

# CRS Report for Congress

## The FCC's Broadcast Media Ownership Rules

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## Summary

The Federal Communications Commission's (FCC or Commission) broadcast media ownership rules are intended to foster the three long-standing goals of U.S. media policy — competition, localism, and diversity of voices. The FCC has the statutory obligation to review these rules every four years to determine if they continue to serve the public interest or should be modified or eliminated. In December 2007, the FCC adopted an order that modified only one of its broadcast media ownership rules — the newspaper-broadcast cross-ownership rule — and left the other rules intact.

Under the new rule, it would be presumptively “not inconsistent with” the public interest, in the 20 largest local markets, for an entity to own both a major daily newspaper and a single television or radio station, so long as the television station is not among the four highest-rated stations in the market and after the transaction there are at least eight independently owned and operating major media voices. Otherwise, in most situations newspaper-broadcast cross-ownership in a local market would be presumptively inconsistent with the public interest. Each proposed combination, however, would be reviewed on a case-by-case basis, and proposed combinations in smaller markets could be approved. Fifteen parties have appealed the new rule; the challenges will be heard by the United States Court of Appeals for the Ninth Circuit. A joint resolution of disapproval to revoke the new rule has been introduced in both the Senate (S.J.Res. 28) and the House (H.J.Res. 79). In addition, S. 2332 and H.R. 4835 would negate the rule because they would require the FCC, before adopting any new broadcast ownership rule after October 1, 2007, to give 90 days' notice for public comment, which was not done prior to adoption of the rule. In contrast, H.R. 4167 would eliminate the newspaper-radio (but not newspaper-television) cross-ownership prohibition in its entirety.

In its previous quadrennial review, in June 2003, the FCC modified five of its broadcast media ownership rules, easing restrictions on the ownership of multiple television stations (nationally and in local markets) and on local media cross-ownership, and tightening restrictions on the ownership of multiple radio stations in local markets. Those rules have never gone into effect. Sec. 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199) instructed the FCC to modify its new National Television Ownership rule to allow a broadcast network to own and operate local broadcast stations that reach, in total, at most 39% of U.S. television households. In June 2004, the United States Court of Appeal for the Third Circuit, in *Prometheus Radio Project vs. Federal Communications Commission*, found that the FCC did not provide reasoned analysis to support its specific local ownership limits, and also that the FCC failed to address the impact of its new rules on minority ownership of broadcast stations, and therefore remanded portions of the new local ownership rules back to the FCC and extended its stay of those rules. This report will be updated as warranted. For a detailed discussion of the historical development of the FCC's broadcast media ownership rules, and especially of FCC actions during the 2003-2007 period, see CRS Report RL31925, *FCC Media Ownership Rules: Current Status and Issues for Congress*, by Charles B. Goldfarb.

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# The FCC's Broadcast Media Ownership Rules

## Current Status<sup>1</sup>

The Federal Communications Commission's (FCC or Commission) broadcast media ownership rules are intended to foster the three long-standing goals of U.S. media policy — competition, localism, and diversity of voices. The FCC is required by statute to review these rules every four years to determine if they continue to serve the public interest or should be modified or eliminated.<sup>2</sup> In addition, in 2004 the FCC was instructed by the United States Court of Appeals for the Third Circuit (Third Circuit) “to justify or modify” the broadcast local ownership rules that it had adopted in 2003 as part of its statutory periodic review.<sup>3</sup> The Third Circuit found that the Commission had not provided reasoned analysis to support the specific ownership limits in those rules:

The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media

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<sup>1</sup> For a detailed discussion of the historical development of the FCC's broadcast media ownership rules, and especially of FCC actions during the 2003-2007 period, see CRS Report RL31925, *FCC Media Ownership Rules, Current Status and Issues for Congress*, by Charles B. Goldfarb.

<sup>2</sup> Section 629 of the FY2004 Consolidated Appropriations Act, P.L. 108-199, modified Section 202(h) of the Telecommunications Act of 1996 (P.L. 104-104), instructing the FCC to perform a quadrennial review of all of its media ownership rules, except the National Television Ownership rule.

<sup>3</sup> *Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 435 (3<sup>rd</sup> Circuit 2004) (*Prometheus*). The decision is available at [<http://www.ca3.uscourts.gov/opinarch/033388p.pdf>], viewed on March 6, 2008. For a legal perspective on the *Prometheus* decision, see CRS Report RL32460, *Legal Challenge to the FCC's Media Ownership Rules: An Overview of Prometheus Radio v. FCC*, by Kathleen Ann Ruane. Although the Third Circuit remanded the FCC's specific cross-media ownership, local television multiple ownership, and local radio multiple ownership rules, and extended the stay, it upheld many of the FCC's findings, including: not to retain a ban on newspaper-broadcast cross-ownership; to retain some limits on common ownership of different-type media outlets; to retain the restriction on owning more than one top-four television station in a market; the Commission's new definition of local radio markets; to include non-commercial stations in determining the size of local radio markets; the Commission's restriction on the transfer of radio stations; to count radio stations brokered under a Joint Sales Agreement toward the brokering station's permissible ownership totals; and to use numerical limits in its ownership rules (though not the specific numerical limits adopted by the Commission).

outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the Commission to justify or modify its approach to setting numerical limits.<sup>4</sup>

As a result of the Third Circuit's stay and remand of the broadcast local ownership rules that the FCC had adopted in 2003,<sup>5</sup> the broadcast media ownership rules that had been in place prior to the FCC's adoption of its Order on June 2, 2003 were reinstated — except that in the interim Congress passed Section 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-199), which instructed the FCC to modify its National Television Ownership rule.

Responding to these statutory and judicial instructions, in December 2007 the FCC adopted an order that modified its newspaper-broadcast cross-ownership rule, but left its other broadcast local ownership rules intact.<sup>6</sup> Two commissioners dissented from the order.<sup>7</sup>

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<sup>4</sup> The decision went on to state: “The stay currently in effect will continue pending our review of the Commission’s action on remand, over which this panel retains jurisdiction.” However, when 15 parties filed appeals of the rule in a number of different federal circuit courts of appeal, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) was chosen at random from among the courts where appeals were filed to hear the challenges. See “Mass Media Notes,” *Communications Daily*, March 11, 2008.

<sup>5</sup> The rules adopted by the FCC in its 2003 Order can be found in *In the Matter of 2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, MB Docket Nos. 02-277 and 03-130 and MM Docket Nos. 01-235, 01-317, and 00-244, Report and Order and Notice of Proposed Rulemaking (2003 Order), adopted June 2, 2003 and released July 2, 2003.

