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ALERT

FCC Releases 2018 Quadrennial Review Report and Order

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The Federal Communications Commission (FCC or Commission) released the Report and Order (Order) in the 2018 Quadrennial Review, one day before the December 27 deadline mandated by the United States Court of Appeals for the District of Columbia Circuit.

As expected, the Commission made no major changes to the Local Radio Ownership Rule (Local Radio Rule) and retained the Dual Network Rule. Despite the deregulatory purpose of the quadrennial review process, the FCC effectively expanded the Local Television Ownership Rule (Local TV Rule) in ways that make it more restrictive.

Background

Under Section 202 of the Telecommunications Act of 1996, the Commission must review its media ownership rules every four years to determine whether competition in the media marketplace has rendered any of these rules unnecessary in the public interest.

In December 2018, the Commission adopted a Notice of Proposed Rulemaking (NPRM) initiating its 2018 Quadrennial Review proceeding. The NPRM sought comment on the Local Radio Rule and Local TV Rule—which limit ownership, by a single entity, of broadcast radio or television stations in local markets, respectively—as well as the Dual Network Rule, which effectively prohibits mergers among ABC, CBS, Fox, and NBC. At that time, litigation concerning the 2010 and 2014 reviews was pending. Following a unanimous Supreme Court decision upholding deregulatory changes that had been made in the course of the 2010 and 2014 reviews, the Commission's Media Bureau released a Public Notice in June 2021 seeking to refresh the record in the 2018 Quadrennial Review proceeding.

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The Commission also released a Public Notice commencing its 2022 Quadrennial Review in December 2022. In April 2023—more than four years after the 2018 Quadrennial Review had commenced—the National Association of Broadcasters filed a Petition for Writ of Mandamus requesting the D.C. Circuit to compel the Commission to conclude the long overdue 2018 review. In response, the D.C. Circuit issued an Order in September 2023 directing the FCC to complete the proceeding by December 27, 2023.

Local Radio Ownership Rule

While some parties had hoped for a loosening of restrictions on local radio ownership, particularly the so-called subcaps that govern the number of AM or FM stations a single owner can hold in a market, the FCC made no changes to the overall numerical limits or the subcaps. The FCC determined that the Local Radio Rule remains necessary to promote the Commission's public interest goals of competition, localism, and viewpoint diversity, explaining that "allowing one entity to own more radio stations in a market than currently permitted would harm competition without achieving the benefit sought by some of enabling station owners to compete more effectively with social media companies and national advertising[.]"

<u>Relevant Market</u>

As it has historically, the FCC determined that the relevant market to consider for purposes of the Local Radio Rule is the radio listening market, as the "unique characteristics of broadcast radio" make it inappropriate "to include satellite or non-broadcast audio sources, such as Internet streaming services, in that market at this time."

According to the Commission, free over-the-air broadcast radio remains a strong and dominant player in the broader audio landscape, even with the emergence of new audio services and platforms, because of radio's widespread availability and local nature, as well as the "companionship" that it offers to listeners. Online streaming services, on the other hand, the FCC explained, serve more directly as substitutes for traditional purchased music collections.

<u>Market Size Tiers, Numerical Limits, and Subcaps</u>

The Commission rejected proposals to modify its market size tiers or numerical limits. The agency explained that it "remain[s] highly skeptical that permitting additional consolidation beyond that currently allowed under our rule is warranted or would address radio's stated woes" and that "if further consolidation were allowed, smaller and independent radio stations could be sacrificed needlessly based on an unrealistic premise that ever larger radio owners are the answer to compete for advertising on a level playing field with large technology companies."

Similarly, the FCC concluded that the AM/FM subcaps should remain in place. The Commission believes that retaining a cap specific only to FM stations would prevent AM stations from migrating to the FM band and thus diminish the AM band. Moreover, it said, eliminating the AM subcap could lead to excessive concentration in the AM band, which in turn would threaten AM's distinctive qualities.

Methodology for Determining Compliance in Non-Nielsen Audio Markets

The Order modified the Local Radio Rule in only one respect, making permanent the contour-overlap methodology that has been used on an "interim" basis (for nearly 20 years) to determine compliance with ownership limits in areas that are not within defined Nielsen Audio Metro markets. Therefore, parties proposing a radio station combination involving one or more stations whose communities of license are not located within a Nielsen Audio Market must continue to show compliance with the Local Radio Rule using the contour-overlap methodology.

Local Television Ownership Rule

The Commission also elected to retain the Local TV Rule—with certain changes that make the rule even more restrictive—"given the unique obligations broadcast licensees have as trustees of the public's airwaves to serve their local communities." As a reminder, we note that the national television ownership cap and the UHF discount were not considered in the 2018 Quadrennial Review proceeding.

Relevant Market

The FCC concluded that the relevant market for purposes of the Local TV Rule "should continue to focus on broadcast television stations, as no other source of video programming provides a substitute for broadcast television[.]" In particular, the Commission explained that the price of cable, satellite, and streaming media compared to free over-the-air broadcast television keeps non-broadcast media from being a comparable alternative to broadcast television, and that online video still largely complements broadcast television instead of competing with it.

