



Virginia Association of Broadcasters Legal Review



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IMPORTANT

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FCC PROPOSES TO LIBERALIZE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE AND ELIMINATE THE RADIO/TELEVISION CROSS-OWNERSHIP RULE

The FCC recently released a *Notice of Proposed Rulemaking* (the “Notice”) reexamining and proposing modifications to the Commission’s ownership rules. The proposals are similar to proposals from the administration of former Chairman Kevin Martin.

The Commission proposes to (a) liberalize, to some extent, the newspaper/broadcast cross-ownership rule and eliminate the radio/television cross-ownership rule, and (b) evaluate television ownership within markets solely by DMA, eliminating the exception that permits co-ownership of stations located in the same DMA but whose contours do not overlap. The proposals, if adopted, would leave other media ownership rules largely unchanged, including the current “dual network” rule that would prohibits a merger between the Big 4 (ABC, CBS, FOX, and NBC) television networks.

No relief is proposed that would allow local TV duopolies or liberalize the local radio ownership rules.

The *Notice* invites comment on these and other important issues, including attribution of shared services agreements and diversity exemptions.

The new proceeding continues the ongoing 2010 Quadrennial Review initiated more than two years ago, and also revisits the FCC's earlier changes to some of the rules that were overturned by the Third Circuit. The details of the proposed modifications and questions for comment are discussed below.

I. Proposed Changes to Ownership Rules

A. Proposal to Change Newspaper/Broadcast Cross-Ownership Rules

The FCC tentatively concludes that its newspaper/broadcast cross-ownership rules, in some form, are still appropriate and should not be abolished. The *Notice* suggests, however, the FCC may adopt changes to relax these restrictions. Although the Commission's most recent effort to relax the rules was overturned by the Third Circuit in 2007, the *Notice* now seeks comment on proposals similar to those the Commission made in 2007. Because the court reinstated the prior rule, the absolute ban on newspaper/broadcast cross-ownership is currently still in effect.

The FCC's current proposal, as its proposal in 2007, would continue to prohibit newspaper/broadcast cross-ownership in markets *below* the top 20. In the top 20 markets, however, newspaper/broadcast combinations could be permitted on a case-by-case, waiver basis if certain criteria are met.

For television stations, the *Notice* proposes to modify the rules to specify Nielsen DMA market designation as the relevant metric for newspaper/television station combinations. This would change the current rule, which prohibits common ownership of a full-service television station and a newspaper where the TV station's Grade A contour encompasses the newspaper's entire city of publication. The change could have positive implications for some broadcasters, but negative implications for others. In some markets, the geographic area of the local DMA may be more extensive than that of a station's Grade A contour, while in other markets, the reverse might be the case.

The *Notice* proposes to grandfather *existing* ownership combinations that are now legal, but which might become illegal with the change, but the Commission may require the combination to be broken up when sold. That aspect of the proposal would, obviously, present potential problems for owners of newspaper/broadcast combinations that are currently legal, but would not be legal under the proposed change, upon a sale of the combination. The FCC seeks comment on the impact of this change.

If adopted, the new rules would presume that in the top 20 DMAs only, cross-ownership of a television station and newspaper may be permitted if the television station is not ranked in the top four stations in the DMA and at least 8 "major media voices" (including newspapers) would remain in the market after the combination. In all other circumstances, a combination would be presumed to be impermissible.

Although the top-20 DMA cut-off standard would apply to both television and radio stations, the restriction on radio stations would still be triggered by radio contours. So, for radio stations, the practical effect of the proposed rules in markets ranking below the top 20 DMAs would be to prohibit common ownership of a daily newspaper and a radio station with a service contour that encompasses the newspaper's city of publication. The proposed rules would presume a waiver, however, and likely allow a combination in a top 20 DMA of a newspaper and a radio station. The FCC seeks comment on whether the rules should continue to rely on contours for this portion of the newspaper/radio rule or, alternatively, move to an Arbitron market definition. The *Notice* asks whether the top 20 DMA cut-off point is useful for evaluation of newspaper/radio combinations. The *Notice* also suggests that the Commission will entertain comments regarding the relaxation or elimination altogether of restrictions on newspaper/radio combinations.

B. Proposal to Eliminate Radio/Television Cross-Ownership Rule

The FCC proposes to eliminate the radio/television cross-ownership rule that currently restricts ownership of radio and television stations in the same market. Under the current rules, the ownership of a television station triggers a limit on the number of radio stations the owner may own within the same market.