<sup>6</sup> *In the Matter of 2006 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licensees*, MB Docket Nos. 06-21, 02-277, and 04-228, and MM Docket Nos. 01-235, 01-317, 00-244, and 99-360, Report and Order and Order on Reconsideration (2007 Order), adopted December 18, 2007, and released February 4, 2008, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-216A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf)], viewed on March 6, 2008. The specific language of the rule changes is presented in Appendix A of the 2007 Order.

<sup>7</sup> See “Statement of Commissioner Michael J. Copps, Dissenting,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A3.pdf)], viewed on March 6, 2008, and “Statement of Commissioner Jonathan S. Adelstein, Dissenting,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278932A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A4.pdf)], viewed on March 6, 2008.

Given these congressional, regulatory, and judicial actions, the current status of the FCC's broadcast media ownership rules is as follows.

## Newspaper-Broadcast Cross-Ownership

**The specifics of the newly adopted rule.** On December 18, 2007, the FCC adopted an order that modified the newspaper-broadcast cross-ownership rule.<sup>8</sup> The new rule, which cannot go into effect until it has been approved by the courts,<sup>9</sup> would replace the current rule that prohibits cross-ownership of a newspaper and a television or radio station in a local market. A number of such combinations currently exist, however, because when the FCC first adopted the cross-ownership prohibition in 1975 it grandfathered some pre-existing combinations and, in the past few years, the FCC has granted a number of newspaper-broadcast combinations temporary waivers, pending conclusion of its quadrennial review proceeding. In its 2007 Order, the FCC granted permanent waivers to five of those newspaper-broadcast station combinations.<sup>10</sup>

The new newspaper-broadcast cross-ownership rule is complex. Every proposed newspaper-broadcast combination in which the signal of the broadcast station encompasses the entire community in which the newspaper is published is subject to a public interest determination with three distinct steps.<sup>11</sup>

*First*, the new rule establishes a bright line test, with strict numerical limits, to identify proposed combinations that would be deemed presumptively “not inconsistent with the public interest.”<sup>12</sup> Specifically, it would be presumptively not inconsistent with the public interest for an entity to own both a major daily newspaper and a single television or radio station in a single local market if:

- the combination is in one of the 20 largest local markets;<sup>13</sup> and,

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<sup>8</sup> 2007 Order, at paras. 13-79 and Appendix A, pp. 84-85..

<sup>9</sup> As explained in fn. 4 above, the Third Circuit, in its *Prometheus* decision, stated that it retained jurisdiction to review the FCC's action on remand, but when 15 parties filed appeals in a number of different circuit courts of appeal, the Ninth Circuit was chosen at random to hear the challenges.

<sup>10</sup> *Ibid.*, at para. 77.

<sup>11</sup> *Ibid.*, at Appendix A, p. 84, amending 47 C.F.R. 73.3555(d).

<sup>12</sup> *Ibid.*, at Appendix A, pp. 84-85, amending 47 C.F.R. 73.3555(d)(3).

<sup>13</sup> Local markets are referred to as designated market areas or DMAs. DMAs are geographic designations developed by Nielsen Media Research. A DMA is made up of all the counties that get the preponderance of their broadcast programming from a given television market. The Nielsen DMAs are both complete (all counties in the United States are in a DMA) and exclusive (DMAs do not overlap). In the 1992 Cable Act, Congress amended the 1934 Communications Act to require, subject to certain exceptions, each cable system to carry the signals of all the local full power commercial television stations “within the same television market as the cable system,” with that market determined by “commercial publications which delineate television markets based on viewing patterns.”

(continued...)

- if the broadcast station is a television station, the station is not among the four highest-rated stations in the market; and,
- after the transaction there still are at least eight independently owned and operating major media voices in the market.<sup>14</sup>

These three bright line numerical limits are straight-forward and easy to objectively identify.

All other proposed newspaper-broadcast station combinations in a local market would be deemed presumptively inconsistent with the public interest.<sup>15</sup>

*Second*, the new rule specifies two *circumstances* that, if met, would automatically *reverse* a negative presumption about a proposed combination.<sup>16</sup> Specifically, the negative presumption would be automatically *reversed* if either:

- the newspaper or broadcast station has failed or is failing;<sup>17</sup> or
- the proposed combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news programming after the combination.<sup>18</sup>

These circumstances are relatively straight-forward and relatively easy to objectively identify. Although the second circumstance cannot be demonstrated in advance of

<sup>13</sup> (...continued)

47 U.S.C. § 534. The DMAs represent the only nationwide commercial mapping of television audience viewing patterns. Each county in the United States is assigned to a television market based on the viewing habits of the residents in the county.

<sup>14</sup> The rule defines major media voices as full-power commercial and noncommercial television stations and major newspapers, where the latter are those newspapers that are published at least four days a week within the DMA and have a circulation exceeding 5% of the households in the DMA. See 2007 Order, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(3)(ii).

<sup>15</sup> 2007 Order, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(4).

<sup>16</sup> *Ibid.*, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(7).

<sup>17</sup> In order to qualify as failed, the newspaper or broadcast outlet has to have stopped circulation or have been dark for at least four months immediately prior to the filing of the assignment or transfer application, or must be involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. To qualify as failing, the applicant must show that (a) the broadcast station has had an all-day audience share of 4% or lower; (b) the newspaper or broadcast station has had a negative cash flow for the previous three years; (c) the combination will produce public interest benefits; and (d) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the newspaper or station. See 2007 Order, at para. 65.

<sup>18</sup> 2007 Order, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(7)(ii).

the combination, the 2007 Order states that “broadcast station licenses that are approved as a result of this reversal presumption will need to report to the Commission annually regarding how they have followed through on their commitment to initiate at least seven hours a week of local news.”<sup>19</sup> The 2007 Order does not identify, however, a process to use if the commitment is not met.

*Third*, the new rule identifies four *factors* that would be considered to *confirm* or *rebut* the positive or negative public interest presumption about a proposed combination, to yield a final public interest determination.<sup>20</sup> Specifically, for any proposed newspaper-broadcast station combination in a local market — whether it met the criteria for a positive or negative public interest presumption — the FCC would be required to make a public interest determination considering the following four factors:

- whether the combined entity will significantly increase the amount of local news in the market;<sup>21</sup>
- whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment;
- the level of concentration in the DMA; and
- the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast is in financial distress, the proposed owner’s commitment to invest significantly in newsroom operations.

Where this public interest determination is being made for a proposed combination that has a negative presumption, “the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market,” with the four factors listed above informing this decision.”<sup>22</sup>

The discussion in the 2007 Order identifies these as factors to be used to *rebut* a negative presumption,<sup>23</sup> but does not indicate whether the FCC may consider additional factors or what weight, if any, it should give these four factors in making its public interest determination. These four factors are not always easy to objectively identify or measure; three involve commitments on the part of the

<sup>19</sup> *Ibid.*, at para. 67.

<sup>20</sup> *Ibid.*, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(5) and (6).

