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ALERT

FCC Adopts Sweeping Changes to Media Ownership Rules

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The Federal Communications Commission (FCC or Commission) has adopted some of the most dramatic changes to the Commission's media ownership rules in decades. At its November 16 Open Meeting, the Commission voted 3-2 to adopt an Order on Reconsideration that, among other things: (i) eliminates the 42-year-old newspaper/broadcast cross-ownership rule; (ii) eliminates the radio/television cross-ownership rule; (iii) loosens the existing rules governing the ownership of local television stations; (iv) adopts a presumptive waiver standard for certain so-called "embedded markets" under the local radio ownership rule; (v) reverses the FCC's earlier decision to treat television joint sales agreements (JSAs) as conferring attributable ownership interests; and (vi) initiates a proceeding to establish an incubator program to facilitate the entry of new and diverse voices in the broadcast industry. The Order on Reconsideration represents a substantial departure from the Commission's Second Report and Order in the 2010/2014 Quadrennial Ownership Review (2016 Media Ownership Order), which largely left the FCC's then-existing rules intact.

The new rules will take effect 30 days from publication in the Federal Register; however, their ultimate fate will almost certainly be decided by the appellate courts. The court battle, like the vote to adopt the Order on Reconsideration itself, likely will track party lines. Statements from the Commissioners preview this: Chairman Ajit Pai declared that the new rules are "based on the law, the facts in the record and sound economics," while Commissioner Mignon Clyburn stated that she "look[s] forward to the day when the court issues a decision to right this sad wrong." While the majority lauded the Order on Reconsideration for finally bringing the "broadcast ownership rules

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into the digital age," the minority wondered how the Commission could reach opposite conclusions from the same record developed for the 2016 Media Ownership Order.

Below, we summarize the key points from the Order on Reconsideration, which—apart from the presumptive waiver standard for certain embedded radio markets—is not significantly changed from the draft order that Chairman Pai released last month.

Newspaper/Broadcast Cross-Ownership Rule

As expected, the Order on Reconsideration repeals the longstanding newspaper/broadcast cross-ownership rule, which was generally considered to be the lowest hanging fruit for deregulation. Under that rule, an entity could not have an attributable interest in both a newspaper and a television or radio station in the same geographic area. In its 2002 Quadrennial Ownership Review, the FCC concluded that the rule was not necessary to promote the goals of competition or localism. Although the United States Court of Appeals for the Third Circuit (Third Circuit) agreed with the agency's findings, it struck down the order on other grounds. Most recently, in its review of the 2010 Media Ownership Review, the Third Circuit lamented that "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest."[1]

Nevertheless, the 2016 Media Ownership Order only moderately loosened the newspaper/broadcast cross-ownership rule, concluding that some newspaper/broadcast cross-ownership restrictions continued to be necessary to promote viewpoint diversity. The 2016 Media Ownership Order created a case-by-case waiver standard and adopted other, minor, changes.

The Order on Reconsideration eliminates the newspaper/broadcast cross-ownership rule in its entirety, concluding that it does not advance localism and competition goals, and that it is no longer necessary to promote viewpoint diversity. The Order on Reconsideration also recognizes the potential benefits of cross-ownership to facilitate investment and achieve efficiencies that will improve local news gathering.

Radio/Television Cross-Ownership Rule

The Order on Reconsideration also repeals the radio/television cross-ownership rule, some version of which has been in effect since 1970. Under that rule (most recently updated in 1999) an entity could own varying numbers of radio and television stations depending on the size of the market. Permissible ownership combinations ranged from up to two television stations (subject to the local television ownership rule) and one radio station in small markets, to up to two television stations (subject to the local television ownership rule) and up to six radio stations, or one television station and seven radio stations, in large markets. In the 2006 Quadrennial Review, the agency found that the 1999 version of the rule should be retained, a decision that the Third Circuit found to be "plausibly justified."[2] However, in two notices of proposed rulemaking that preceded the 2016 Media Ownership Order, the Commission tentatively concluded that the rule was no longer necessary to promote competition, localism, or viewpoint diversity. In particular, the FCC noted that media ownership studies provided little evidence that radio/television cross-ownership impacted viewpoint diversity and discussed the growth of alternative media outlets, such as the Internet and cable, as sources of

viewpoint diversity. The Commission also suggested that the rule might not be necessary because radio stations are not primary outlets that contribute to viewpoint diversity.

Notwithstanding these prior tentative conclusions, the FCC retained the radio/television cross-ownership rule in the 2016 Media Ownership Order with only minor modifications. The Commission determined that the rule remained necessary to promote viewpoint diversity even though it had previously suggested the opposite. The agency also found that the rule served public interest goals separate and apart from the local radio and local television ownership rules (discussed below), which primarily promote competition.

