



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Commission Initiates 2018 Quadrennial Review of Media Ownership Rules

The FCC kicked off its 2018 Quadrennial Review of media ownership rules with the adoption, by a 3 to 1 vote (Commissioner Rosenworcel dissented in part), of a [Notice of Proposed Rulemaking](#) (“Notice”) at its open meeting on December 12, 2018.

The rules under review in the proceeding are (1) the Local Television Ownership Rule, (2) the Local Radio Ownership Rule, and (3) the Dual Network Rule. Note that the National Ownership Cap Rule is specifically excluded by law from the Quadrennial Review, and the Commission is reviewing it in a separate, ongoing proceeding. The Notice also seeks comment on a few proposals relevant to promoting diversity in the broadcast industry.

Background. The FCC is required under the Telecommunications Act of 1996 to review media ownership rules every four years in order to determine whether they remain “necessary in the public interest as the result of competition”—and to modify or eliminate any rules that it determines are no longer in the public interest.

Broadcasters may recall that last year, in November 2017, the FCC adopted an [Order on Reconsideration](#) (“Order on Reconsideration”) that (1) ended the Commission’s 2010 and 2014 Quadrennial Review proceedings and (2) significantly liberalized local media ownership rules, by

eliminating some of them and reforming others. Although the Order on Reconsideration remains subject to a court challenge, its rule changes are now in effect. To some extent, the Notice picks up where the Order on Reconsideration left off.

Overview of Notice. At a high level, the Notice asks whether the ownership rules at issue continue to promote competition, viewpoint diversity, and localism. The Notice recognizes that the media marketplace has undergone dramatic changes since the Commission first began its Quadrennial Review proceedings back in the late 1990s, citing consumers' ever-increasing access to audio and video programming online. And the rules themselves are old; some of them date all the way back to the 1940s!

The Notice seeks comment on a wide range of questions about the ownership rules in particular and the media marketplace in general. According to Chairman Pai, the Commission in the Notice does not reach any tentative conclusions about the rules or offer any proposals for modifying them. Commissioner Rosenworcel disagrees with that assessment, arguing the Notice does in fact contain proposals. Regardless, it will be difficult to predict what—if any—action the Commission will ultimately take as part of the 2018 Quadrennial Review.

Local Television Ownership Rule. In its 2017 Order on Reconsideration, the Commission modified its Local Television Ownership Rule in several ways. First, the Order on Reconsideration eliminated the Eight Voices Test, i.e., the rule that a transaction resulting in ownership of more than one commercial television station in a market was permissible only if at least eight independent television “voices” would remain in the market after the combination. The Order on Reconsideration also modified, but did not eliminate, the general prohibition on ownership of two Top-Four television stations in the same market. However, the FCC relaxed its approach to Top-Four combinations, allowing a party seeking to own two Top-Four stations in the same market to demonstrate, on a case-by-case basis, whether the Top-Four Prohibition is not warranted based on the circumstances in a particular market and/or with respect to the particular transaction.

In the Notice, the Commission seeks comment on whether the Commission should retain, tighten, or loosen the Top-Four Prohibition and whether the case-by-case analysis that the Commission now uses to evaluate a proposed two-Top-Four transaction should be modified. The Commission also seeks comment on whether it ought to adopt a more expansive view of the relevant “market” at issue in Top Four considerations to include non-broadcast video programming sources (e.g., cable, online video, etc.). In that regard, the Notice asks a variety of questions about viewers' habits in terms of consuming programming from local broadcast stations in comparison to non-broadcast video programming.

Further, the Notice asks questions relating to whether, due to technical developments, multicast streams now function as separate broadcast stations, and whether satellite stations should continue to be exempt from the Local Television Ownership Rule, given that they are sometimes used to carry two Big Four Networks in the same market. Finally, the Notice seeks feedback on how ATSC 3.0 will affect local television ownership, and whether the FCC should continue to require the disclosure of shared service agreements.

Local Radio Ownership Rule. Under the Local Radio Ownership Rule, the number of radio stations that may be commonly owned in a radio market is tiered, and it depends on the total

number of full-power commercial and noncommercial radio stations in the market (defined by Nielsen Audio markets), 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, an 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, an 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 allows common ownership of an AM and FM station in one market even if such common ownership would exceed the 50 percent limit.)