<sup>21</sup> This factor, which has no numerical limits, is used to review all proposed newspaper-broadcast cross-ownership combinations and is distinct from one of the two criteria that would reverse a negative public interest presumption — that the combination involve a broadcast station that has not been offering local news programming but post-combination would initiate seven hours of local newscasts.

<sup>22</sup> 2007 Order, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(6).

<sup>23</sup> *Ibid.*, at paras. 68-75.



applicant to future actions. Neither the rule nor the language in the 2007 Order address what recourse the FCC or affected parties would have if the applicant did not live up to its commitments once it obtained the license.

Given the mandatory public interest determination in the adopted rule, a proposed newspaper-broadcast combination in a top-20 market, with eight or more independent major media voices, and not involving a top-four television station, although not presumptively inconsistent with the public interest, could nonetheless be rejected by the Commission. Similarly, a proposed newspaper-broadcast combination in a non-top-20 market, or in a market with fewer than eight independent major media voices, or involving a top-four television station, and thus presumptively inconsistent with the public interest, could nonetheless be approved by the Commission.

On one hand, the complexity of the new rule potentially allows for a detailed, sophisticated analysis of the public interest implications of a proposed newspaper-broadcast station combination. On the other hand, its complexity, and the reliance on commitments to future behavior and subjective factors, potentially allows a majority of the Commission to justify whatever determination it reaches.

In its order adopting the new rule, the Commission stated:

To the extent that a proposed combination does not qualify for a positive presumption, it will have a high hurdle to cross to win Commission approval.<sup>24</sup>

But in that same order, the Commission granted permanent waivers to five newspaper-broadcast combinations<sup>25</sup> although the combinations did not appear to meet all the criteria to be presumptively in the public interest. The brief discussion (comprised of a single paragraph plus footnotes) addressing these permanent waivers did not provide the sort of detailed case-by-case analysis that some might expect to be required to cross “a high hurdle.” Citing these waivers, the two FCC commissioners who had dissented from the 2007 Order issued a strongly worded statement questioning whether the new rule would be interpreted in a fashion that would create “loopholes” that would allow many cross-ownership combinations that are not presumptively in the public interest, rather than constituting a high hurdle to limit such combinations.<sup>26</sup>

**The FCC’s justification of the numerical limits in the rule.** Since the Third Circuit found that the FCC had failed to justify the numerical limits in the rules it had adopted in 2003, and the new FCC rule incorporates a number of numerical limits in both its positive and negative public interest presumptions, the 2007 Order

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<sup>24</sup> Ibid., at para. 68.

<sup>25</sup> Ibid., at para. 77.

<sup>26</sup> “Joint Statement by FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Order,” FCC New Release, February 4, 2008, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-280001A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280001A1.pdf)], viewed on March 6, 2008.

discussed the record evidence underlying each of the numerical elements in its new newspaper-broadcast cross-ownership rule.<sup>27</sup>

- The FCC limited the presumption that a newspaper-broadcast combination would be in the public interest to the top 20 DMAs because there was evidence in the record showing differences between the top 20 DMAs and all other DMAs, in terms of the number of independent voices. The data showed that while there are at least 10 independently owned television stations in 18 of the top 20 DMAs, none of the DMAs ranked 21 through 25 have 10 independently owned television stations; while 17 of the top 20 DMAs have at least two newspapers with a circulation of at least 5% of the households in that DMA, four of the five DMAs ranked 21 through 25 have only one such newspaper.<sup>28</sup>
- The FCC limited the presumption that a newspaper-broadcast combination would be in the public interest to markets in which there still would be eight independent major media voices after the combination because it found that these major media voices are generally the most important and relevant outlets for news and information in local markets today.<sup>29</sup> It justified basing its presumption on the number of major media voices — rather than all media voices — by citing relatively unanimous support in the record for the position that consumers continue predominantly to get their local news from daily newspapers and broadcast television. Data on the record show that consumers rely mostly on newspapers and television for news and information. Other media outlets contribute to diversity, but those other voices are not major sources of local news or information, and thus they are not included in the definition of major media voices.<sup>30</sup> The FCC did not provide empirical justification for the bright line numerical limit of eight independent major media voices, however. It “selected the number eight for the major media voice count because we are comfortable that assuring that minimum number of major media voices in the top 20 markets

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<sup>27</sup> Since the new rule creates public interest presumptions based on numerical limits, but requires case-by-case public interest determinations that can supersede the numerical limits, it may well be that the courts will find that the burden on the FCC to justify the specific numerical limits is lower than the burden required to justify the rules in the 2003 Order.

<sup>28</sup> *Ibid.*, at para. 56. The FCC also appears to rely on its finding that the top 20 markets, on average, have 15.5 major voices (independently owned television stations and major newspapers), 87.8 total voices (all independently owned television stations, radio stations, and major newspapers), and approximately 3.3 million television households, while markets 21 through 30, by comparison, have, on average, 9.5 major voices, 65.0 total voices, and fewer than 1.1 million television households. A comparison of these averages for the top 20 markets and the 21<sup>st</sup> through 30<sup>th</sup> markets, however, does not address whether the bright line cutoff between the 20<sup>th</sup> and 21<sup>st</sup> markets is justified.

<sup>29</sup> *Ibid.*, at para. 57.

<sup>30</sup> *Ibid.*, at para. 58.

— along with the other unquantified media outlets that are present in those markets — will assure that these markets continue to enjoy an adequate diversity of local news and information sources.”<sup>31</sup> It noted that all the top 20 markets have at least eight television stations and one major newspaper, and stated that it did “not want to allow a significant decrease in the number of independently owned major media voices in any of those markets” and thus imposed the requirement that there be at least eight major media voices post-combination.

- The FCC limited the presumption that a newspaper-television combination in the top 20 DMAs would be in the public interest to those situations in which the television station is not one of the top four rated stations in the market because it considered a daily newspaper and the top four stations to be the most influential providers of local news in their market; thus the combination of a newspaper with a top four station is likely to cause greater harm to diversity in the market than other combinations.<sup>32</sup> Moreover, the FCC believed “that combinations of newspapers and non-top four television stations are more likely to result in the production of more local news in furtherance of our localism goal.”<sup>33</sup> According to the FCC, the available data show that stations below the top four are less likely to carry local news, and therefore more likely to carry “new news” as a result of a newspaper combination; specifically, 86% of stations ranked first through fourth in all DMAs provide local news, averaging 2083 minutes, while only 40% of stations ranked fifth and below in all DMAs provide some local news, averaging 458 minutes.<sup>34</sup> While the top-four station numerical limit has intuitive appeal since it conforms with the four major national broadcast television networks (ABC, CBS, Fox, and NBC),<sup>35</sup> it is not clear that the cited data are relevant to a determination that the proper limit is the top four stations. The FCC compares averages for the top four stations to averages for all remaining stations, and finds sharp differences. But these averages provide no information about whether there is a significant change in the amount of local news provided by the fourth and fifth stations in a market. Moreover, the data presented are for all DMAs, but the presumption is limited to the top 20 markets. The Commission does not indicate whether the sharp difference in averages between the top four stations and all

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<sup>31</sup> Ibid., at para. 60.

