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ALERT

FCC Commences 2018 Quadrennial Review of Media Ownership Rules

December 20, 2018

The Federal Communications Commission (FCC) has adopted a Notice of Proposed Rulemaking (NPRM) launching the 2018 Quadrennial Review of certain of the agency's broadcast ownership rules. This review is the latest in a series conducted pursuant to the Telecommunications Act of 1996, which requires the agency to periodically examine the covered rules to determine whether they remain "necessary in the public interest as the result of competition," and to repeal or modify any rule that does not meet that standard. Comments and reply comments will be due 60 and 90 days, respectively, after the NPRM is published in the Federal Register. We will advise our clients when the deadlines have been set.

The NPRM tees up:

(1) the Local Radio Ownership Rule;

(2) the Local Television Ownership Rule; and

(3) the Dual Network Rule.

The NPRM also asks for comment on several diversity-related proposals that the FCC previously has considered.

Throughout the NPRM, the FCC recognizes that the media marketplace in which broadcasters compete has undergone "dramatic changes" since the late 1990s, but does not reach any tentative conclusions regarding whether or how these developments warrant changes to any of the media ownership rules at issue. Nor does it deal with the national television ownership rule, or the so-called "UHF discount," which are the subject of a separate pending

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proceeding. The NPRM acknowledges that the "growth of broadband Internet and other technologies has given consumers access to more content on more platforms than ever before," while noting that "broadcast television and radio stations remain important fixtures in local communities."

As a reminder, the Wheeler Commission in 2016 adopted the 2010/2014 Quadrennial Review Order, which largely retained the then-existing media ownership rules with only minor modifications. In response to petitions for reconsideration, however, the Pai Commission adopted an Order on Reconsideration in November 2017 that reversed certain elements of the earlier Order, including repeal of the Newspaper/Broadcast and Radio/Television Cross Ownership Rules. The Pai Commission also revised the Local Television Ownership Rule by eliminating the eight voices test necessary to justify local television duopolies and providing for waivers of common ownership of two Top-Four ranked stations in a market. Further, the Order on Reconsideration eliminated attribution for television joint sales arrangements. Multiple parties sought judicial review of the 2010/2014 Quadrennial Review Order and the subsequent Order on Reconsideration, and these challenges remain pending before the U.S. Court of Appeals for the Third Circuit.

The 2018 Quadrennial Review

Local Radio Ownership–the Local Radio Ownership Rule limits both the total number of radio stations an entity may own within a local market and the number of radio stations within the market that entity may own in the same service (AM or FM). The NPRM asks broadly whether the rule remains necessary to promote competition, diversity, or localism within local radio markets. The FCC also seeks comment on various aspects of the rule's operation.

First, the NPRM asks whether the broadcast radio listening market remains the relevant product market for purposes of the rule, or if justification exists to broaden the market to include audio-based media such as satellite radio and online audio services. In addition, the FCC questions whether it should modify the current tier-based approach–which allows varying levels of common radio ownership in Nielsen Audio Metro Markets with 45-plus, 30-44, 15-29, and 14 or fewer radio stations–whether by adopting different tiers, drawing the lines between tiers differently, or abandoning a tiered approach altogether. The NPRM asks whether, if the FCC modifies the tiers, it should account for variations across markets in broadband access and adoption rates, and how granularly the FCC can and should measure listening rates for satellite radio and online audio services. Further, the NPRM further seeks input on whether the FCC should revisit its interim methodology for defining radio markets outside of the Nielsen Audio Metro Market rankings, and asks commenters opposed to retaining this contour-overlap methodology to propose a detailed alternative supported by evidence.

With respect to numerical limits, the FCC asks for specific examples supporting assertions that the current limits are too restrictive or too lenient. The NPRM also seeks comments on whether it should assign varying weights to different classes of radio stations when applying the numerical limits (e.g., should a Class A AM station be worth two stations and a Class D AM a half?).

A proposal by the National Association of Broadcasters (NAB) to maintain the eight-station limit for the top 75 Nielsen Audio Metro markets—but apply it only to FM stations—and to eliminate numerical limits for both FM and AM services outside of the top 75 markets received considerable press attention ahead of the adoption of the NPRM, and the FCC seeks comment on NAB's suggestions. Relatedly, the FCC seeks comment on whether it should retain, modify, or eliminate the AM/FM subcaps. The NPRM also asks whether these changes would be consistent with the agency's efforts to revitalize AM radio.

Finally, the NPRM asks how any local radio ownership rule should apply on a going forward basis to radio stations in markets that contain multiple embedded Nielsen Audio Metro Markets, such as New York and Washington, DC.

Local Television Ownership—the local television ownership rule limits the number of full power television stations an entity may own within the same local market. As it does with its radio counterpart, the NPRM seeks comment on whether the local television rule serves the FCC's policy goals of competition, diversity, or localism.

In addition to the fundamental question of whether the current two-stations to a market limit should be loosened or tightened, the NPRM asks questions about how to define the market for local television. The NPRM solicits comments on whether to modify the relevant market to include sources other than local broadcast video programming and how, if at all, the FCC's market definition analysis should consider the analytical framework that the Department of Justice applies to local television issues. With respect to competition, the NPRM asks how, if at all, it should consider competition among television stations for: viewers, advertisers, retransmission consent fees, network affiliation, the provision of local news or other programming, the production or acquisition of programming, innovation, or any other form or competition, and whether the rule has served as a proxy for preserving a certain level of localism or viewpoint diversity in local television markets.

The NPRM also asks whether the FCC should alter either the general prohibition on owning two stations ranked among the Top-Four in a market, or the case-by-case approach to evaluating requests to own two Top-Four stations, that exist under the current rule. Among myriad questions the FCC asks about the effects of Top-Four combinations on competition, it raises whether Top-Four combinations have undue bargaining leverage for stations able to negotiate retransmission consent agreements jointly. Further, the FCC asks for input, supported by economic data, for alternatives to the Top-Four Prohibition.

In addition, the NPRM seeks comment on local television ownership issues related to multicasting, satellite stations, low power television stations, the implications of the next generation broadcast television transmission standard (ATSC 3.0) on local television ownership issues, and the disclosure of shared services agreements.

Dual Network Rule—the Dual Network Rule effectively prohibits a merger between or among the Big Four networks: ABC, CBS, Fox, and NBC. In addition to asking the preliminary question of whether the rule is necessary to promote competition, localism, or diversity, the NPRM seeks comment on whether the Big Four broadcast networks remain a unique force in the provision of primetime entertainment programming and/or operate as a "strategic group" in the national advertising market. Moreover, the NPRM asks whether the Dual Network Rule is still necessary to preserve a balance of power between the Big Four and their local affiliates, whether the rise of online video platforms has altered the network-affiliate dynamic, and whether allowing mergers among the Big Four networks would impede the ability of local affiliates to make programming decisions that serve local needs.

Minority and Female Ownership—the NPRM seeks comment on several diversity proposals that the FCC has considered in previous quadrennial reviews. The NPRM asks whether the agency should extend cable procurement-type requirements–which require cable systems to seek to encourage minority and female participation in their businesses–to broadcasters. In addition, the NPRM seeks comment on whether the FCC should attempt to develop a model for market-based, tradeable "diversity credits" that could be redeemed by a station buyer to offset increased concentration that would result from a proposed transaction. Finally, the NPRM asks questions about alternative formulas aimed at creating media ownership limits that promote diversity.

Please contact one of the authors listed on this alert should you have questions or if you are interested in filing comments in response to the NPRM.