



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Comment Dates Set on FCC's Quadrennial Review of Media Ownership Rules

Comment dates have been set on the FCC's [Notice of Proposed Rulemaking](#) ("Notice") in the 2018 Quadrennial Review of media ownership rules. Comments are due April 29, 2019, and reply comments are due May 29, 2019.

As we've previously reported, 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 FCC is reviewing it in a separate, ongoing proceeding. The Notice also seeks comment on several proposals relevant to promoting diversity in the broadcast industry. We provided extensive background on the Quadrennial Review process when we reported on the Notice's adoption back in December 2018. Here, we remind you of the key items on which the FCC seeks comment.

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. The Notice seeks comment on a wide range of questions about the ownership rules in particular and the media marketplace in general.

Local Television Ownership Rule. The Notice seeks comment on the FCC's general prohibition on ownership of two Top-Four television stations in the same market. Broadcasters may recall that FCC relaxed its approach to Top-Four combinations in 2017, allowing a party seeking to own two Top-Four stations in the same market to demonstrate, on a case-by-case basis, whether enforcement of the Top-Four Prohibition is warranted (or not) based on the circumstances in a particular market and/or with respect to the particular transaction.

The Notice seeks comment on whether the FCC 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 FCC 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' consumption of 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 so-called "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% limit.)

The Notice seeks comment on whether the Commission should retain its current approach of using tiers based on market size, whether the tiers described above 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 by NAB that pushes for relaxation of radio station ownership limits. NAB has argued 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 maintains 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 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.

Again, comments are due April 29; reply comments are due a month later, on May 29.

Music Licensing Alert: Action Required by **March 31, 2019**, for Commercial Radio Stations Seeking Extension of GMR Interim License

Performing rights organization Global Music Rights (“GMR”) is again offering an extension of its interim license. **Commercial radio stations wishing to extend their interim license with GMR must take action by March 31, 2019.**

Broadcasters will recall that GMR (formed in 2013) is a performing rights organization (“PRO”) operating in the United States—the others are ASCAP, BMI, SESAC, and Pro Music Rights. PROs grant licenses to broadcasters and other users of music (such as restaurants, bars, and retail establishments) for the right to perform music written by affiliated songwriters and publishers. GMR’s repertory includes an estimated 20,000 essential songs, and most broadcast stations simply cannot avoid playing songs in GMR’s catalog. Absent a license to perform these songs, stations risk copyright infringement—for which statutory damages could be up to \$150,000 per song.

As we have previously reported, GMR has offered multiple 6-month extensions of its interim license to radio stations pending the resolution of antitrust litigation filed by the Radio Music License Committee (“RMLC”) against GMR. Thus, the current GMR interim licenses expire on **March 31, 2019**.

With the RMLC and GMR antitrust litigation ongoing, GMR is again offering to extend the interim licenses for an additional 6-month period—this time, from March 31, 2019, through September 30, 2019. GMR is offering the license extension on the same terms as the existing interim license. There should be no change to your station’s license fee for the extended period.

License Extension Is Not Automatic; Action Required. **The extension is not automatic. You must take action in order to extend the interim license for your station. You will need to obtain and sign a new agreement with GMR.**

The extension agreement must be signed and returned by **March 31, 2019**, and the first monthly payment under the extended interim license is due no later than **April 30, 2019**. To submit the signed agreement, along with other payment information, you can complete and submit GMR’s online form, which is available at: <https://globalmusicrights.com/rmlcform>.

According to the RMLC, GMR intends to send interim license extension offers directly to stations. If your station has not received such a GMR license extension agreement by March 15, 2019, you may wish to contact GMR directly via e-mail at radiolicensing@globalmusicrights.com or phone at 844-827-5467.

Questions about whether to extend your current GMR licenses, or about whether, and when, to enter into a license agreement with GMR in the first place, should be directed to your legal counsel; such issues depend on the unique circumstances of your station and your risk tolerance, as well as future developments in the RMLC-GMR litigation. As for the ongoing RMLC-GMR dispute, we are monitoring it and will keep you posted.

Commission Seeks Comments on TV Ratings System

The FCC is seeking comments on the television content rating system (the “TV Parental Guidelines” or “Guidelines”)—which aim to provide parents both with timely information about the nature of upcoming video programming and with the technical tools necessary to easily block violent, sexual, or other objectionable programming—and the corresponding Oversight Monitoring Board (the “Board”). On February 26, 2019, the FCC issued a [Public Notice](#) (the “Notice”) in response to a directive from Congress, set forth in the 2019 Consolidated Appropriations Act, to provide a report on (1) the extent to which the Guidelines match the video content that is being shown and (2) the ability of the Board to address public concerns. Accuracy—both of the ratings themselves and their application to certain types of programming—appears to be the central animating issue.

Comments are due soon—on March 12, 2019, and reply comments are due on March 19, 2019.

As broadcasters may recall, when the current TV Parental Guidelines and so-called V-chip technology came about in the 1990s, the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America (which jointly proposed the Guidelines) committed to establishing the Oversight Monitoring Board to ensure that the Guidelines would be applied accurately and consistently across television programming. Both the accuracy of the TV Parental Guidelines and the efficacy of the Board are subjects on which the Notice seeks comment. Although couched as two separate inquiries (one regarding the Guidelines themselves and one regarding the Board), each inquiry shares a common thread: whether the current system results in accurate and consistent rating of television programming.

Regarding the Guidelines, the current system contains both an audience (age) rating and content-based descriptors, the latter of which may be appended to a program’s rating when applicable. For instance, a program may simply be rated TV-PG (parental guidance suggested), or instead may be rated TV-PG D (parental guidance suggested, with some suggestive dialogue) in light of the program content. Some advocacy groups have expressed concerns that the ratings and descriptors are not applied consistently across television programming and that programs with graphic violence or gun violence are often incorrectly rated as appropriate for children. Accordingly, the Notice seeks comment, among other things, on:

- Whether programs with objectionable content are being tagged with appropriate age ratings;
- Whether the ratings are being applied consistently across similar programming; and
- Whether particular categories of program content are more likely to be rated inaccurately or inconsistently.

Regarding the Oversight Monitoring Board, the Notice generally seeks comment on whether the Board is able to effectively address public concerns, including:

- Whether the Board has taken steps to respond to concerns regarding the accuracy of the ratings that are being applied to television programming;
- Whether the Board has engaged in any enforcement activity to ensure accurate application of the ratings;
- Whether the Board regularly has been taking steps to determine if the Guidelines are providing useful and accurate information to parents or instead need to be modified or updated; and
- Whether, and in what ways, the Board is responsive to public concerns regarding the Guidelines.

And, as a final catchall, the Notice additionally seeks comment on whether there is any other information that the Commission should consider and include in its report, which is due to Congress on May 15, 2019.

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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