Numerical Limit

The Commission found that the current state of the local television marketplace does not justify loosening the Local TV Rule to allow ownership of more than two in-market stations. The FCC agreed that greater consolidation may lead to more operating efficiencies for the commonly owned stations. Yet, the Commission concluded that such consolidation also would mean the loss of an independent station operator, to the detriment of competition, localism, and viewpoint diversity, and that any "marginal additional efficiency" does not outweigh countervailing harms to the FCC's public interest goals.

Top-Four Prohibition

The Commission also retained the Top-Four Prohibition, which prohibits broadcasters from acquiring two stations ranked in the top four audience share in a market unless the agency finds that such an acquisition serves the public interest, convenience, and necessity. The Commission concluded that "the record does not demonstrate an imminent threat to the viability of broadcast television at this time that would either warrant, or, more importantly, be remedied by loosening or eliminating the Top-Four Prohibition."

However, the agency modified the Top-Four Prohibition in two ways that make it more restrictive. First, the Commission decided to extend the Top-Four Prohibition to LPTV stations and multicast streams. Specifically, the Commission revised a note to the Local TV Rule that prohibits network affiliation acquisitions between full-power stations to also prohibit an entity from acquiring network-affiliated programming of another top-four full power station in the same DMA and then placing that programming on the multicast stream of an existing full power station or on an LPTV station (or any other class of television station exempted from the ownership rules, such as a Class A TV station) in the same DMA if that affiliation could not be placed on a full-power station under the Local TV Rule.

This extension will only apply to transactions entered into after the Order's release date, as existing combinations will be grandfathered. However, these combinations may not be transferred or assigned except in compliance with the new rule.

Second, the Commission modified its methodology for determining a station's audience share for purposes of the Top-Four Prohibition (and for "failing station" waiver requests) as follows:

- A Top-Four showing (or a failing station waiver request) in an assignment or transfer application will now require submission of Nielsen or comparable audience share data averaged over a 12-month period immediately preceding the date the application is filed, rather than (as previously) the most recent share data at the time the application is filed. Where the station or stations at issue have changed network affiliations within the preceding 12 months, the Commission specified that ratings should be averaged for the period since the affiliation change took place.
- The relevant daypart for audience share data (formerly 9am-midnight) is now Sunday-Saturday, 7am-1am.
- Audience share data for all free-to-consumer, non-simulcast, commonly controlled multicast streams (if reported separately by Nielsen or a comparable source) must be added to the station's audience share figure.

<u>Other Issues</u>

The Commission concluded that none of the 2016 television broadcast incentive auction, the subsequent repack, or the adoption and deployment of ATSC 3.0 should have any effect on the Local TV Rule.

In addition, the FCC elected to retain the shared service agreement disclosure requirement, finding that "disclosure facilitates the Commission's analysis of the broadcast industry and allows the public to analyze ownership diversity in the industry, recognizing that consolidation of operations could limit competition and diversity."

Dual Network Rule

The Commission also decided to retain the Dual Network Rule, finding that the rule promotes competition in the provision of programming suitable for large, national audiences and the sale of national advertising time. Moreover, it said, the rule furthers localism by maintaining a balance among the Big Four broadcast networks and their affiliate groups.

According to the Commission, if two of the Big Four networks were to merge, competition for advertising revenue would lessen and the networks would be less incentivized to compete for viewers by providing a national television product that is desired by viewers. The FCC also concluded that a merger of two of the Big Four broadcast networks would reduce options for local broadcast affiliates to reaffiliate with a national network and diminish local affiliates' ability to influence the programming decisions of the networks to the detriment of local communities.

Minority and Female Ownership, Diversity-Related Proposals

The Commission said the record in the 2018 Quadrennial Review proceeding failed to establish concrete, affirmative steps the agency can or should take with respect to its structural ownership rules to address minority and female ownership. At the same time, the FCC explained that it remains committed to examining barriers to minority and female ownership of broadcast stations, including in the context of the 2022 Quadrennial Review.

Looking Ahead

The modifications adopted in the Order will generally be effective 30 days after the Order is published in the Federal Register, although the extension of the Top-Four Prohibition to LPTVs and multicast streams will apply to all applications filed, and transactions entered into, after December 26.

As has been the case with each previous Quadrennial Review, the Commission's decision undoubtedly will be the subject of judicial challenge. In addition, the 2022 Quadrennial Review has been underway since last December. Although that proceeding presents the Commission's next opportunity to revise its media ownership rules, it is difficult to foresee an agency decision to loosen rules that it just decided to retain intact or—in the case of the Local TV Rule—tighten. We will monitor and report on appeals of the Order, including potential impact on the 2022 Quadrennial Review, as well as developments in the 2022 proceeding itself.

Should you have any questions, please contact one of the authors listed on this alert or the Wiley attorney who regularly handles your FCC matters.