<sup>32</sup> Ibid., at para. 61.

<sup>33</sup> Ibid., at para. 61.

<sup>34</sup> Ibid., at para. 62.

<sup>35</sup> However, the local affiliates of those four networks are not always the top-four rated stations in a market. In particular, in several markets with large Hispanic populations, the local Univision affiliate is among the four highest rated stations.

additional stations that holds when looking at all DMAs also holds when looking only at the top 20 markets.

- The FCC would reverse a negative presumption toward a proposed newspaper/broadcast combination if the broadcast outlet has not been offering local newscasts prior to the combination, but would initiate local news programming of at least seven hours per week as a result of the combination, because “the Commission has historically considered [broadcasters’] news and public affairs programming to be uniquely and particularly important,” and thus a “positive presumption under this limited circumstance will increase diversity of choices, provide more local programming, and allow better local service by media outlets.”<sup>36</sup> In the discussion of this criterion for *reversing* a negative presumption, the Order provides no explanation for how the Commission selected the seven hour numerical limit. But in the discussion of factors to be used to *rebut* a presumption, the Order states, without explanation, “we consider a significant increase to be at least seven hours a week of additional news in the market.”<sup>37</sup> The discussion in the Order does not address whether this criterion might create a perverse incentive. Yet an existing station seeking to be purchased might expect that a local newspaper would value that station more highly than other potential purchasers from outside the market, and thus might have the incentive to discontinue offering local news programming in order to allow its purchase by that newspaper under the “initiates local news programming” criterion.
- One of the four factors to be considered when confirming or rebutting a public interest presumption about a proposed combination is “whether the combined entity will significantly increase the amount of local news in the market.”<sup>38</sup> Interestingly, it is in its discussion of this factor that the Commission references seven hours of programming per week as a significant increase, but in the rule, itself, there is no mention of seven hours or any measure of a significant increase.<sup>39</sup> Moreover, it appears that this factor would only consider the impact of the proposed combination on the amount of local news programming offered by the combining newspaper and broadcast station. It would not consider the impact of the proposed combination on total local news programming in the local market. It is possible, however, that the combined newspaper-broadcast entity could command advertising revenues and audience share to the detriment of the other broadcasters in the market, and that as a result those other broadcasters might reduce or

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<sup>36</sup> 2007 Order, at para. 67.

<sup>37</sup> *Ibid.*, at para. 70.

<sup>38</sup> *Ibid.*, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(5)(i).

<sup>39</sup> *Ibid.*, at Appendix A, p. 85, amending 47 C.F.R. 73.3555(d)(5)(i).

eliminate their local news programming, which sometimes is expensive to produce. The comments submitted in the record by a group of consumer organizations<sup>40</sup> included econometric studies that purportedly show that newspaper-broadcast cross-ownership decreases the total amount of local news provided in a market. In its 2007 Order, however, the FCC found “numerous difficulties” with that analysis, however, and concluded that it “cannot rely on its conclusions.”<sup>41</sup> Nonetheless, it is not clear why the FCC would not consider the impact of a proposed combination on the amount of market-wide local news programming in its public interest determination.

**Challenges to the new rule.** The new newspaper-broadcast cross-ownership rule has been appealed both by parties opposing any loosening of the FCC’s newspaper-broadcast cross-ownership rule and parties seeking greater loosening of the rule.<sup>42</sup> As indicated earlier, the new rule has been appealed by 15 parties and the Ninth Circuit was chosen at random to hear the challenges. It is likely that an affected party that favors the rule change will petition the court to end the current stay and allow the rule to go in effect pending court review.

In December 2007, just before the FCC voted to adopt the new rule, a bipartisan group of 25 senators informed the FCC of its intention to pass a joint resolution of disapproval to revoke the rule.<sup>43</sup> A joint resolution of disapproval cannot be introduced until the rule has been published in the Federal Register and transmitted to Congress, however.<sup>44</sup> On March 5, 2008, once the new rule had been transmitted to Congress, Senator Dorgan introduced S.J.Res. 28, a resolution of disapproval to

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<sup>40</sup> See, for example, *In the Matter of 2006 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Docket Nos. 06-121, 02-277, and 04-228 and MM Docket Nos. 01-235, 01-317, and 00-244, Further Comments of Consumers Union, Consumer Federation of America, and Free Press, October 22, 2007

<sup>41</sup> 2007 Order, at paras. 43-44.

<sup>42</sup> According to a “Broadcast” note in *Communications Daily*, March 7, 2008, the FCC’s General Counsel’s office identified more than 10 parties that appealed the rule change within 10 days of its publication in the Federal Register. Among the parties opposing any loosening of the rule are Prometheus Radio Project, Free Press, and the United Church of Christ. Among the parties favoring further loosening of the rule are Fox, Tribune, Sinclair, Bonneville, the Scranton Times, Cox Enterprises, Media General, the National Association of Broadcasters, and the Newspaper Association of America.

<sup>43</sup> “Quarter of Senate Writes FCC Threatening to Revoke Media Rule,” BNA, Inc. Daily Report for Executives, December 18, 2007.

<sup>44</sup> For a detailed discussion of the process required for a joint resolution of disapproval, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg.

block the new rule.<sup>45</sup> On March 13, 2008, Representative Inslee introduced a companion House resolution (H.J.Res. 79). Also, S. 2332 (introduced by Senator Dorgan) and H.R. 4835 (introduced by Representative Inslee) would negate the rule because they would require the FCC, before adopting any new broadcast ownership rule after October 1, 2007, to give 90 days' notice for public comment, which was not done prior to adoption of the rule.<sup>46</sup> In contrast, H.R. 4167 (introduced by Representative Stearns) would eliminate the newspaper-broadcast radio (but not television) cross-ownership prohibition in its entirety.

## Television-Radio Cross-Ownership

In its 2003 Order, the FCC adopted a new, less restrictive Television-Radio Cross-Ownership rule, but the Third Circuit remanded that rule and extended its stay that left in place the rule that the FCC had adopted in 1999. That rule remains in place today. Under the rule:

- An entity may own up to two television stations (provided it is permitted under the Local Television Multiple Ownership rule) and up to six radio stations (provided it is permitted under the Local Radio Multiple Ownership rule) in a market where at least 20 independently owned media voices would remain post-merger.
- Where entities may own a combination of two television stations and six radio stations, the rule allows an entity alternatively to own one television station and seven radio stations.
- An entity may own up to two television stations (as permitted under the Local Television Multiple Ownership rule) and up to four radio stations (as permitted under the Local Radio Multiple Ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain.
- A combination of one television station and one radio station is allowed regardless of the number of voices remaining in the market.<sup>47</sup>

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<sup>45</sup> Anne Veigle, "Dorgan Resolution Would Bar Media Ownership Rules," *Communications Daily*, March 6, 2008, at p. 1.