The Order on Reconsideration grants NAB's petition for reconsideration regarding the radio/television cross-ownership rule and eliminates the rule in its entirety, based on a conclusion that the rule is no longer necessary to promote viewpoint diversity. The Commission, in this latest action, determines that the earlier conclusion that radio stations contribute to viewpoint diversity to a degree that justifies retention of the rule was in error, particularly given evidence that consumer reliance on radio stations for news has declined significantly and the number of all-news commercial radio stations has decreased. In addition, the Order on Reconsideration concludes that the 2016 Media Ownership Order's decision to retain the rule failed to take into account the realities of the digital media marketplace and the existence and growing number of other local media outlets to which consumers have access. It also finds that the rule did little to promote viewpoint diversity because it already permitted a significant degree of common ownership—up to eight outlets in larger markets—and that elimination of the rule will not adversely impact minority and female ownership.

Local Television Ownership Rule

The Order on Reconsideration grants, in part, petitions for reconsideration filed by NAB and Nexstar regarding the local television ownership rule, and revises that rule in two significant respects. Prior to the Order on Reconsideration, the local television ownership rule allowed a company to own up to two television stations in a local market only if: (i) the digital noise limited service contours (NLSCs) of the stations did not overlap; and (ii) at least one of the stations was not ranked among the top-four stations in the market (the Top Four Prohibition) and at least eight independently owned television stations would remain in the market after consummation of a proposed transaction (the Eight Voices Test). The Order on Reconsideration revises the local television ownership rule by eliminating the Eight Voices Test and adopting a hybrid approach to the Top Four Prohibition that allows for case-by-case analysis.

The rule in place prior to the Order on Reconsideration was adopted in 1999 and, following denial of reconsideration, challenged in court. The D.C. Circuit remanded the rule to the FCC, finding that the Eight Voices Test was flawed because it failed to consider outlets other than television broadcast stations.[3] In subsequent quadrennial review decisions, the Commission decided to retain the rule and was affirmed by the Third Circuit. The 2016 Media Ownership Order again retained (with only a minor technical modification) the 1999 version of the local television ownership rule, based on a determination that the rule remained necessary to promote competition. In that decision, the FCC concluded that it was appropriate to focus on promoting competition among broadcast stations—rather than a larger market that would include non-broadcast video alternatives—for purposes of evaluating the continued appropriateness of the local television

ownership rule. The Order on Reconsideration, while recognizing that the video marketplace has changed significantly since 1999 and, particularly, in very recent years, preserves the focus on competition among local television stations rather than including non-broadcast sources given the "unique and important role" of broadcast television.

At the same time, the Order on Reconsideration emphasizes that the very importance of local television stations makes it important to avoid unnecessary restrictions on television broadcasters in view of the constantly expanding video programming options available to consumers. In an effort to help television broadcasters achieve economies of scale and improve their ability to serve their local markets, the Order on Reconsideration adopts two "common sense modifications" to the local television ownership rule.

First, the Order on Reconsideration eliminates the Eight Voices Test, finding it to be unsupported by the record or reasoned analysis. Noting that the Commission has spent years seeking comment on the local television ownership rule, the Order on Reconsideration finds that the Eight Voices Test represents, at bottom, an arbitrary line. In addition, the Order on Reconsideration determines that the Eight Voices Test is inconsistent with the realities of the current television marketplace and prevents combinations that would likely produce significant public interest benefits. Further, it notes that small and mid-sized markets—in which the Eight Voices Test effectively prohibits common ownership of television stations—are those in which the efficiencies of common ownership can often produce the greatest benefits.

Second, the Order on Reconsideration retains the Top Four Prohibition, but modifies it to include a case-by-case analysis where strict application of the rule may not be appropriate based on the circumstances of a particular market or transaction. The Order on Reconsideration finds that the record generally supported the FCC's prior determination that top-four combinations are associated with potential harms. At the same time, it notes that these harms may not be present with respect to all such combinations, and finds that the Top Four Prohibition is over-inclusive and should be modified. As a result, the Order on Reconsideration allows applicants to request a case-by-case examination of proposed combinations that would otherwise violate the Top Four Prohibition. While declining to adopt a rigid set of criteria to guide its case-by-case analysis, the Commission suggests that the following types of information could be relevant:

- Ratings share data of the stations proposed to be commonly owned compared with other stations in the market;
- Revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees;
- Market characteristics, such as population, the number and types of broadcast television stations serving the market, and whether there are any strong competitors outside of the top-four rated stations;
- The likely effects on programming meeting the needs and interests of the community; and
- Any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.

