

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

September 23, 2015

To: Subcommittee on Communications and Technology Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Subcommittee Hearing on “Broadcast Ownership in the 21st Century”

On Friday, September 25, 2015 at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing titled “Broadcast Ownership in the 21st Century.”

I. OVERVIEW

The 21st century communications and media marketplaces have changed and continue to evolve in dramatic ways. Even though many Americans get their news primarily from traditional media outlets and sources, including over-the-air and retransmitted local broadcast and satellite signals and networks, a considerable number of broadcast and print viewers and listeners have shifted to, or also access Internet-“streamed” and “on-demand” news, information, and entertainment content.

According to a 2014 study, television remains the top news source, with 87 percent of Americans reporting their use of the medium as primary.¹ Radio and print also continue to be utilized with 65 percent of Americans using radio, and 61 percent getting news from print sources.² Local television stations generated total on-air ad revenue reaching \$20 billion in

¹ State of the News Media 2015, Pew Research Center (Apr. 29, 2015) (online at <http://www.journalism.org/2015/04/29/state-of-the-news-media-2015/>) (local television stations had higher viewership in 2014) at 44.

² American Press Institute, *How Americans get their news* (Mar. 17, 2014) (online at americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/).

2014, which was up 7 percent from 2013.³ Television news audiences and viewership increased in the morning and early evening news time slots, by 2 percent and 3 percent, respectively.⁴ Recently, the economic health of the broadcast television industry has been buoyed by marked increases in political advertising⁵ and the rapid growth of retransmission consent payments, which nearly totaled \$5 billion in 2014.⁶

Despite competition from free and subscription Internet-and satellite- radio services, Pew Research reported that 91 percent of Americans ages 12 and older had listened to over-the-air, terrestrial radio in the week before the survey.⁷ Radio sector revenue was down slightly, by 1 percent in 2014.⁸ BIA/Kelsey estimates the radio broadcasting industry brought in \$14.9 billion in advertising revenues last year.⁹

Repeated calls for deregulation and the modification of the Federal Communications Commission's (FCC) media ownership rules, which would lead to further consolidation of commercial television, radio, and print stations and outlets in designated market areas (DMAs) must be balanced against public interest objectives to promote localism and diversity of ownership and viewpoints. Two notable data points are that, in 2014, there were 31 all-news radio stations nationally, and that one large broadcaster owned ten of these stations --- which was almost one-third of the total.¹⁰

II. FCC MEDIA OWNERSHIP RULES

A. Quadrennial Review

The FCC is charged with licensing the public airwaves and promoting localism, competition, and diversity in media. The 1996 Telecommunications Act directed the FCC to comprehensively review its broadcast and media ownership rules – and report on the same to Congress -- every four years, known as the Quadrennial Review. The purpose of the

³ State of the News Media 2015, Pew Research Center (Apr. 29, 2015) (online at <http://www.journalism.org/2015/04/29/state-of-the-news-media-2015/>) (local television stations had higher viewership in 2014) at 44.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 48.

⁷ *Id.* at 57.

⁸ *Id.* at 62.

⁹ See Overall U.S. Radio Industry Revenues Remain Steady at \$14.9 Billion in 2014, BIA/Kelsey Press Release (Apr. 1, 2015) (online at [http://www.biakelsey.com/Company/Press-Releases/150401-Overall-U.S.-Radio-Industry-Revenues-Remain-Steady-at-\\$14.9-Billion-in-2014.asp](http://www.biakelsey.com/Company/Press-Releases/150401-Overall-U.S.-Radio-Industry-Revenues-Remain-Steady-at-$14.9-Billion-in-2014.asp)).

¹⁰ *Id.* at 60.

Quadrennial Review is to determine which rules are still necessary in promoting the public interest.¹¹ The five rules subject to the Quadrennial Review are:

- *The Local Television Ownership Rule* allows ownership of more than one station in the same market only if (1) the commonly-owned stations are not both in the top four rated stations in that market and (2) eight independently-owned television stations remain in the market;
- *The Local Radio Ownership Rule* limits the number of AM and FM radio stations under common ownership in the same market, depending on the number of AM and FM radio stations in that market;
- *The Newspaper/Broadcast Cross-Ownership Rule* prohibits common ownership of a daily newspaper and a full-power broadcast station (AM or FM or TV) in the same market;
- *The Radio/Television Cross-Ownership Rule* limits the combined number of commercial radio and television stations one entity may own in a market; and
- *The Dual Network Rule* prohibits a merger between two of the top four national networks (i.e., ABC, CBS, Fox, and NBC).