<sup>46</sup> S. 2332 and H.R. 4385 also would require the FCC to initiate, conduct, and complete a separate rulemaking to promote the broadcast of local programming and content; require the FCC to establish an independent Panel on Women and Minority Ownership of Broadcast Media; and conduct a full and accurate census of the race and gender of broadcast owners.

<sup>47</sup> 47 C.F.R. 73.3555(c) as it existed prior to the FCC's June 2, 2003 Order. For this rule, media "voices" include independently owned and operating full-power broadcast television stations, broadcast radio stations, English-language newspapers (published at least four times a week), one cable system located in the market under scrutiny, plus any independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron.

In its 2007 Order, the FCC retained the existing Television-Radio Multiple-Ownership rule, concluding that, in the absence of the cross-media limits that it had adopted in 2003 but that the Third Circuit had remanded, the existing rule provided protection for diversity goals in local markets and thereby served the public interest.<sup>48</sup> Citing its 1999 Order creating the current rule, the Commission found that “Because the two media ‘serve as substitutes at least to some degree for diversity purposes,’ there remains a need to retain a cross-ownership rule ‘to ensure that viewpoint diversity is adequately protected.’”<sup>49</sup> The Commission did not find support in the record for either tightening or loosening the current rule.<sup>50</sup>

## Local Television Multiple Ownership

In its 2003 Order, the FCC adopted a new, less restrictive Local Television Multiple Ownership rule, but the Third Circuit remanded that rule and extended its stay that left in place the rule that the FCC had adopted in 1999, which is sometimes referred to as the “TV duopoly” rule. Under this rule, an entity may own two television stations in the same DMA only if the following requirements are met:

- either the Grade B contours<sup>51</sup> of the stations do not overlap, or
- (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, *and* (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination were consummated.<sup>52</sup>

This second option is sometimes referred to as the “top four ranked/eight voices test.” An existing licensee of a failed, failing, or unbuilt television station may seek a waiver of the rule.<sup>53</sup> Any combination formed as a result of a failed, failing, or

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<sup>48</sup> 2007 Order, at para. 82.

<sup>49</sup> *Ibid.*, at para. 84.

<sup>50</sup> *Ibid.*, at paras. 83-84.

<sup>51</sup> Grade B is a measure of signal intensity associated with acceptable reception. The FCC’s rules define this contour, often a circle drawn around the transmitter site of a television station, in such a way that 50 percent of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90 per cent of the time. Although a station’s predicted signal strength increases as one gets closer to the transmitter, there will still be some locations within the predicted Grade B contour that do not receive a signal of Grade B intensity.

<sup>52</sup> 47 C.F.R. 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08, para. 8.

<sup>53</sup> A “failed” station is one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. Under the standard for “failing” stations, a waiver is presumed to be in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had all-day audience share of 4% or lower; (2) the financial condition of one of the merging stations

(continued...)

unbuilt station waiver may be transferred together only if the combination meets the Local Television Multiple Ownership rule or one of the three waiver standards at the time of transfer.<sup>54</sup>

In its 2007 Order, the FCC found that:

in order to preserve adequate levels of competition within local television markets, the local television ownership rule as it is currently in effect should be retained.<sup>55</sup>

This finding reverses the finding in its 2003 Order that the existing rule was not necessary to protect competition.<sup>56</sup> The Commission also reversed the finding in its 2003 Order that the current rule potentially threatens local programming and that the efficiencies to be gained by relaxing the rule could result in a higher quantity and quality of local news and public affairs programming, finding that the evidentiary record is unpersuasive regarding the effects of multiple ownership on local programming.<sup>57</sup>

In its 2007 Order, the FCC reinstated the requirement that the applicant demonstrate that the “in-market” buyer was the only reasonably available entity willing and able to operate the subject station, which it had previously repealed.<sup>58</sup> In its *Prometheus* decision, the Third Circuit had remanded the repeal of that requirement because the Commission had failed to address the original purpose of the requirement — to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled, and consequently more affordable, stations were for sale.<sup>59</sup>

## Local Radio Multiple Ownership

The ownership limits currently in place are those that the FCC adopted in 1996 to codify the language in Section 202(b)(1) of the 1996 Telecommunications Act, *but*, as a result of the Third Circuit agreeing in rehearing to lift the portion of its stay relating to the FCC’s new methodology for defining local radio markets, those

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<sup>53</sup> (...continued)

is poor; (3) and the merger will produce public interest benefits. Under the standard for “unbuilt” stations, a waiver is presumed to be in the public interest if an applicant meets each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. (47 C.F.R. 73.3555, Note 7 (1) and *Local Television Ownership Report*, 14 FCC Rcd at 12941, para. 86.

<sup>54</sup> *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41, paras. 77, 81, 86.

<sup>55</sup> 2007 Order, at para. 87.

<sup>56</sup> *Ibid.*, at para. 101.

<sup>57</sup> *Ibid.*, at para. 103.

<sup>58</sup> 2007 Order, at paras. 96 and 105.

<sup>59</sup> *Prometheus*, 373 F.3d at 420-421.



markets are defined using that new methodology. Specifically, the current rules provide that:

- in a radio market with 45 or more full power commercial and noncommercial radio stations, an entity may own, operate, or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM);
- in a radio market with between 30 and 44 (inclusive) full power commercial and noncommercial radio stations, an entity may own, operate, or control up to seven commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with between 15 and 29 (inclusive) full power commercial and noncommercial radio stations, an entity may own, operate, or control up to six commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with 14 or fewer full power commercial and noncommercial radio stations, an entity may own, operate, or control up to five commercial radio stations, not more than three of which are in the same service (AM or FM), except that an entity may not own, operate, or control more than 50 percent of the stations in such market.<sup>60</sup>

These numerical limits are applied to geographic markets that are defined according to Arbitron rating boundaries, which are based on market factors rather than on the signal transmission contours that previously were used to define markets.<sup>61</sup> Since Arbitron boundaries do not cover small radio markets, the FCC performed a rulemaking proceeding to determine how to define geographic markets in those small markets for which there are no Arbitron market definitions.<sup>62</sup>

Also, under current rules, when a “brokering” station has a Joint Sales Agreement (JSA) with a “brokered” station — typically this authorizes one station acting as a broker to sell advertising time for the brokered station in return for a fee — the brokered stations counts toward the number of stations the brokering licensee may own in a local market.<sup>63</sup>

In its 2007 Order, the FCC concluded that all the specific elements in the current Local Radio Ownership rule — including the specific ownership tiers, numerical limits, and AM/FM subcaps, as well as the market definitions revised in 2003 —

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<sup>60</sup> Section 202(b) also provides that the commission may permit a party to exceed these limits “if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation.” 1996 Act, § 202(b)(2), 110 Stat. at 10-11.