If adopted, the FCC's proposed rule would allow a single owner to hold the maximum number of each type of station (radio or television) that would otherwise be permitted in that market under the local television ownership rule and local radio ownership rule. For example, one owner could hold, within the same market, the maximum number of radio stations *and* the maximum number of TV stations permitted for that market. The FCC tentatively concludes that radio and television stations are not "substantial substitutes" within the markets, and, therefore, are not competitors. In place of the cross-ownership rules, the Commission instead proposes to rely on the local ownership rules for television and radio stations currently in effect to serve the goals of localism and diversity.

C. Proposal to Eliminate Grade B Contours in Local Television Ownership Rule

The *Notice* proposes a modification to the local television ownership rules to evaluate ownership within markets based solely on DMA. The current local television ownership rule also allows ownership of two television stations in the same DMA if their Grade B contours do not overlap. The Commission observed that the Grade B contour is a holdover from analog days and is now irrelevant in terms of digital. If the proposal is adopted, the FCC would abandon the Grade B contour overlap restriction, leaving the local test to be simply whether the stations are in the same DMA. The FCC seeks comment on this proposal, noting that it will allow grandfathering provisions to preserve existing ownership combinations.

Otherwise, local television ownership rules will stay largely the same. The FCC tentatively concludes that it should retain restrictions on the number of TV stations that one owner may hold in the same market.

D. The “Voice Count” And Multicast Network Affiliation To Be Reviewed

The Commission invites comment on whether it should consider alternative sources of video programming in the “voice” count or whether it should adopt an alternative framework to the current 8 independent voices test. The *Notice* asks whether digital multicasting has changed the landscape for broadcast competition generally and, specifically, whether the Commission should limit dual network affiliation for some stations that multicast. This proposal could have far reaching implications for television stations that have more than one Big 4 network affiliation. The *Notice* asks in this connection whether it should permit waivers for combinations in smaller markets where station owners are more limited but may have a larger need for cost savings and efficiencies in developing news programming. Some cable companies have argued aggressively to the Commission that stations that have more than one Big 4 network affiliations have an unfair competitive advantage in retrans negotiations.

E. No Proposed Changes To Local Radio Ownership Rules

For radio stations, the *Notice* proposes to maintain the rules that currently limit the number of stations that may be owned by a single entity in each market based on the number of competitors in the market. The FCC seeks comment, however, on related issues within the rules for radio stations, including whether it should adjust the numerical limits on ownership within market tiers or eliminate the AM and FM subcaps. Under current rules, the AM and FM subcaps limit the number of stations of each type that a single owner may hold. If the rules were modified to eliminate subcaps, an owner might be permitted to hold more AM stations or FM stations within a single market. For now, the FCC does not propose any change, but the *Notice* asks for comment regarding the impact of digital radio and FM translators on coverage and competition issues in local radio markets.

F. Proposal To Retain Dual Network Rule

The FCC’s current rules prohibit the common ownership of more than one Big 4 Network (ABC, NBC, CBS, and Fox). This rule was upheld by the Third Circuit when it was challenged several years ago, and the FCC now proposes to retain the rule. The Commission tentatively concludes that the rules still play an important role in fostering competition and protecting localism. The *Notice* invites comment on this tentative conclusion. This item, of course, has enormous implications for Big 4 network affiliated television stations.

II. Attribution of Shared Services Agreements

The *Notice* also inquires whether shared services agreements should be “attributable” under the ownership rules. Broadcasters frequently use shared services agreements to provide for shared news production arrangements between separately owned stations. Under the FCC’s rules currently in effect, such agreements are generally not attributable and have no impact on ownership limits. The *Notice* seeks comment on how shared services agreements should be defined, the benefits and detriments of these arrangements, and what attribution standards should apply.

III. Diversity and Other Goals of the Proceeding

The FCC also seeks comment on issues related to minority and female ownership. Specifically, the Commission is revisiting its proposals in the 2008 *Diversity Order* that were struck down by the Third Circuit. The court struck a number of the FCC’s measures designed to increase ownership opportunities for minority- and women-owned entities because it concluded that the FCC’s eligibility standards (based on revenue) were arbitrary and capricious. The Commission now seeks comment on how its ownership rules could promote greater minority and women ownership of broadcast stations.

The *Notice* also refers to Media Ownership Study 7, among other ownership studies, which suggests a positive relationship between minority ownership of radio stations and the total amount of minority radio programming in the market. The FCC seeks comment on the how the studies’ conclusions should influence the Commission’s local radio ownership rules. Notably, the Commission has also relied on various ownership studies relating to the goals of diversity, localism, and competition. The *Notice* invites comment on all of these studies.

Comments on the *Notice* are due March 5, 2012, and reply comments are due April 3, 2012.

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We will continue to keep you apprised of significant developments in this proceeding.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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