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ONE HUNDRED THIRTEENTH 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
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MEMORANDUM

June 10, 2014

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Hearing on "Media Ownership in the 21st Century"

On Wednesday, June 11, 2014, at 10:30 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing titled "Media Ownership in the 21st Century."

I. BACKGROUND

The proliferation of mobile devices and Internet access is changing how Americans get news, information, and entertainment, although the majority continues to rely on traditional media sources today. According to one recent study, 87% of Americans get their news from television, 65% from radio, and 61% from print sources.[1] The most recent data from the Federal Communications Commission (FCC) indicates that 90% of American households subscribe to a pay television service,[2] even though broadcast stations continue to be the dominant medium for the most highly viewed television programming.[3] Although Americans increasingly go online

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

[2] *In the Matter of* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (MB Docket 12-203), Fifteenth Report (July 22, 2013).

[3] For example, during the week of May 26, 2014, eight of the top ten programs aired on broadcast television. *See* The Nielsen Company, *Top Ten* (online at nielsen.com/us/en/top10s.html) (accessed June 6, 2014).

for news and information, the vast majority of local news online comes from newspapers and broadcast television stations.[4]

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 requires the FCC to review certain rules related to media ownership every four years, known as the Quadrennial Review.[5] The five rules subject to the Quadrennial Review are:

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

On March 31, 2014, the FCC adopted a Further Notice of Proposed Rulemaking (FNPRM) to begin the 2014 Quadrennial Review, which incorporated the proceeding from the never-adopted 2010 Quadrennial Review.[6] In 2012, former FCC Chairman Julius Genachowski proposed to repeal the radio/television cross-ownership rule and relax the newspaper/broadcast cross-ownership rule by making it easier to obtain a waiver for common ownership of a smaller

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[4] Pew Research Internet Project, *How people learn about their local community* (Sept. 26, 2011).

[5] 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.

[6] 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).

TV station and a newspaper in the top 20 markets.[7] That proposal was part of the never-adopted 2010 Quadrennial Review.

In the 2014 FNPRM, the FCC proposes retaining the local radio rule and dual network rule.[8] The FNPRM proposes 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 seeks further comment on the proposals from the 2010 Quadrennial Review but does not make any tentative conclusions.

The 2014 FNPRM also seeks 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 6.8% of full-power commercial TV stations, racial minorities only 2.2% of full-power commercial TV stations, and African Americans in approximately .019% of all broadcast stations.[9] Previous FCC efforts to promote diversity have been overturned by the courts because of the difficulty of supporting race-neutral criteria used by the Commission to promote female and minority ownership.[10] 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.[11]

B. Joint Sales Agreements

In the same March 2014 item, the FCC 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.[12] The FCC uses its broadcast attribution rules to determine whether an entity owns or controls a sufficient interest in a broadcast station. If that

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[7] FCC Chairman Genachowski, *Chairman's Statement on the Status of Media Ownership Proceeding* (Feb. 26, 2013) (online at fcc.gov/document/chairmans-statement-status-media-ownership-proceeding).

[8] 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).

[9] Federal Communications Commission, *Report on Ownership of Commercial Broadcast Stations* (Nov. 14, 2012).

[10] *See Prometheus Radio Project v. FCC* (3d Cir. 2011). The United States Court of Appeals for the Third Circuit found that the definition of "eligible entity" used by the FCC to promote minority and female broadcast ownership is arbitrary and capricious because the Commission failed to justify how such a revenue-based definition advances the Commission's stated goals of promoting diversity.

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

[12] 47 CFR §73.3555 note 2k.

entity has a sufficient interest, it has the ability to affect the station's programming or other major operational decisions, triggering the FCC's media ownership restrictions. Under the FCC's new rules, if a television station sells more than 15% 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 new rules provide stations with two years to unwind existing agreements and also permit stations to seek a waiver of the new rule.

Separately, the FCC's Media Bureau released a Public Notice to provide greater processing guidance to broadcast transactions that include sharing or "sidecar" agreements such as JSAs.[13] 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 characterizes 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.[14]

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 stations in a market to the detriment of localism, competition, and diversity.[15] 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.[16] Public interest groups argue that the FCC's diversity goals are not advanced when minority owners do not actually control the stations.[17] The National Association of Broadcasters has filed a petition in the D.C. Circuit challenging the

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[13] 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).

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

[15] 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).

[16] 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) (press release).

[17] 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).

FCC's new JSA attribution rules absent concluding the Quadrennial Review.[18] It also has challenged the Public Notice issued by the FCC's Media Bureau.[19]

Sinclair Broadcast Group, which has a merger with Allbritton Communications Company pending before the FCC, claims that it is forced to have three television stations go dark as a result of the JSA rule change.[20] Sinclair asserts that it could not find any buyer for the stations that may need to be divested under the new rules. Public interest advocates and broadcast attorneys expressed skepticism that Sinclair could not find any buyers for the stations.[21] The National Association of Black Owned Broadcasters stated, "The unique circumstances in which Sinclair finds itself do not support any conclusion regarding the overall important benefits of the new JSA rule" and noted that Sinclair may have other financial and anti-competitive incentives to allow the stations to go dark.[22]

III. WITNESSES

David Bank
Managing Director, Global Media Equity Research
RBC Capital Markets

Paul Boyle
Senior Vice President of Public Policy
Newspaper Association of America

Jessica Gonzalez
Executive Vice President and General Counsel
National Hispanic Media Coalition

William Lake
Chief, Media Bureau
Federal Communications Commission

Bernard Lunzer

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

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

[20] Letter to FCC from Clifford M. Harrington, Counsel to Sinclair Broadcast Group, Inc. Re: File No. BTCCDT-20130809ABW et al. (May 29, 2014).

[21] Communications Daily, *Sinclair Wants to Cancel TV License to Get Allbritton Deal Approved* (May 30, 2014).

[22] National Association of Black Owned Broadcasters, *NABOB Continues to Support New FCC JSA Rules* (May 30, 2014) (press release).

President
Newspaper Guild-CWA

Jane Mago
Executive Vice President and General Counsel
National Association of Broadcasters