<sup>61</sup> 2003 Order, at para. 239.

<sup>62</sup> *Ibid.*, at para. 239.

<sup>63</sup> *Ibid.*, at para. 239.

remain “necessary in the public interest” to protection competition in local radio markets,<sup>64</sup> although it employs a different rationale for justifying these limits than it used in its 2003 Order. In the 2007 Order, it found that

By maintaining the current numerical limits, we seek to guard against additional consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting. The number of commercial radio station owners declined by 39 percent between 1996 and 2007, with most of the decline occurring during the first few years after the 1996 Act. Although the average number of commercial owners across all Arbitron radio markets currently is 9.4, the largest commercial firm in each Arbitron Metro market has, on average, 46 percent of the market’s total radio advertising revenue, and the largest two firms have 74 percent of the revenue. In 111 of the 299 Arbitron Metro markets, the top two commercial station owners control at least 80 percent of radio advertising revenue. The top four commercial firms also dominate audience share. And evidence in the record indicates that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates. All of this data in the record supports the conclusion that the current numerical limits are not unduly restrictive and that additional consolidation would not serve the Commission’s competitive goals. (Footnotes omitted.)<sup>65</sup>

The Commission also found:

By preserving a healthy, competitive local radio market, the local radio ownership rule helps promote our interest in localism. Aside from the positive effect on localism that ensues from a competitive radio market, however, the Commission has never found that the local radio ownership rule significantly advances our interest in localism.<sup>66</sup>

Similarly, based on its examination of the record, the Commission

cannot conclude that the local radio ownership rule is necessary to protect format diversity. Nevertheless, we find that retaining the current, competition-based numerical limits on local radio ownership will promote diversity indirectly.... Thus, it is proper for us to retain the status quo, as the ownership tiers serve the public interest in light of competition.<sup>67</sup>

In the 2007 Order, the Commission also found that retaining the current, competition-based AM/FM subcaps “will promote diversity indirectly by facilitating and encouraging entry into the local media market by new and underrepresented parties, and we thus conclude that the AM subcaps are in the public interest.”<sup>68</sup>

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<sup>64</sup> 2007 Order, at paras. 110, 116, 117, and 123.

<sup>65</sup> *Ibid.*, at para. 118.

<sup>66</sup> *Ibid.*, at para. 124.

<sup>67</sup> *Ibid.*, at para. 128.

<sup>68</sup> *Ibid.*, at para. 134.

## National Television Ownership (% Cap)

A broadcast network may own and operate local broadcast stations that reach, in total, up to 39% of U.S. television households; entities that exceed the 39% cap must divest as needed to come into compliance within two years; the FCC may not forbear on applying the 39% cap; and the FCC is prohibited from performing the quadrennial review of the 39% cap.<sup>69</sup> In practice, the National Television Ownership rule applies to the major broadcast networks, limiting them to ownership and operation of local broadcast stations that reach, in total, the prescribed percentage of U.S. television households.

When calculating the total audience reached by an entity's stations, the so-called "UHF discount" is applied — audiences of UHF stations are given only half-weight.<sup>70</sup> For example, if an entity owns a UHF station in a market with an audience of two million households, that audience would only be counted as one million households when calculating the entity's market reach. In its 2007 Order, the FCC found that

the Commission is foreclosed from addressing the issue of the UHF discount in this proceeding by the 2004 Consolidated Appropriations Act. Although the Act did not specifically mention the UHF discount, the *Prometheus* court observed that the statutory 39 percent national cap would be altered if the UHF discount were modified.... Accordingly, we conclude that the UHF discount is insulated from review under Section 202(h).<sup>71</sup>

However, the Commission noted that the Third Circuit recognized that the FCC might have authority, outside Section 202(h) to modify or eliminate the UHF discount, and that the FCC had sought public comment on the scope of that authority prior to the Third Circuit's *Prometheus* decision.<sup>72</sup> The Commission therefore decided to separately address the extent of its authority to alter the UHF discount and whether it should retain, revise, or eliminate the discount.

## Dual Network Ownership

The Dual Network Ownership rule permits common ownership of multiple broadcast networks, but prohibits a merger among the "top four" networks — ABC,

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<sup>69</sup> These requirements all are in Section 629 of the FY2004 Consolidated Appropriations Act (P.L. 108-109, 118 Stat. 3 et seq.). The relevant FCC rule is 47 C.F.R. 73.3555(d)(1).

<sup>70</sup> The Third Circuit concluded that challenges to the FCC's decision to retain the 50% UHF "discount" were moot "because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit ... [which] would undermine Congress's specification of a precise 39% cap." (*Prometheus*, 373 F.3d at 396). The relevant FCC rule is 47 C.F.R. 73.3555(d)(2)(i).

<sup>71</sup> 2007 Order, at para. 143.

<sup>72</sup> *Ibid.*, at para. 144.

CBS, Fox, and NBC.<sup>73</sup> In both its 2003 Order and its 2007 Order, the FCC retained the rule.<sup>74</sup> In both reviews, the Commission found that the rule continues to be necessary to promote competition in the national television advertising and program acquisition markets, and that the rule promotes localism by preserving the balance of negotiating power between networks and affiliates.

In 2001, as part of an earlier biennial review of its broadcast media ownership rules, the FCC had modified this rule to allow the four major networks to own, operate, maintain, or control broadcast networks other than the four majors. With this change, Viacom, the owner of CBS, was allowed to purchase UPN, and NBC was able to purchase Telemundo, the second largest Spanish-language network in the United States.

## **Impact of the Broadcast Media Ownership Rules on Minority Ownership**

In its *Prometheus* decision, the Third Circuit also found that the FCC had failed to address the impact of its new rules on minority ownership of broadcast stations and instructed the Commission to address in its rulemaking process proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting that the Minority Media Telecommunications Council (MMTC) had submitted in the proceeding in 2003.<sup>75</sup>

Responding to this court instruction, in December 2007 the FCC adopted an order that implemented 12 of the 34 proposals to foster minority ownership of broadcast stations that the Commission had put out for comment in an August 1, 2007, Second Further Notice of Proposed Rulemaking.<sup>76</sup> Eligibility for these programs was not limited, however, to minority or socially and economically disadvantaged businesses, but rather was available to all small businesses.<sup>77</sup> A

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<sup>73</sup> 47 C.F.R. 73.658(g).

