Communications

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FCC Sets Comment Dates for Broadcast Ownership Rule Review

The Comment and Reply Comment dates have been set for the FCC's Notice of Proposed Rulemaking in the Congressionally-mandated Quadrennial Regulatory Review of the FCC's broadcast ownership rules. Comments are due on March 5, 2012 and Reply Comments are due on April 3, 2012.

The Quadrennial Regulatory Review began in 2010 when the FCC requested comments on a Notice of Inquiry and commissioned a number of academic studies, each focused on a different aspect of the FCC's ownership rules. The NPRM marks the culmination of these efforts, but for the moment, proposes very little change in the Commission's rules. Instead, the substance of the NPRM consists largely of a number of questions posed by the FCC about the future of the broadcast industry. This means that significant changes could still result from this proceeding, depending upon the conclusions reached by the FCC with regard to these questions. A prime example of this is the FCC's inquiry into many of the contractual arrangements broadcasters rely upon to operate. In particular, the NPRM takes aim at Local News Sharing Agreements, Shared Services Agreements, and other arrangements in which broadcasters work cooperatively to reduce operating costs. For those interested in filing comments, or just understanding what is at stake, below is an in-depth look at the FCC's tentative conclusions and the areas on which it seeks comment.

Inquiry Into Contractual Relationships: The FCC has asked whether there are certain types of cooperative arrangements among stations that so significantly impact viewpoint diversity and competition in a market that they should be made subject to the FCC's ownership rules. The FCC acknowledges the argument by public interest groups that Local News Sharing Agreements and Shared Services Agreements can result in one station controlling the news programming of multiple stations, reducing the diversity of news coverage available in the market, reducing employment opportunities, and potentially skirting the ownership restrictions contained in the FCC's rules. The FCC asks whether Local News Sharing Agreements or Shared Services Agreements are so similar to other agreements that are already covered by its rules, such as Local Marketing Agreements, that they should also be covered by its ownership rules. The FCC also asks whether disclosure of the existence of such agreements should be required.

Proposals Affecting Television Ownership: The FCC concludes that it must retain its local television ownership rule to advance its goals of competition, localism and viewpoint diversity. As a result, it

proposes to retain the prohibition on duopolies in markets where less than eight independently owned television voices would remain after the creation of a duopoly, and to retain the ban on duopolies involving two of the top four rated TV stations (Top 4) in the market. At the same time, the FCC asks whether it should consider a different number of voices, such as six or seven, or adopt a tiered approach based on DMA size, although the upper limit would remain two TV stations per market. In addition, the FCC asks for comment on the impact of alternative video platforms on the continued viability of broadcast television stations and the impact of those platforms' growth on the broadcast television industry. The FCC states that it believes viewers consider broadcast television to be a unique program offering, not interchangeable with new technologies, but asks for evidence of that. It also asks whether the relevant product market has expanded beyond video programming to include the Internet and alternative sources of locally oriented content, such as websites and blogs that are not entirely comprised of video programming, that is, whether these sources should also be considered "voices" under the rule. Finally, the FCC asks whether it should adopt a waiver standard for markets where the rules would prohibit common ownership of two stations, and if it were to do so, what factors it should take into consideration in considering such a waiver.

With respect to its prohibition on combinations involving the Top 4 stations in a market, the FCC notes that there is typically a drop-off in local news programming between the fourth and fifth ranked stations in a market, providing a clear demarcation point for the ban. Nevertheless, it asks whether it should expand the prohibition to include the top six ranked stations. It also asks whether it should regulate circumstances in which a single licensee enters into agreements that may be considered "the functional equivalent of a transfer of control or assignment of license", but that do not require an application or prior Commission approval. In connection with this proposal, it gives an example based on a recent case and asks how the rules should address it. In that example, the licensee of two in-market stations, one of which is a Top 4 station in the market, purchases the network affiliation of another Top 4 station in the market. The first licensee then airs that network's programming on its second, lower-ranked station, and swaps the stations' call signs. As a result of the new network affiliation, the licensee's lower-ranked station becomes a Top 4 station. The licensee now commonly-owns two Top 4 stations in the market, none of which, under the current rules, required any authorization by the FCC.

