Virginia Association of Broadcasters Legal Review

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Legal Memorandum

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Local Media Ownership Rules to Be Relaxed Significantly at FCC's November 16 Meeting

Significant relaxation of the FCC's local media ownership rules is close to becoming reality. At its November 16 meeting, the FCC will consider adopting an Order on Reconsideration that would modernize those rules by eliminating some of them and reforming others.

As broadcasters know, the FCC's local broadcast ownership rules limit a single entity's ownership of television, radio, and newspaper properties within a local market. The Communications Act requires the FCC to periodically review these rules to determine whether they remain in the public interest. In August 2016, under the leadership of then-Chairman Wheeler, the Commission adopted by a 3-2 vote cast along partisan lines, an Order (the "August 2016 Order") which left the local ownership rules essentially unchanged. The August 2016 Order also reinstated the television JSA (joint sales agreement) attribution rule—which had been struck down by a federal appeals court—and required commercial television stations to disclose certain SSAs (shared services agreements). A variety of industry stakeholders filed petitions for reconsideration of the August 2016 Order, and the FCC's anticipated action at the November 16 meeting will respond to those petitions for reconsideration. Because the FCC's action will be taken in response to the August 2016 Order, the FCC is not engaging in another round of comments

and reply comments; instead, the FCC will be relying on the "voluminous record" that was established earlier in the proceeding. (In addition, it is worth noting that litigation remains pending in a federal appeals court relating to several aspects of the August 2016 Order. At this time, while it is not entirely clear what will happen to the pending litigation, it is a near certainty that the FCC's Order on Reconsideration will result in further litigation by many of the same stakeholders involved in the pending litigation.)

On October 26, the FCC released a draft Order on Reconsideration, which explains the action the FCC is likely to take on November 16 to relax a significant portion—but not all—of the local ownership rules. While it is plausible that the text of the Order on Reconsideration will change between now and the November 16 meeting, we do not expect any significant changes to the substantive elements of the Order on Reconsideration. Thus, based on the draft, here are some of the highlights of the local media ownership rule changes broadcasters can expect to be adopted in mid-November:

* Elimination of the Newspaper/Broadcast Cross-Ownership Rule. Under current rules, a full-power broadcast station (TV or radio) and a daily newspaper may not be commonly owned if the station's relevant contour completely encompasses the newspaper's city of publication (except that existing NBCO combinations have been grandfathered for decades). The FCC will eliminate the Newspaper/Broadcast Cross-Ownership Rule because "it is no longer necessary to promote viewpoint diversity," and it prevents ownership combinations that would "enable both broadcasters and newspapers to better serve the public interest."

* Elimination of the Radio/TV Cross-Ownership Rule. Under current rules, the number of commercial radio and television stations an entity may own in the same market is tiered; that is, the amount of common ownership permitted depends on compliance with the local TV and radio ownership rules and the number of independently owned media voices (television and radio stations, cable systems, and newspapers) that would remain in the relevant market if the stations that are subject to a proposed transaction become commonly owned. The FCC will eliminate the Radio/Television Cross-Ownership Rule because "it is no longer necessary to promote viewpoint diversity in the modern media marketplace."

* Modification of Local TV Ownership Rule. Under current rules, a transaction resulting in ownership of more than one commercial television station in a market is permissible only if at least eight television "voices" would remain in the market after the deal, and provided that the two stations are not both ranked in the top four in the market. (Exceptions to the current rule's combination limits may be granted by the FCC pursuant to a waiver for "satellite" stations and for "failed or failing" stations.)

- *Eight Voices*. The FCC will eliminate the Eight-Voices Test because it "is unsupported by the record or reasoned analysis and is no longer necessary in the public interest." As a result, television duopolies will become legally viable in a majority of markets across the country. As a corollary, the continued existence of duopoly waivers for "satellite" stations and for

"failed or failing" stations will become far less important for ownership combination purposes. (But, stay tuned to see if the FCC revises the regulatory fee discount for satellite stations.)

- *Two Top-Four Stations Prohibition*. The FCC believes that the record continues to support a general prohibition on ownership of two top-four television stations in the same market. However, the FCC's approach to top-four combinations will allow for some flexibility, and the new rule will allow a party seeking to own two top-four stations to demonstrate (and will require the FCC to consider), on a case-by-case basis, that the Top-Four Prohibition is not warranted based on the circumstances in a particular market and/or with respect to the particular transaction.