The Commission last adopted a Quadrennial Review Order in 2008.¹² In 2009, former Chairman Genachowski started the 2010 Quadrennial Review process by holding a series of public workshops and adopting a Notice of Inquiry (NOI) in 2010. Two rounds of comments on the NOI led to the adoption of a Notice of Proposed Rulemaking (NPRM) in 2011. The FCC sought additional rounds of comments on the NPRM and on 11 FCC-commissioned studies on the media ownership issues.

In 2012, Chairman Genachowski circulated a draft order that proposed retaining all of the existing rules, with three exceptions: (1) a repeal of the radio/television cross-ownership rule (2) a repeal of the newspaper/broadcast cross-ownership rule for radio stations, and (3) a relaxation of the newspaper/broadcast cross-ownership rule with respect to television to make it easier to obtain a waiver for common ownership of a smaller TV station and a newspaper in the top 20 markets.¹³ However, the Commission never adopted the 2012 draft Order.

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), as amended by the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629. The 1996 Act does not require the FCC to review the UHF discount or the broadcast attribution rules as they apply to broadcaster sharing or marketing arrangements, and the Consolidated Appropriations Act removed consideration of the National TV Ownership rule under the Quadrennial Review.

¹² See Report and Order and Order on Reconsideration, FCC 07-216 (rel. Feb. 4, 2008) (online at https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf). The 2008 Order was challenged in the U.S. Court of Appeals for the Third Circuit and remanded back to the Commission in 2011. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011).

¹³ FCC Chairman Genachowski, *Chairman's Statement on the Status of Media Ownership Proceeding* (Feb. 26, 2013) (online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-319131A1.pdf).

On March 31, 2014, under Chairman Wheeler, the Commission adopted a Further Notice of Proposed Rulemaking (FNPRM) to begin the 2014 Quadrennial Review, which incorporated the record from the never-adopted 2010 Quadrennial Review.¹⁴ In the 2014 FNPRM, the FCC proposed retaining the local radio ownership rule and the dual network rule, and it proposed making largely technical changes to the local television ownership rule to account for the digital television transition, while retaining the current ownership limits. On the radio/television cross-ownership rule and the newspaper/broadcast cross-ownership rule, the FNPRM sought further comment on proposals from the 2010 Quadrennial Review but the commission did not make any tentative conclusions.

The 2014 FNPRM also sought comment on additional measures to promote broadcast ownership diversity. According to the FCC's most recent data, women retain a majority of voting shares in only 6.3 percent of full-power commercial TV stations, with racial minorities at only 3 percent.¹⁵ Previous FCC efforts to promote diversity have been overturned by the courts, in part due to the difficulty in rationalizing a cause-and-effect nexus between race-neutral criteria and the escalation of female and minority ownership.¹⁶ On March 31, 2014, 11 Democrats on the Energy and Commerce Committee wrote to Chairman Wheeler urging him to "institute an aggressive ownership diversity agenda having the objective of significantly increasing minority and woman ownership" as part of the Quadrennial Review and any other applicable proceedings.¹⁷

Chairman Wheeler has publicly committed to completing the 2014 Quadrennial Review by June 30, 2016.¹⁸

B. Joint Sales Agreements

In determining which entity or entities "own" a particular broadcasting station or license, the FCC uses what it refers to as broadcast attribution rules. A particular entity having a sufficient interest in a license, so that it is deemed attributable, would have the ability to affect

¹⁴ Federal Communications Commission, *2014 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*, MB Docket 14-50, *Further Notice of Proposed Rulemaking and Report and Order* (Mar. 31, 2014).

¹⁵ Federal Communications Commission, *Report on Ownership of Commercial Broadcast Stations* (June 27, 2014).

¹⁶ *See Prometheus Radio Project v. FCC* (3d Cir. 2011) (FCC's definition of "eligible entity" is arbitrary and capricious in that FCC was unclear as to how revenue based definition promotes diversity).