In a similar vein, the FCC asks whether multicasting presents the same potential benefits to station owners and viewers as ownership of a second in-market station (e.g., efficiency gains and improved programming) or whether common ownership of two stations presents unique benefits that are not achieved via multicasting. It then goes on to ask whether it should limit duopolies or the ability of station owners to have dual affiliations where the Top 4 networks (ABC, NBC, CBS, and Fox) are involved.

The FCC does propose one concrete change to its television duopoly rule, largely to account for the transition to digital television. Currently, the duopoly rule is triggered by an overlap in analog contours between two television stations, which contours of course no longer exist. Accordingly, the FCC proposes to apply its duopoly rules to combinations involving two television stations in the same Nielsen DMA, even if their analog contours never overlapped. The FCC asks for comment on this proposal, and recognizes that there may be some markets that are so large that two stations licensed to the market do not actually compete with one another for viewers. It asks how it should address such situations, especially given that both stations would be entitled to market-wide MVPD carriage.

However, in most cases where a market is large enough to contain full power stations whose analog contours did not overlap, such market-wide carriage is already limited. This is because of the "hub and spoke" analysis developed by the U.S. Court of Appeals for the Second Circuit. That analysis allowed cable operators to petition to have their market redefined for purposes of outlying stations so that those stations were not entitled to cable carriage in the central "hub" of the Nielsen DMA. Because of this

approach, a change in the duopoly rule would cause stations licensed to communities outside the "hub" of the market to be treated the same as stations licensed to the core of the market for purposes of prohibiting duopoly ownership, but differently when these stations then seek cable carriage throughout the market.

In seeking comments, the FCC also asks about whether it should grandfather existing combinations that do not meet the new rule, and whether those grandfathered combinations should be allowed to be sold as a combination, or if station divestitures to break up the combination upon sale should be required.

Finally, with respect to television, the FCC tentatively concludes that it should retain its dual network rule which prohibits the common ownership of any of the Top 4 broadcast networks. The FCC states that network primetime programming garners ratings far in excess of programming available from any other source. As a result, the FCC asserts, the networks have considerable control over affiliates, the cost of programming, the availability of non-entertainment programming in the market, and many other program-related matters. It asks whether this influence is being eroded by the availability of programming from other sources.

Proposals Affecting Radio Ownership: As with the television ownership rules, the FCC has concluded that it must retain the current local radio ownership rule to support competition, localism and viewpoint diversity. The Commission tentatively concludes that broadcast radio stations compete among themselves and it is not appropriate, at this time, to consider non-broadcast sources of audio programming such as Pandora, iTunes or satellite radio. Nevertheless, the FCC asks for comment on this conclusion and asks, if it were to consider alternative sources of programming in the context of the rule, should these sources be counted as in-market stations, thereby increasing the number of duopolies permitted in that market. Similarly, the FCC asks whether it should consider the level of broadband deployment and/or adoption in the market when determining whether to count Internet-based audio services and whether that analysis should include fixed or wireless broadband, or both.

The FCC also asks specific questions about the numerical limits that currently exist on local radio station ownership. Specifically, it asks whether it should create additional tiers to allow for ownership of additional stations in the largest markets. Here again, the FCC asks whether non-broadcast sources of programming should be considered in setting revised ownership limits.

With regard to the AM/FM subcaps (the numerical limit on common ownership of stations in the same service in the same area), the FCC asks what the impact of the introduction of digital radio is on the technological and economic differences between AM and FM stations and whether that impact dictates that the subcaps be revised. The FCC also inquires about what the impact has been of allowing AM stations to use FM translators to provide expanded coverage in their service areas without the need for acquiring additional AM stations.

Finally, the FCC asks whether it should adopt a waiver standard specific to the local radio ownership rule for situations where the rules would prohibit a combination, and if so, what the waiver criteria should be.