* Elimination of Attribution Rule for TV JSAs. Under current rules, JSAs that involve more than 15 percent of sales of a second station in the same market create an attributable ownership interest in the second station (which in many cases would create a violation of the current local television ownership rule). The FCC will eliminate the attribution rule for television JSAs, because it finds that JSAs are beneficial agreements that serve the public interest by allowing television broadcasters to better serve their local markets.

* No Changes to the Local Radio Ownership Rule. Notably, the draft Order on Reconsideration explains that the Commission will not be making a change to the ownership limits currently allowed under the Local Radio Ownership Rule. Thus, the number of radio stations in a radio market that may be commonly owned will remain tiered, depending on the total number of full-power commercial and noncommercial radio stations in the market, as follows:

- In markets with 45 or more radio stations, an entity can own no more than eight commercial radio stations, no more than five of which may be in the same service (AM or FM).
- In markets with 30-44 radio stations, an entity can own no more than seven commercial radio stations, no more than four of which may be in the same service.
- In markets with 15-29 radio stations, one entity can own no more than six commercial radio stations, no more than four of which may be in the same service.
- In markets with fewer than 15 radio stations, one entity can own up to five commercial radio stations, no more than three of which may be in the same service; provided, however that an entity cannot own more than 50 percent of the radio stations in the market. (The AM/FM combo exception continues to allow common ownership of an AM and FM station in one market even if such common ownership would exceed the 50 percent limit.)

In addition, the Order on Reconsideration will maintain the requirement that commercial TV stations disclose certain SSAs.

Finally, in a Notice of Proposed Rulemaking ("NPRM") that will accompany the Order on Reconsideration, the FCC will initiate a proceeding to establish the details of a so-called "incubator

program" which will have as a goal the facilitation of entry of "new and diverse voices in the broadcast industry." Among other things, the NPRM will seek comment on issues such as defining the entities eligible to participate in the program and determining incubation activities, incentives for encouraging incubation, and a review process for incubation proposals. We will provide greater detail on this incubator program proposal when the FCC releases the final version of the NPRM after its November 16 meeting.

FCC Poised to Adopt Order to Allow TV Stations to Begin Implementing the ATSC 3.0 Transmission Standard

Television stations will soon be able to implement Next Gen TV for over-the-air broadcasting. In response to a multi-stakeholder petition filed in April 2016, the FCC launched a rulemaking proceeding earlier this year in which it proposed to allow television stations to use the "Next Generation" broadcast television transmission standard ("Next Gen TV" or "ATSC 3.0") on a voluntary, market-driven basis. At its November 16 meeting, the FCC will consider an Order to adopt rules to govern the use of ATSC 3.0 by television stations. A draft of the Order was released on October 26, and it contemplates, among other things, the following:

* Allowing television broadcasters to use ATSC 3.0 on a voluntary, market-driven basis.

* Requiring stations that use ATSC 3.0 to partner with another local station to simulcast their programming using ATSC 1.0, so that viewers will continue to receive their existing broadcast service. (This simulcast requirement is intended to address the issue resulting from the fact that ATSC 3.0 is not backwards-compatible with existing TV sets and receivers, meaning consumers who want to receive ATSC 3.0 will need to buy new TV sets or converter equipment.)

* Requiring, for five years, that the programming aired on the ATSC 1.0 simulcast channel to be "substantially similar" to the programming aired on the ATSC 3.0 channel (i.e., the programming must be the same, except for programming features that are based on the enhanced capabilities of ATSC 3.0, advertisements, and promotions for upcoming programs).

* Exempting low power TV and TV translator stations from the simulcasting requirement, and permitting full power stations to seek waivers from the requirement on a case-by-case basis if the full power station has no viable simulcast partner.

* Retaining mandatory carriage rights on cable and satellite systems for simulcast DTV signals, and affording Next Gen TV signals no mandatory carriage rights during the period of time that local simulcasting is required by the FCC's rules.

* Subjecting Next Gen TV signals to the public interest obligations that currently apply to television broadcasters.

*	Requiring stations to air consumer education notifications in advance of ATSC 3.0 deployment.