Applicants are encouraged to provide data over a substantial period (*e.g.*, three years) to strengthen their request for relief from the Top Four Prohibition in a particular case.

In addition, the Order on Reconsideration declines to adopt specific criteria related to the issue of retransmission consent in the context of the Top Four Prohibition, and it concludes that the modifications are not likely to harm minority and female ownership. The Order on Reconsideration also reaffirms that it remains premature to analyze the impact of the broadcast incentive auction on the local television ownership rule.

Local Radio Ownership Rule

The Order on Reconsideration denies in part and grants in part a petition for reconsideration of the FCC's decision in the 2016 Media Ownership Order to retain the FCC's methodology for determining compliance with the local radio ownership rule in markets that contain embedded markets (*i.e.*, smaller markets, as defined by Nielsen Audio Metro (Nielsen), that are included in a larger parent market).

In the 2016 Media Ownership Order, the Commission did not revise the local radio ownership rule, either in general or with respect to embedded markets. The Order on Reconsideration denies the petition for reconsideration to the extent that it sought an across-the-board change to the way that the FCC treats embedded markets, and states that the Commission will undertake a full examination of its approach to embedded market transactions in the forthcoming 2018 quadrennial review. Pending that review, the Order on Reconsideration adopts the petition's alternative request to adopt a new standard for markets with multiple embedded markets, which currently consist of only New York, NY, and Washington, DC. Under the new standard, where a party seeks to own stations in multiple embedded markets of a single parent market (and not stations in the parent market itself), the Commission will presume that a waiver of the local radio ownership rule is in the public interest if: (i) ownership of the stations in question complies with the ownership rules in the embedded market to which the stations are home (using Nielsen data for that market); and (ii) ownership of the stations complies with the ownership rules using the contour overlap methodology that would apply to non-rated markets. The Order on Reconsideration does not adopt NAB's proposal regarding separating embedded markets from parent markets under certain circumstances; however, it does indicate that the FCC will consider this proposal in the forthcoming 2018 quadrennial review.

The Order on Reconsideration finds that the Commission's decision in the 2016 Media Ownership Order was otherwise supported by a reasoned explanation. Likewise, the Order on Reconsideration affirms that the Commission's longstanding decision to evaluate the Puerto Rico market using a contour overlap mythology does not undermine its embedded market decision. Rather, the Commission explains that the uniqueness of the Puerto Rico market, specifically its mountainous topography, makes a comparison between that market and parent markets that include embedded markets inapposite.

Television JSA Attribution

The Order on Reconsideration eliminates the television JSA attribution rule, concluding that the FCC erred in its previous decision to adopt this rule because: (i) the underlying record did not support a finding of attribution; and (ii) the Commission failed to properly consider the public interest benefits of television JSAs.

The attribution of television JSAs has a long and tortured history. The FCC first considered whether to make these agreements attributable in 1999, but concluded that the agreements did not convey a sufficient degree of influence or control to warrant attribution. In 2004, the agency sought further comment on this conclusion. Then in 2014, relying on the decade-old proceeding, the Commission reversed course and adopted the television JSA attribution rule. In that decision, the FCC found that JSAs had the potential to allow the brokering station to exert significant influence over the brokered station and, thus, that television JSAs should be attributable. Following its adoption, the television JSA attribution rule was challenged on appeal. In vacating the rule, the Third Circuit determined that the rule was adopted prematurely because the Commission had not yet decided whether the Local Television Ownership Rule remained necessary.[4] Subsequently, the FCC concluded that the local television ownership rule continued to serve the public interest and re-adopted the television JSA attribution rule. NAB and Nexstar then petitioned for reconsideration of that decision. This Order on Reconsideration grants those petitions.

The Order on Reconsideration eliminates the television JSA attribution rule, finding that the Commission's previous attribution analysis was deficient and did not adequately consider the record. In the Order on Reconsideration, the Commission finds that there is no evidence of actual harm associated with television JSAs; however, it makes clear that this finding is separate from any case-by-case analysis that the Department of Justice might engage in as part of its broader antitrust authority related to a particular transaction. Additionally, the Order on Reconsideration determines that the record contains ample evidence of the public interest benefits of JSAs, which the FCC previously failed to recognize.

In conclusion, the Order on Reconsideration asserts that eliminating the television JSA attribution rule is appropriate even with its decision to otherwise relax the local television ownership rule. The Order on Reconsideration acknowledges that there may be less need for television JSAs going forward. However, the Commission desires to preserve the right of television broadcasters to enter into television JSAs given the significant public interest benefits that can result from these agreements.

