissioned media ownership studies relating to the impact of different local market ownership structures on the policy goals of competition, diversity, and localism. Comments and reply comments are due 45 and 75 days, respectively, after publication of the NPRM in the Federal Register. We will notify our clients once specific dates are established.

Newspaper/Broadcast Cross-Ownership Rule

Noting the continued importance of newspapers and broadcast television stations as the predominant sources of local news and information, the agency tentatively concludes that some newspaper/broadcast cross-ownership restrictions remain necessary to protect viewpoint diversity. However, consistent with the conclusions reached in the last two quadrennial reviews, the Commission also concedes

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that a blanket prohibition is "overly broad and does not allow for certain cross-ownership that may carry public interest benefits." Accordingly, the FCC proposes to adopt a rule that includes most elements of the version of the rule adopted in the 2006 review, which the Third Circuit remanded in *Prometheus* based on its finding that the Commission had failed to comply with the notice and comment provisions of the Administrative Procedure Act.

Specifically, the FCC proposes a rule that prohibits common ownership of a daily newspaper and a broadcast station in local markets, but presumes that a waiver is consistent with the public interest for (1) daily newspaper/radio station combinations in a top-20 Nielsen designated market area (DMA), or (2) daily newspaper/full-power commercial television station combinations in a top 20 DMA, if: (a) the television station is not ranked among the top four television stations in the DMA, and (b) at least eight independently owned and operated "major media voices" (*i.e.*, full-power commercial and noncommercial television stations and major newspapers) would remain in the DMA after the combination. The rule presumes a waiver to be inconsistent with the public interest in all other circumstances. The Commission tentatively concludes that a case-by-case approach would best promote viewpoint diversity, but it seeks comment on whether a bright-line rule would be preferable. The FCC also asks whether it should retain or abolish the specific factors set forth to overcome a negative presumption and instead rely on a general waiver standard.

The Commission proposes to eliminate the contour overlap triggers for its newspaper/broadcast cross-ownership restrictions and apply the rule to daily newspapers and television stations located within the same DMA. The FCC also seeks comment on whether the top 20 DMAs is the appropriate demarcation point, based on its conclusion that diversity in those markets is healthy and vibrant as compared to DMAs ranked below 20, and on its decision to retain the top-four and eight major media voices restrictions.

The agency also seeks comment on an alternative proposal to eliminate or loosen the newspaper/radio cross-ownership restriction, observing that radio stations are not primary contributors to viewpoint diversity. The Commission asks whether, if it continues to regulate newspaper/radio combinations, it should shift, as it proposes to do in the case of television, from a contour-based approach to a market-based approach (*i.e.*, applying the cross-ownership rule to radio stations and newspapers located in the same Arbitron metro).

Significantly, although the FCC does not expressly recognize this in the NPRM, revising the ban on cross-ownership to apply to newspapers and television stations within the same DMA, or to newspapers and radio stations within the same Arbitron metro market, appears likely to significantly increase the number of combinations that would be prohibited. Currently, the rule bars only those combinations where the Grade A contour of a television station, the 2 mV/m contour of an AM radio station, or the 1 mV/m contour of an FM radio station encompasses the entire community in which a proposed co-owned newspaper is published. The Commission seeks comment on its tentative conclusion that it should grandfather existing combinations that would violate the rules it ultimately adopts.

Radio/Television Cross-Ownership Rule

The Commission proposes to repeal the radio/television cross-ownership rule, concluding that it is no longer necessary to promote the public interest. Repealing the rule will not have a negative impact on competition goals because radio and television are not substitutes in the programming or advertising markets, the FCC observes. The agency also anticipates that repeal of the rule is not likely to significantly increase consolidation of broadcast facilities, and it seeks comment on whether eliminating the radio/television cross-ownership restriction would allow greater efficiencies through joint operations and lead to increases in local news coverage. Although the relevant media ownership studies produced ambiguous results with regard to whether the rule promotes localism, the studies did conclude that radio/television cross-ownership has a negligible effect on viewpoint diversity. The Commission believes that the rule is not necessary to promote localism or diversity because the local television and local radio ownership rules will adequately protect these goals.