<sup>74</sup> See 2003 Order, at para. 592, and 2007 Order, at para. 139.

<sup>75</sup> *Prometheus*, 373 F.3d at 421, footnote 59.

<sup>76</sup> *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services; 2006 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Docket Nos. 07-294, 06-121, 02-277, and 04-228 and MM Docket Nos. 01-235, 01-317, and 00-244, Report and Order and Third Further Notice of Proposed Rule Making, adopted on December 18, 2007 and released on March 5, 2008, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-217A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.pdf)], viewed on March 5, 2008.

<sup>77</sup> Commissioners Copps and Adelstein dissented in part from the order because they were (continued...)

companion Notice of Proposed Rulemaking sought comment on eligibility criteria and on how best to improve FCC collection of data regarding the gender, race, and ethnicity of broadcast licensees.

## **Underlying Issues: Standard of Review, Bright Line Tests, Case-by-Case Evaluations, and Waivers**

The FCC has the statutory obligation to perform a quadrennial review of its broadcast media ownership rules. In performing this review, the Commission must address several fundamental issues that have potentially significant policy implications. First, what is the relevant standard for reaching a public interest determination about existing ownership rules? Second, what are the advantages and disadvantages of using bright line tests vs. case-by-case evaluations when making a public interest determination about a proposed ownership transactions that would increase media concentration? Is there a distinction between the two approaches when there is a waiver process available to parties that do not meet a bright line test?

### **Standard of Review**

There has been some controversy surrounding the standard to be used in reaching a public interest determination about the existing rules. The D.C. Circuit, in *Fox Television Stations, Inc. v. Federal Communications Commission*, stated “Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”<sup>78</sup> Further, in response to petitions for rehearing, the D.C. Circuit stated “[T]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”<sup>79</sup> But in the same decision, the D.C. Circuit stated that “[t]he Court’s decision did not turn at all upon interpreting ‘necessary in the public interest’ to mean more than ‘in the public interest’” and added “we think it better to leave unresolved precisely what § 202(h) means when it instructs the Commission first to determine whether a rule is

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<sup>77</sup> (...continued)

concerned that people of color and women would not benefit appreciably from, and might be harmed by, these programs if eligibility is not specifically targeted to socially and economically disadvantaged businesses. See “Statement of Commissioner Michael J. Copps, Concur in Part, Dissent in Part,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf)], viewed on March 6, 2008, and “Statement of Commissioner Jonathan S. Adelstein, Concur in Part, Dissent in Part,” December 18, 2007, available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279035A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A4.pdf)], viewed on March 6, 2008.

<sup>78</sup> 280 F.3d 1048.

<sup>79</sup> 293 F.3d 539.

‘necessary in the public interest’ but then to ‘repeal or modify’ the rule if it is simply ‘no longer in the public interest.’”<sup>80</sup>

In its 2003 Order, the FCC majority took this language to mean that the Commission must overcome a high burden to retain any ownership rule. Responding to a question from Senator McCain in a June 4, 2003 Senate Commerce Committee hearing, then-FCC chairman Powell stated that the D.C. Circuit interprets the act to be “biased toward deregulation” and added that for the Commission to be in concert with that interpretation it “cannot re-regulate.” In response to a question from Senator Dorgan, then-FCC commissioner Abernathy stated that the D.C. Circuit’s interpretation directs the Commission to minimize regulation as competition develops, not to regulate to maximize the number of voices.

At that same hearing, all five FCC commissioners and several Senators agreed that it would be useful for Congress to provide both the Court and the Commission guidance on the standard to use for reviewing ownership rules and on whether the act allows the commission to re-regulate broadcast ownership.

Subsequently, in its *Prometheus* decision, the Third Circuit found:

While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act, *see Fox I*, 280 F.3d at 1033; *Sinclair*, 284 F.3d at 159, we do not accept that the “repeal or modify in the public interest” instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both “modify” and the requirement that the Commission act “in the public interest.” ...

Rather than “upending” the reasoned analysis requirement that under the APA ordinarily applies to an agency’s decision to promulgate new regulations (or modify or repeal existing regulations), *see State Farm*, 463 U.S. at 43, § 202(h) *extends* this requirement to the Commission’s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission’s rulemaking authority to contravene “traditional administrative law principles.”<sup>81</sup>

## **Bright Line Tests, Case-by-Case Evaluations, and Waivers**

In its 2003 Order, the FCC reviewed the advantages and disadvantages of implementing bright line rules that incorporate specific limits on the number of media outlets a company can own in a local market (without regard to such market-specific characteristics as the market share of the post-merger company or the degree to which the merging company is vertically integrated into program production) vs. implementing flexible, yet quantifiable rules that would allow for case-by-case reviews that more readily take into account market-specific or company-specific market shares and characteristics.

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<sup>80</sup> 293 F.3d 540.

<sup>81</sup> *Prometheus*, 373 F.3d at 394 (emphasis in original).

The Commission chose the bright line approach, in large part because it identified regulatory certainty as an important policy goal in addition to the three traditional goals of diversity, competition, and localism.<sup>82</sup> The Commission stated:

Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.<sup>83</sup>

It concluded that the adoption of bright line rules rather than case-by-case analysis provides certainty to outcomes, conserves resources, reduces administrative delays, lowers transactions costs, increases transparency of process, and ensures consistency in decisions, all of which foster capital investment in broadcasting. The Commission conceded that bright line rules preclude a certain amount of flexibility.

The 2003 Order did not explain how the Commission would weigh the goal of regulatory certainty vis-à-vis the traditional goals of diversity, competition, and localism, if the former were to be in conflict with one or more of the latter. On one hand, the Commission stated that it would continue to have discretion to review particular cases, and would have an obligation to take a hard look both at waiver requests (where a bright line ownership limit would proscribe a particular transaction) and at petitions to deny a license transfer (where a bright line ownership limit would allow a particular transaction). At the same time, however, it suggested it would not look favorably upon some petitions:

Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.<sup>84</sup>

Having determined that a bright line test was preferable to case-by-case review, the Commission created bright line tests for its broadcast media cross-ownership and local ownership rules. The Third Circuit found that the Commission's decision to retain a bright line numerical limits approach to broadcast ownership rules was "rational and in the public interest,"<sup>85</sup> but found the methodology used by the Commission to set those numerical limits arbitrary.

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<sup>82</sup> 2003 Order at paras. 80-85. In the section on Policy Goals, there are four subsections — Diversity, Competition, Localism, and Regulatory Certainty.

<sup>83</sup> *Ibid.*, at para. 83, fn. omitted.

<sup>84</sup> *Ibid.*, at para. 453, fn. 980.

<sup>85</sup> *Prometheus*, 373 F.3d at 431.

