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FCC Releases Further Notice of Proposed Rulemaking in Broadcast Ownership Proceeding

On July 24, 2006, the FCC released the text of the Further Notice of Proposed Rule Making (“FNPRM”) in the broadcast ownership proceeding that was adopted at the FCC’s June 21, 2006 agenda meeting. The FNPRM encompasses a number of docketed rule makings – a 2006 quadrennial regulatory review, the 2002 biennial regulatory review, cross-ownership of broadcast stations and newspapers, and rules and policies concerning local ownership of television stations and radio stations in the same market including the definition of radio markets. Basically, the FNPRM seeks comment on how the Commission should address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005) (“*Prometheus*”); whether the media ownership rules are “necessary in the public interest as the result of competition;” and whether they should be changed in any way. Comments in the proceeding are due by **September 22, 2006** and reply comments by **November 21, 2006**.

The Further Notice is very open-ended, with a broad invitation for comments from all quarters. At the outset, the Commission states that the policy objectives of competition, diversity, and localism will guide its actions on remand and asks those submitting comments to consider whether these goals might be better addressed by using an alternative regulatory scheme or set of ownership rules. In an effort to address the concerns of various interest groups, the FNPRM also urges commenters to discuss the potential effects of the current broadcast ownership rules and any proposed changes on: ownership by minorities, women and small businesses; advertising markets; the ability of independent stations to compete; the availability of family-friendly and children’s programming; the amount of indecent and/or violent content broadcast over the air; and the availability of independent programming. The Commission further notes that the media marketplace

continues to evolve and seeks comment on the impact of new technologies and the availability of television programming and music on the Internet.

Consistent with Section 202(h) of the Telecommunications Act of 1996 (the “1996 Act”) that requires the next quadrennial review of the media ownership rules to commence in 2006, the Commission states that it is initiating a comprehensive review.

The Local Television Ownership Rule

The FCC’s, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620 (2003) (“Ownership Order”), *aff’d in part and remanded in part, Prometheus* (“*2002 Biennial Review Order*”) revised the local TV ownership rule to permit one entity to own more than one television station in certain markets while still ensuring that there would be at least six equal-sized television owners in most markets. The *2002 Biennial Review Order* also modified the criteria for seeking waivers of the local TV ownership rule.

In *Prometheus*, the Third Circuit held that the Commission had failed to consider the audience share of stations in setting its limits on the number of stations an entity could own in the same market. In addition, the court directed the Commission on remand to review the FCC’s elimination of the requirement that those seeking to acquire a failed, failing or unbuilt station as a second station in the market must demonstrate that no out-of-market buyer is reasonably available.

The FNPRM seeks comment on all the issues remanded by the court and asks whether there is enough evidence to justify the local station ownership limits adopted in the *2002 Biennial Review Order*, or whether those limits should be further revised. For instance, the Commission asks: Is there evidence to support fluidity of television station market shares? Should the limits vary depending on the size of the market? How would any changes impact the need for the top-four ranked restriction? Commenters are also urged to consider whether their proposals would be consistent with the decision of the U.S. Court of Appeals for the District of Columbia in *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 155 (DC Cir. 2002) where the court found that the FCC had not justified its exclusion of non-broadcast media from its count of independent owners under the local TV ownership rule’s eight-voices test.

The Local Radio Ownership Rule

In the *2002 Biennial Review Order*, the Commission retained the limits on the number of radio stations in each service that a person could own or control in the same market, consistent with AM/FM service caps that Congress had adopted in the 1996 Telecommunications Act. However, the Commission modified the definition of a local radio market by moving from a contour-overlap approach to an Arbitron Metro market definition and by including noncommercial stations in the number of radio stations counted in a market for radio duopoly purposes. In addition, the Commission decided to attribute radio station joint sales agreements (“JSAs”) to in-market station owners.

The Third Circuit found that the decisions to use Arbitron radio metro markets, as well as to include noncommercial stations and JSAs in the computations were justified. However, the court remanded the Commission’s decision to retain the existing local radio ownership numerical caps because it disagreed with the Commission’s rationale that the limits ensured five equal-sized competitors in most markets. The court found that the number “five” had not been justified as an appropriate benchmark and that the Commission had not taken account of the “actual market shares” of stations. The court affirmed the Commission’s decision to make JSAs attributable under its ownership regulations.

In the FNPRM, the Commission invites comment on these issues and asks whether the radio numerical limits should be revised or whether they can be justified. The Commission also asks how it should address the Third Circuit's concern that any numerical limits finally adopted should take into account the actual market shares of stations and seeks comment on whether the rule should still ensure a specific number of competitors in a market, and, if so, what the appropriate benchmark should be.

Cross-Media Limits

The *2002 Biennial Review Order* concluded that neither the newspaper/broadcast cross-ownership rule nor the radio/television cross-ownership rule was necessary in the public interest. As a result, the Commission replaced these rules with a new set of cross-media limits. It adopted a Diversity Index for use in analyzing the availability of media outlets that contribute to viewpoint diversity in local media markets. In its decision, the Third Circuit affirmed the FCC's decision to eliminate the newspaper/broadcast cross-ownership rule but concluded that the cross-media limits selected by the FCC were not based on a reasoned analysis and asked the Commission to justify or modify these limits on remand. The court also faulted the FCC's reliance upon the Diversity Index and held that the FCC did not rationally derive its cross-media limits from the Diversity Index.

In the only tentative conclusion reached in the FNPRM, the Commission has announced that the Diversity Index is an inaccurate tool to measure diversity. It seeks comment on how to address cross-ownership limits and asks whether such limits should vary depending on the characteristics of local markets.

Dual Network Rule

The dual network rule permits common ownership of broadcast networks but prohibits a merger among the "top four" networks – ABC, CBS, NBC and Fox. In the *2002 Biennial Review Order*, the Commission decided that the rule was necessary to promote competition and localism. Now, the FCC seeks comment on whether the dual network rule remains necessary.

UHF Discount

In *Prometheus*, the Third Circuit held that challenges to the national television ownership rule had been rendered moot by congressional action setting the national cap at 39%. The court stated that the UHF discount rule was "insulated from this and future periodic review requirements," but further noted that the Commission was considering its authority to modify or eliminate the discount. The FNPRM asks whether the Commission has the authority to modify or eliminate the UHF discount and if so, whether the UHF discount should be retained, modified or eliminated.

Petitions for Reconsideration of 2002 Biennial Review Order

Finally, the FNPRM observes that various petitions for reconsideration of the *2002 Biennial Review Order* were filed and states that parties may refresh these earlier filed pleadings in their comments.

As noted above, comments concerning the FNPRM are due by **September 22, 2006** and reply comments by **November 21, 2006**. Those interested in filing comments should contact any of the attorneys in the Communications Section.

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