¹⁷ Letter from Rep. Rush et al. to FCC Chairman Wheeler (Mar. 31, 2014).

¹⁸ Statement of Chairman Tom Wheeler, Re: Broadcast Media Ownership, Diversity and Joint Sales Agreements, MB Docket Nos. 14-50, 09- 182, 07-294, 04-256 (Mar. 31, 2014) (online at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-28A2.pdf).

the station's programming or other major operational decisions, triggering the FCC's media ownership restrictions.

As part of the above-mentioned March 2014 item, the FCC also modified and finalized its attribution rules with respect to Joint Sales Agreements (JSAs) – agreements that enable two broadcasters to coordinate the sale of advertising time.¹⁹ Under the FCC's new rules, if a television station sells more than 15 percent of the advertising time per week for another station, the FCC will consider the second station attributable to the first station under the media ownership rules. The Commission provided stations with two years to unwind existing agreements and also permit stations to seek a waiver of the new rule. Initially, the end of the two year unwinding period was June 16, 2016, but Congress extended the deadline to December 19, 2016, as part of the STELA Reauthorization Act of 2014.²⁰ Additionally, H.R. 3148, introduced on July 21, 2015, and referred to this Subcommittee, would permanently grandfather any existing JSA that was in effect on the effective date of the Order adopted by the FCC on March 31, 2014.

In a separate, but related action, the FCC's Media Bureau released a Public Notice on March 12, 2014, to provide greater processing guidance to broadcast transactions that include sharing or "sidecar" agreements such as JSAs.²¹ The Media Bureau reaffirmed that transactions will be examined on a case-by-case basis and in their totality for consistency with the statutory requirement that they serve "the public interest, convenience, and necessity." Specifically, proposed mergers must fully describe all side agreements and establish that such agreements do not violate the new broadcast attribution rules for JSAs. FCC Chairman Wheeler characterized the Public Notice as necessary:

[F]or the sake of transparency and the even application of the law ... to reaffirm the congressional command that the legal standard for deciding the transfer of licenses under Section 301(d) is the "public interest, convenience, and necessity" and that, of course, no single set of unwritten, little understood formulations can replace the Commission's responsibility to apply that standard with an understanding of the totality of the facts.²²

Proponents of greater scrutiny of JSAs, including the Justice Department's Antitrust Division, argue that JSAs were being used to allow companies to effectively control multiple

¹⁹ 47 CFR §73.3555 note 2k.

²⁰ STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 104, 128 Stat. 2059, 2063 (2014).

²¹ FCC Media Bureau, *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests* (Public Notice) (Mar. 12, 2014) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0312/DA-14-330A1.pdf).

²² Letter from FCC Chairman Wheeler to Reps. Upton, Walden, Waxman, and Eshoo (Mar. 27, 2014).

stations in a market to the detriment of localism, competition, and diversity.²³ Critics of the FCC's action argue that JSAs promote ownership diversity by allowing a minority-owned station to share operating costs with another station.²⁴ Public interest groups contend and counter the critics' arguments by asserting that the FCC's diversity goals are not advanced when minority owners do not actually control the stations.²⁵ Since the release of the Public Notice and the adoption of the JSA Order, the FCC has announced its new policies have resulted in a net increase of ten (10) minority and female-owned broadcast TV stations as of December 2014.²⁶

The National Association of Broadcasters (NAB) filed a petition in the D.C. Circuit challenging the FCC's new JSA attribution rules absent concluding the Quadrennial Review.²⁷ The Commission filed its brief on June 18, 2015,²⁸ but oral arguments have not yet been scheduled. NAB also challenged the Public Notice issued by the FCC's Media Bureau,²⁹ but the Court of Appeals for the D.C. Circuit dismissed the petition on September 9, 2014.³⁰

III. OTHER PENDING PROCEEDINGS

In August 2015, Chairman Wheeler circulated a draft Report and Order that would repeal the Commission's network non-duplication and syndicated exclusivity rules.³¹ Current FCC

²³ United States Department of Justice, *2010 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*, MB Docket 09-182, et al (ex parte) (Feb. 20, 2014).