Proposals Affecting Newspaper/Broadcast Cross-Ownership: The FCC has concluded that some form of newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. However, the Commission asks whether it should eliminate the ban on cross-ownership entirely with regard to radio stations, stating that radio stations are not the primary outlets contributing to local viewpoint diversity. The FCC states that consumers rely on other types of media for local news and information, regardless of market size. Therefore, it questions whether there is any reason to be more restrictive in small markets than in large ones.

With respect to television, the FCC had actually relaxed its newspaper cross-ownership limits in 2006, but the U.S. Court of Appeals for the Third Circuit vacated the new rule because it found that the FCC had failed to comply with the applicable notice and comment requirements in adopting it. In this NPRM, the FCC revisits its 2006 rule and proposes to readopt most of it. Specifically, it proposes to create a presumption in favor of cross-ownership in the Top 20 markets as long as the combination does not involve one of the Top 4 television stations in the DMA, and as long as eight independent "major media voices" will remain in the market post merger.

The FCC asks for comment on whether the Top 20 market demarcation point is appropriate, or if the rule should be expanded and if so, to what size market. It also asks whether the prohibition on combinations involving the Top 4 stations in a market should be expanded and if so, which additional stations should be covered by the ban. In this regard, the FCC requests comment on the findings in Media Ownership Study 4 that television stations affiliated with the four major networks tend to air more local news than other stations and that for each network affiliate in the market, there is an increase of approximately 35 minutes per day of local news programming. Lastly, the FCC asks whether the eight major media voices criteria is appropriate, or whether it should rely only on the Top 20 market requirement.

The Commission also seeks to update the rule to account for the digital transition, saying that it will apply the cross-ownership ban on television stations and newspapers located in the same DMA, as opposed to those where the television station's analog Grade A contour encompasses the newspaper's community of publication. While this revision is technically necessary to adapt to the fact that television stations no longer have analog Grade A contours, the change is not without consequence, as expanding to a DMA-wide test for overlap will prohibit previously permissible newspaper-TV combinations. For this reason, the FCC asks whether adopting a DMA-wide test would significantly increase the number of television station/newspaper combinations subject to the ban.

Finally, the FCC asks whether it should adopt a formal waiver standard to overcome or reverse the presumption against combinations where the Top 20 market, Top 4 stations or eight voices tests are not met.

Provisions Affecting Cross-Ownership of Radio and Television Stations: The FCC proposes to eliminate its current restrictions that apply when one entity owns radio and television stations in the same market. Instead, the FCC proposes to simply require that a licensee's radio station ownership comply with the local radio ownership rule, and that its television station ownership comply with the local television ownership rule. In making this proposal, the FCC states that advertisers and consumers do not consider radio and television to be interchangeable, and that allowing more radio-TV combinations would not harm competition.

Proposals on Diversity: In its efforts to increase minority and female ownership of broadcast stations, the FCC had previously adopted a number of provisions that benefited "eligible entities," which the FCC defined as enterprises that would be considered small businesses under standards established by the Small Business Administration. The U.S. Court of Appeals for the Third Circuit remanded this decision back to the FCC, stating that the FCC had not provided an adequate basis for concluding that adopting a standard to benefit small businesses would increase female and minority broadcast ownership. Accordingly, the FCC seeks comment on whether it could adopt a standard either reinstating its previous approach to "eligible entities" backed by a more expansive record of support, or adopting a standard based on race or gender that could survive judicial scrutiny. The FCC also seeks comment on the full range of proposals it had previously put forward, as well as any new ones commenters might suggest, with respect to what should be implemented to increase diversity of broadcast ownership.

As this condensed summary makes clear, the NPRM contains a great deal of information and seeks input on a large number of issues that are of great consequence to broadcasters. Broadcasters are therefore strongly encouraged to consult with counsel on submitting comments in this proceeding, or to at least discuss with counsel how the proposed changes may impact the broadcaster's operations.

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