Notably—but not unexpectedly—the FCC will not adopt a Next Gen TV tuner mandate for new television receivers at the November 16 meeting. And, the draft Order makes clear that the FCC is not attempting to resolve all regulatory issues relating to implementation of ATSC 3.0. Indeed, the FCC recognizes that it may be too early in the Next Gen TV revolution to promulgate rules covering the entire regulatory landscape. Thus, with an eye to the future and to the evolution of the industry, the FCC will also consider a Further Notice of Proposed Rulemaking at its November 16 meeting, which will, among other things:

*	Seek comment on issues related to exceptions and waivers of the requirement that Next Gen TV broadcasters partner with a local station to simulcast DTV signals.

*	Seek comment on whether to let full power broadcasters use vacant channels in the television broadcast band to encourage use of Next Gen TV.

*	Tentatively conclude that local simulcasting should not change the "significantly viewed" status of a Next Gen TV station for purposes of cable and satellite carriage.

We will provide greater details about the Order and the Further Notice of Proposed Rulemaking when the FCC releases the final text after its November 16 meeting.

Modernization of Media Regulation Update: FCC Targets Ancillary/Supplementary Services Report and Newspaper/Broadcast Public Notice Requirements

Chairman Pai continues to make good on his pledge to release a Notice of Proposed Rulemaking each month focused on eliminating or revising at least one outdated FCC rule as part of the FCC's Modernization of Media Regulation Initiative. At its October meeting, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") that takes aim at two such rules by: (1) proposing to require only those broadcasters who actually provide feeable ancillary or supplementary services to submit the annual report regarding such services; and (2) seeking comment on whether to update its rules to permit broadcast station applicants to give public notice of certain application filings online instead of via newspaper publication and/or broadcast announcement—or whether to repeal the rule altogether.

Ancillary/Supplementary Services Reporting Form. Every December, all digital television broadcast licensees and permittees are required to report to the FCC (using Form 2100, Schedule G) whether they have offered any "ancillary" or "supplementary" services during the 12-month period ending on the preceding September 30—even if they did not provide any ancillary or supplementary services or receive revenue from those services during the relevant reporting period. Recognizing that only a small fraction of DTV stations actually offer these services, the

NPRM proposes to modify FCC rules so that only those DTV stations that actually provide feeable ancillary or supplementary services would be subject to the annual reporting requirement.

Recall that "ancillary" and "supplementary" services are services provided on that portion of a station's digital spectrum capacity or bit stream that is not needed to provide the required one free, over-the-air video broadcast signal, and for which the station receives compensation in return for the broadcast. Such services include, but are not limited to, computer software distribution, data transmission, teletext, interactive materials, aural messages, paging services, audio signals, subscription video, and other similar services. (If a station has received compensation, either directly or indirectly, in exchange for ancillary or supplementary services, then it must also file FCC Form 159 and remit to the Commission 5% of the gross revenue received for the ancillary or supplementary services.) Ancillary and supplementary services do not include "any video broadcast signal provided at no direct charge to viewers"—in other words, a free, over-the-air multicast stream is not an ancillary and supplementary service.

Television broadcasters would likely welcome the FCC's proposed change, as the overwhelming majority of them annually spend time and resources completing and filing the ancillary/supplementary services report form merely to inform the FCC that they do not provide any such services.

Public Notice of Filing Broadcast Applications. The NPRM also proposes to update FCC rules to allow broadcasters to give public notice of the filing of certain broadcast applications via the Internet (instead of via newspaper publication and/or on-air announcement), or, alternatively, to eliminate the public notice requirement altogether.

Rules adopted more than 50 years ago require broadcasters filing certain applications—including for license renewals, new construction permits, transfers/assignments of licenses, and major license modifications—to provide public notice of their application filings by local newspaper and/or by announcing the filings on-air. The FCC adopted the public notice requirements to make sure the public knew about the broadcast applications and would have a meaningful opportunity to participate in the broadcast licensing process.

Times, of course, have changed dramatically, and the FCC believes that viewers and listeners today reasonably would expect to obtain information about broadcast applications online. As such, the NPRM seeks comment regarding whether to allow applicants to provide notice (or at least a portion of such notice) on the Internet, together with a link to the applicant's online public file containing the relevant application, and to broadcast the address of the Internet website containing such information—instead of alerting the public in the newspaper or on the airwaves. Alternatively, the NPRM asks whether the FCC should go further and eliminate the public notice requirements altogether, given the ready availability of most applications in FCC online databases and in station online public files.

Comments on the NPRM will be due 30 days after it is published in the Federal Register, and reply comments will be due 15 days later.

If you have any questions concerning the information discussed in this memorandum, please let us know.

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