²⁴ Statement of Commissioners Ajit Pai and Michael O'Reilly on the *Negative Impact of the Decision to Restrict Television Stations' Use of Joint Sales Agreements* (May 29, 2014).

²⁵ Free Press, *Fair Trade? Why Armstrong Williams Doesn't Represent Broadcast Diversity* (Mar. 12, 2014) (online at freepress.net/blog/2014/03/12/fair-trade-why-armstrong-williams-doesnt-represent-broadcast-diversity).

²⁶ See FCC blog, *Making Good on the Promise of Independent Minority Ownership of Television Stations* (Dec. 4, 2014) (online at <https://www.fcc.gov/blog/making-good-promise-independent-minority-ownership-television-stations>).

²⁷ National Association of Broadcasters, *Petition for Review in the U.S. Court of Appeals for the District of Columbia Circuit* (May 30, 2014) (No. 14-1092) (online at www.nab.org/documents/newsRoom/pdfs/053014_JSA_order_petition.pdf).

²⁸ See https://apps.fcc.gov/edocs_public/attachmatch/DOC-334009A1.pdf.

²⁹ National Association of Broadcasters, *Petition for Review in the U.S. Court of Appeals for the District of Columbia Circuit* (May 12, 2014) (No. 14-1072) (online at www.nab.org/documents/newsRoom/pdfs/051214_SSA_order_petition.pdf).

³⁰ See https://apps.fcc.gov/edocs_public/attachmatch/DOC-329283A1.pdf.

³¹ See FCC Blog, "Upgrading Media Rules to Better Serve Consumers in Today's Video Marketplace" (Aug. 12, 2015) (online at <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace>).

rules prohibit cable and satellite providers from importing an out-of-market TV station or providing the same syndicated programming in order to preserve the exclusivity provisions contained in network affiliation contracts or syndicated programming agreements. Broadcasters oppose the repeal of the rules, citing that the rules are essential to the “vibrancy of our uniquely free and local broadcast system,”³² and that repeal would “usurp the only viable and efficient enforcement mechanism for contractual exclusivity rights.”³³

The Commission also recently adopted a NPRM to review its so-called “totality of the circumstances” test in its retransmission consent rules that evaluate whether broadcast stations and multichannel video programming distributors (MVPDs) are negotiating in good faith for broadcast carriage rights.³⁴ Congress required that the Commission conduct this proceeding as part of the STELA Reauthorization Act of 2014.³⁵ Broadcasters are concerned that the Commission’s NPRM goes beyond what Congress directed, and could potentially tip the balance in favor of MVPDs.³⁶

IV. WITNESSES

The following witnesses have been invited to testify:

Paul Boyle

Senior Vice President of Public Policy
Newspaper Association of America

Kim Keenan

President and CEO
Multicultural Media, Telecom and Internet Council

See also Broadcasting Cable, *FCC Order Would Ax Syndex, Network Non-Duplication Rules* (Aug. 12, 2015) (online at <http://www.broadcastingcable.com/news/washington/fcc-order-would-ax-syndex-network-non-duplication-rules/143320>).

³² *See* National Association of Broadcasters, *Exclusivity Rules Foster Investment in Localism by Broadcast TV Stations, New Study Finds* (July 24, 2014) (online at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3468>).

³³ *See* Reply Comments of the National Association of Broadcasters, MB Docket No. 10-71, at page vii. (online at http://www.nab.org/documents/newsRoom/pdfs/072414_Exclusivity_Reply_Comments.pdf).

³⁴ *See* In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014 Totality of the Circumstances Test, Notice of Proposed Rulemaking (Sept. 2, 2015) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0902/FCC-15-109A1.pdf).

³⁵ *See* Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

³⁶ *See* National Association of Broadcasters, *NAB Statement on FCC Retransmission Consent NPRM* (Sept. 2, 2015) (press release) (online at <https://www.nab.org/documents/newsRoom/pressRelease.asp?id=3778>).

Jason Kint

CEO

Digital Content Next

Todd O'Boyle

Program Director, Media and Democracy Reform Initiative

Common Cause

Michael Scurato

Vice President, Policy

National Hispanic Media Coalition

Gerry Waldron

Partner

Covington & Burling