Shared Services Agreements

The Order on Reconsideration declines to reconsider either the definition of a Shared Services Agreement (SSA) or the SSA disclosure requirement adopted in the 2016 Media Ownership Order. Rather, it concludes that the adoption of both a definition and a disclosure requirement was fully supported by the record supporting the 2016 Media Ownership Order.

Significantly, the Order on Reconsideration affirms that this decision is not a pretext for further regulation of SSAs. Indeed, the Order on Reconsideration notes that should a future FCC consider the regulatory status of these agreements, it first must: (i) demonstrate a significant study and understanding of the impact of these agreements on station operations; and (ii) consider the public interest benefits these agreements help facilitate.

Diversity/Incubator Program and Notice of Proposed Rulemaking

The Order on Reconsideration adopts a Diversity/Incubator Program (Incubator Program) to promote new entry and ownership diversity in the broadcast industry. The Incubator Program has been discussed and debated for decades; most recently, the Commission declined to adopt the program in 2014, and NAB sought reconsideration of the issue. With this most recent action, the FCC agrees with NAB that the Incubator Program should be adopted. However, the FCC also adopts a Notice of Proposed Rulemaking (NPRM) regarding how to structure and monitor the Incubator Program, in light of what the Commission considers to be outstanding concerns.

The NPRM sets forth the FCC's vision for the Incubator Program as a means to help provide capital and support for new and diverse media entrants by providing a benefit to an established media company for helping to facilitate station ownership for certain classes of owners. The Commission gives the example of an established company receiving a broadcast ownership rule waiver for providing a new owner with "management or technical assistance, loan guarantees, direct financial assistance through loans or equity investments, training, or business planning assistance."

Specifically, the NPRM seeks comment on the costs and benefits associated with the Incubator Program and related proposals, as well as numerous questions related to the following topics:

- ***How to define entities eligible for Incubator Program participation.*** The Commission has proposed several options, including, at NAB's suggestion, a new entrant standard similar to the one that is applicable in the broadcast auction context; a revenue-based eligibility standard; a standard based on the Small Business Administration's definition of a socially and economically disadvantaged business; and a standard that would look to various criteria to determine if an entity has overcome significant disadvantage.
- ***How to define qualifying incubation activities.*** The FCC's NPRM makes clear that an incubation activity needs to provide the incubated entity with support that: (i) it would otherwise lack; and (ii) is essential to its operation and ability to serve the community. This support could be financial—such as loans or loan guarantees—or operational—such as business planning assistance. The Commission also proposes the concept of donating stations to certain organizations to allow a new entrant to gain operational experience without first having to acquire a station. The FCC also expresses interest in technical questions, such as whether to impose time minimums or maximums for some activities and whether incubated entities need to make certain certifications.
- ***What meaningful benefit to provide incubating stations.*** The suggested benefit to incubating stations is waiver of the local broadcast ownership rules; however, the Commission has also asked about allowing the incubating entity to obtain an otherwise prohibited non-controlling attributable interest in the incubated station.
- ***Who should the program apply to.*** The FCC has asked whether the Incubator Program should apply to radio only, or to both radio and television. Additionally, the Commission asks if it should begin as a limited trial or as a fully expanded program.

- ***How the Commission should review incubation proposals.*** The FCC contemplates that most of the proposals for incubation relationships will be accompanied by an application to assign or transfer control, subject to the normal review process. The NPRM asks whether this is a sufficient review, and what the Commission should consider in evaluating the proposal. The NPRM also asks whether the Incubation Program should be open to existing media owners facing financial or technical difficulties, and if so, how such a proposal would be reviewed.
- ***How to assess compliance.*** The FCC also expresses in technical questions such as asks how it should monitor compliance with the terms of incubation, and suggests tools such as periodic reports and public file requirements, among other things. The Commission also asks what the repercussions of non-compliance should be.

The FCC contemplates that the newly commissioned Advisory Committee on Diversity and Digital Empowerment will play a key role in creating the Incubator Program.

Comments on the NPRM will be due 60 days from publication of the NPRM in the Federal Register.

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The Order on Reconsideration represents a sea change in the FCC's media ownership approach. While this decision has been generally well-received by broadcasters, it is yet to be determined whether it will significantly alter the media landscape, particularly given the likelihood of legal challenges. What is clear is that the debate over media ownership regulation is far from over.

[1] *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).

[2] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 457 (3d Cir. 2011).

[3] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

[4] *Prometheus III*, 824 F.3d at 57-60.