The Notice seeks comment on whether the Commission should retain its current approach of using tiers based on market size, whether the current tiers—i.e., the Nielsen Audio market tiers of 45+, 30-44, 15-29, and 14 or fewer—should remain in place or be modified, and how stations in areas outside of the defined Nielsen Audio markets should be treated. In addition, the Notice asks whether the FCC should retain, modify, or eliminate its AM/FM station ownership subcaps.

The Commission also seeks comment on a [proposal](#) made over the summer by NAB that pushes for relaxation of radio station ownership limits. NAB argues that radio stations compete with streaming services, satellite radio, podcasts, Facebook, and YouTube for listeners and advertisers. NAB urges the Commission to consider (1) in the top 75 Nielsen Audio markets, allowing a single entity to own or control up to eight commercial FM stations, with no limit on AM ownership; and (2) in markets outside the top 75, eliminating all restrictions on the number of FM and AM stations a single entity can own or control.

Similar to its questions regarding television, the Notice also asks whether the Commission should revise its definition of the relevant “market” to include other audio sources in addition to broadcast radio stations, such as satellite radio and online audio services. The Notice queries whether advertisers view satellite radio and audio streaming services as substitutes for broadcast radio, and whether consumers view non-broadcast audio services as meaningful substitutes for local radio stations.

Dual Network Rule. The Notice also addresses the Dual Network Rule, which prohibits a merger between or among the “Big Four” TV Networks (NBC, ABC, CBS, and Fox). The Notice seeks comment on the Commission’s previous conclusions (1) that the primetime entertainment programming provided by the Big Four Networks is a distinct product that has a unique ability to attract large audiences when compared to other broadcast and cable programming, and (2) that the Big Four Networks comprise a “strategic group” in the national advertising market.

Additionally, the Notice seeks comment on whether the Dual Network Rule serves to maintain a balance of bargaining power between the Big Four Networks and their local Affiliates; how the rise in online video services has altered the Network-Affiliate dynamic; and whether a

Big Four Network merger would reduce the ability of local Affiliates to influence Network programming decisions in a manner that suits the needs of local audiences.

Diversity Proposals. Finally, the Notice seeks comment on three proposals aimed at increasing diversity in broadcasting. At a high level:

(1) The Notice asks whether the Commission should develop a model for market-based, tradeable “diversity credits” that would serve as an alternative method to ownership limits. The idea here is that “diversity credits” could be traded in a market-based system and redeemed by a station buyer to offset increased ownership concentration that would result from a transaction.

(2) The Notice seeks comment on whether it should extend its cable procurement requirements—which require that cable systems encourage minority and female entrepreneurs to participate in their businesses and analyze those recruitment efforts—to broadcasters.

(3) The Notice asks about proposals for alternative formulas—a “tipping point” formula and a “source diversity” formula—that are aimed at creating ownership limits that promote diversity. The Commission notes that these formulas contain few details and raise significant administrative and practical concerns, on which the Commission seeks comment. The tipping point formula would assess how much advertising revenue an “independent” broadcaster would need to survive in a given market, and would then bar any other broadcaster from acquiring stations in that market if the result would be that the acquiring broadcaster would hold combined revenue so large as to leave insufficient revenue for the independents in the market. The source diversity formula, on the other hand, would measure the level of consumer welfare derived from viewpoint diversity in a market by asking whether a particular market manifests strong diversity, moderate diversity, or slight diversity.

We will keep you posted on updates in the 2018 Quadrennial Review proceeding. Comments on the Notice will be due 60 days after its publication in the Federal Register, and reply comments will be due 90 days after publication.

FCC Eliminates License Posting Requirement

Broadcasters will soon be able to put away some of their thumb tacks and scotch tape and recycle some old binders. That’s because the FCC, on December 11, 2018, adopted a [Report and Order](#) (“Order”) that eliminates the requirement that a station’s physical license, and any other instruments of authorization, must be posted in a conspicuous place at the principal control point of the transmitter, either by affixing them to the wall or putting them in a binder.

The posting rules were originally adopted almost 90 (yes, 90!) years ago; over time, the Commission expanded the rules to additional transmission services. The Order finds that the regulations are outdated and no longer necessary because the vast majority of the information contained on posted licenses is now available in stations’ online public inspection files.

Stations can’t take down those licenses just yet—the Order won’t take effect until it is published in the Federal Register. We’ll keep you posted.

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

Tim Nelson, Editor

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