Local Television Ownership Rule

The Commission tentatively concludes that the local television ownership rule remains necessary to promote competition among broadcast television stations in local markets, and it proposes to retain the current rule with minor modifications. Noting that analog contours are no longer applicable now that the digital transition is complete and that the relevant market in which television stations compete is the DMA, the agency proposes to eliminate the provision of the rule that allows an entity to own two television stations in the same DMA if there is no Grade B contour overlap between the commonly owned stations. The FCC tentatively concludes that it will grandfather existing combinations that will exceed the local television ownership limits if the Grade B contour provision is eliminated.

With the exception of the Grade B contour provision, the duopoly rule would remain the same under the FCC's proposal, allowing common ownership of two television stations in the same DMA if at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations will remain in the DMA. The Commission finds that the top-four prohibition is necessary to promote competition, and it seeks comment on whether this prohibition advances localism and viewpoint diversity goals. With regard to the eight-voices test, the FCC believes it is necessary to promote competition, but seeks comment on whether marketplace changes warrant modification of the eight-voices test, whether alternative sources of video programming should be included in the voice count, and whether an alternate approach (e.g., a tiered approach) should be adopted. The agency proposes to retain the current numerical limits, noting that it has not observed sufficient marketplace changes that would allow an entity to own more than two television stations in a local market.

The FCC also is considering whether to adopt a waiver standard that would allow certain television combinations in small markets, even between top-four stations, and it asks whether allowing such waivers would promote additional local news offerings and what criteria should be considered under this standard. Further, the Commission asks whether multicasting should be considered in determining local television ownership limits and whether the ability of station owners to form dual network affiliations through multicasting should be limited.

Local Radio Ownership Rule

The Commission tentatively concludes that the current local radio ownership rule remains necessary in the public interest to promote competition among local broadcast radio stations, and that the rule also furthers the goals of viewpoint diversity and localism. Citing generally the "degree of consolidation" in the radio market, the FCC proposes to retain the existing numerical ownership limits and market size tiers. However, the Commission seeks comment on whether to adopt any changes to the numerical limits and specifically inquires about whether to allow increased common ownership in larger markets by creating additional tiers. Though the agency does not propose to include non-broadcast audio programming (e.g., satellite radio, Internet radio) in determining market size, the Commission asks how it would account for these alternative sources if it were to do so.

In addition, the FCC proposes to keep the current AM/FM subcaps, but seeks comment on whether the ongoing digital radio transition has impacted the technical and marketplace distinctions between AM and FM stations. The Commission also inquires whether it should adopt a specific waiver standard for the local radio ownership rule and, if so, what criteria should be considered and whether the waiver standard should be applied differently depending on market size.

Dual Network Rule

Noting that top-four broadcast networks continue to possess unique characteristics that distinguish them from other broadcast and cable networks, the FCC tentatively concludes that the dual network rule remains necessary in the public interest to promote competition. Specifically, the Commission finds that a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming and would substantially lessen competition for national advertising dollars. The FCC also seeks comment on whether a top-four merger would harm localism by reducing the bargaining power of network affiliates.

Minority and Female Ownership Diversity

In addition, the FCC seeks comment on how it should respond to the Third Circuit's remand of measures adopted in the 2008 *Diversity Order* that relied on a revenue-based "eligible entity" standard and on other actions the agency should consider to advance its objective of increasing broadcast station ownership by women and minorities. As directed by the Third Circuit in *Prometheus II*, the Commission seeks comment on the impact on minority and female ownership with regard to each of the media ownership rules.

Attribution Issues

The FCC seeks comment on whether certain types of "sharing agreements," including LNS agreements and SSAs, should be deemed to create attributable interests. The FCC asks whether such agreements are substantively similar to Local Marketing Agreements (LMAs) and Joint Sales Agreements (JSAs), each of which are already considered attributable under the some of the media ownership rules. The FCC also seeks comment on how LNS agreements, SSAs, and similar agreements impact competition, diversity and localism goals, how they should be defined if they are to be considered attributable, and whether the FCC should

consider the impact of such agreements on other matters such as retransmission consent negotiations.