In its 2007 Order, the FCC has changed direction, opting for a rule that incorporates elements of both a bright line approach (presumptions with specific numerical limits) and a case-by-case approach (factors that the Commission would consider in the case-by-case review of both combinations that met the presumption of being in the public interest and combinations that did not). The FCC was motivated in part by the fact that elements of the evidentiary record were inconclusive and therefore not supportive of strict bright line numerical limits. The Commission found:

The inconclusiveness of some of the data and disagreement as to the outcome of the studies, however, supports our decision to undertake a case-by-case review of particular combinations in particular markets, rather than providing hard, across-the-board limits. Under our method, we can consider facts in a particular case, with a presumption in favor of allowing newspaper and radio station or non-top four television station combinations in the top 20 markets, and a presumption against combinations in all other markets. A case-by-case approach will enable the Commission to make a more fully informed assessment that a proposed transaction in a particular market actually will increase the total amount of local news generated by the combined outlets.<sup>86</sup>

Establishing presumptions, as opposed to a bright line, will allow for the evaluation of proposed newspaper/broadcast combinations under defined circumstances on a case-by-case basis.<sup>87</sup>

At the same time, the FCC concluded in its 2007 Order that, based on the evidentiary record in the proceeding, it was appropriate to maintain the current numerical limits in its other broadcast ownership rules.<sup>88</sup> In that Order, however, the Commission did not present data to support all the specific numerical limits in those rules.

Thus, currently, most of the broadcast media ownership rules have bright line numerical limits, but the newspaper-broadcast cross-ownership rule is more flexible, requiring the FCC to make a case-by-case public interest evaluation.

There may not be a sharp distinction, however, between rules with bright line numerical limits and rules requiring case-by-case evaluations because parties may seek waivers of bright-line rules and, to the extent the FCC grants such waivers, the effect may be to provide equal or even greater flexibility. This is particularly apparent in recent FCC waiver decisions involving newspaper-broadcast station combinations in local markets.

When the FCC adopted its new newspaper-broadcast cross-ownership rule, in the same Order it granted permanent waivers to five newspaper-broadcast combinations.<sup>89</sup> As explained earlier, the combinations that were granted waivers did not appear to meet all the criteria in the new rule to be presumptively in the public

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<sup>86</sup> 2007 Order, at para. 46.

<sup>87</sup> *Ibid.*, at para. 52.

<sup>88</sup> See, for example, 2007 Order, at para. 113.

<sup>89</sup> *Ibid.*, at para. 77.



interest and the brief discussion addressing these permanent waivers did not provide the sort of detailed case-by-case analysis that would appear to be required under the new rule.

These waiver grants followed closely upon controversial waiver grants made by the Commission in November 2007. At that time, the FCC issued a Memorandum Opinion and Order, with commissioners Copps and Adelstein dissenting,<sup>90</sup> granting the applications to transfer control of Tribune Company and its licensee subsidiaries from the existing shareholders to Sam Zell, the Tribune Employee Stock Ownership Plan, and EGI-TRB, LLC. The transferees had requested temporary, but indefinite, waiver of the newspaper-broadcast cross-ownership rule to permit common ownership pending the outcome of the Media Ownership proceeding of: KTLA(TV), Los Angeles, and the *Los Angeles Times*; WPIX(TV), New York, and *Newsday*; WGN-TV and WGN(AM), Chicago, and the *Chicago Tribune*; WSFL(TV), Miami, and the Ft. Lauderdale *South Florida Sun-Sentinel*; and WTIC(TV), Hartford, WTTX(Waterbury), and the *Hartford Courier*. The FCC denied the requested waivers in all the markets except Chicago, requiring the Transferees to come into compliance with the newspaper-broadcast cross-ownership rule in all the markets except Chicago within six months. However, the order noted that the Commission was scheduled to vote on a revised newspaper-broadcast cross-ownership rule at its December 18, 2007, meeting, and therefore took the following three steps:

- The six-month clock for coming into compliance with the newspaper-broadcast cross-ownership rule in New York, Los Angeles, Miami, and Hartford would not begin running until January 1, 2008.
- Should the FCC adopt a revised newspaper-broadcast cross-ownership rule before January 1, 2008, that six-month clock would not begin to run. Rather, the applicants would receive a two-year waiver of the rule for the New York, Los Angeles, Miami, and Hartford markets.
- Should the applicants choose to challenge the denial of waivers in court, they were granted a temporary waiver of the newspaper-broadcast cross-ownership rule for the New York, Los Angeles, Miami, and Hartford markets that would last either for two years or until six months after the conclusion of the litigation, whichever is longer.

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<sup>90</sup> *In the Matter of Shareholders of Tribune Company, Transferors and Sam Zell, et al., Transferees, for Consent to the Transfer of Control of the Tribune Company and Applications for the Renewal of License of KTLA(TV), Los Angeles, California, et al.*, MB Docket No. 07-119 and File Nos. BRCT-20060811ASH, *et al.*, Memorandum Opinion and Order, adopted and released November 30, 2007. The Memorandum Opinion and Order and the statements of four commissioners, including the two dissenting commissioners, is available at [[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-211A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-211A1.pdf)], viewed on March 6, 2008.

The applicants did file an appeal on December 3, 2007, of the denial of its request for indefinite waivers in the U.S. Court of Appeals court.<sup>91</sup>

In dissenting from the FCC decision, Commissioner Michael Copps stated:

If the majority simply granted a two-year waiver to Tribune — which would have been the straightforward thing to do — Tribune would have been unable to go to court because a party cannot file an appeal if their waiver request is granted. So what does this Order do? It *denies* the waiver request but offers an automatic (and unprecedented) waiver extension as soon as Tribune runs to the courthouse door, lasting for two years or until the litigation concludes — whichever is *longer*. Presto! Tribune gets at least a two-year waiver plus the ability to go to court immediately and see if they can get the entire rule thrown out. And most important, Tribune is *not* required to seek a hearing before the very court which expressly retained jurisdiction when it remanded the general newspaper-broadcast cross-ownership ban. Instead, Tribune can end run the Third Circuit and petition for review before what it may hope is a more sympathetic court. (emphasis in original.)<sup>92</sup>

The Tribune waiver and the waivers in the 2007 Order lend at least the appearance that the majority at the FCC used the existing waiver process to approve newspaper-broadcast combinations that might not have met the requirements of either the old or the new cross-ownership rule. This suggests that it may be less important whether the ownership rules have bright lines or require case-by-case evaluations. Both the waiver process for bright line rules and the evaluation process for case-by-case public interest determinations appear to give the FCC commissioners a significant degree of discretion in their decision making and allow them to choose to enforce ownership limits more or less stringently.

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<sup>91</sup> See, for example, “Tribune appeals FCC ruling,” *Hollywood Reporter*, December 7, 2007.

<sup>92</sup> See fn. 90 above.