

Review of Broadcast Ownership Rules

Although its focus has been on other areas lately, the FCC has issued a *Notice of Inquiry* to explore revision of its broadcast ownership rules. Similar exercises that have been undertaken every four years since enactment of the Telecommunications Act of 1996 resulted only in fine-tuning (and court rejection of a single bolder initiative). This time, citing “dramatic” and “profound” changes in the marketplace, a broader-based “fresh look” is promised, with “no preconceived notions” about the framework that may result or specific rules that may be adopted. Further impetus may arise from the Senate Commerce Committee’s recent interest in a possible rewrite of the Communications Act, numerous independent studies that the FCC is commissioning, and the impact of the FCC’s own broadband plan.

The *Notice of Inquiry* is quite extensive and poses hundreds of questions. Consequently, this memorandum attempts only an overview.

The Commission retains its fundamental concern of advancing its traditional policy goals of competition, localism and diversity. In a background introduction, it cites such disparate modern trends as the increased consolidation of the broadcast industry, penetration of alternative media, declining newspaper circulation, shifts in advertising placement, control of websites by owners of traditional outlets, the rise of social media as information sources and an attenuation of local reporting and content. The Commission’s discussion of the impact of these developments upon its policy goals centers on four affected groups: consumers, advertisers, content creators and distributors.

Competition – The Commission’s focus here is upon how to measure competition in today’s media marketplace. Its prior analyses have attempted to quantify the impact of regulation upon fostering lower pricing, higher output, increased consumer choices and technological progress. Aside from this economic focus, the Commission seeks a metric to assess consumer welfare in terms of utilization and satisfaction, taking into account evolving opportunities and choices.

Localism – Traditionally, the Commission has evaluated localism in terms of available programming, and especially the quantities of news and public affairs offered by over-the-air broadcasters. Here, too, the Commission questions how to measure localism as it applies to consumers, and particularly in light of the impact of the changing media marketplace upon consumer satisfaction. For the first time, the Commission seems willing to consider the notion that consumers may not want as much local broadcast programming as it has assumed. Thus, the Commission seems prepared to consider a shift away from attempting to assess local programming input (that is, how much news is broadcast, its local content, the staff devoted to producing it, etc.) and regarding each medium as a separate market with its own responsibilities. Rather, it now may look at the entire mix of available information, including the increasing availability of Internet blogs, websites and similar resources, and the extent to which local creators and production meaningfully contribute to the quantity and responsiveness of useful local content. The Commission is particularly concerned over defining and measuring localism as it applies to historically-underserved minority communities.

Diversity – In part owing to First Amendment sensitivities, the Commission’s traditional approach to diversity has been structural, so as to foster program and viewpoint diversity through oversight and regulation of sources, outlets and minority/female ownership. A threshold issue is to define the geographic region in which diversity

is to be assessed, and the Commission tentatively suggests using an area in which citizens have roughly the same range of media choices. Although the Commission still hopes to promote diversity generally through competition among media outlets, it notes its historical (and presumably continuing) concern with the specific needs of children for educational programming and protection from excessive and inappropriate commercial messages. As with localism, the Commission will consider a “demand” (rather than “supply”) approach that will try to measure media consumption and audience satisfaction as proxies for viewpoint diversity, although the Commission seeks guidance as to how that might be assessed. Even so, it raises a number of concerns with source diversity, including the continuing need in each market for independent media outlets owned by diverse individuals, and the impact of such established structural controls upon content diversity.

Specific Rules to be Considered – Although the findings of this initial inquiry will be implemented only after one or more notices of proposed rulemaking, the Commission has already raised the prospect of changes in specific rules. For each medium, it seeks comment on how the current rules impact its three core policy goals.

- **Local Television Ownership** – The current approach requires eight independently-owned and -operated full power stations in a DMA, and effectively bars any mergers among the top four-rated stations. In addition to possibly adjusting this standard, the Commission asks how to define markets now that the former Grade B contour no longer exists following the digital transition, the extent to which other media should be factored in, whether the “failing/failed” station exception remains relevant, and – perhaps most notably – whether consolidation might provide more and better programming.
- **Local Radio Ownership** – The present limitations on common control depend upon the number of stations in Arbitron-rated markets or overlapping stations in other areas. The Commission questions the continued need for separate caps for AM and FM stations or whether they should be considered part of a consolidated service, whether to count low power stations, and whether to consider market share and/or the degree of consolidation of other media.
- **Cross-Ownership** – Noting newspapers’ need for relief, the Commission suggests that the time may be ripe to favor certain consolidations previously banned. Thus, it questions the disparate treatment of newspaper/radio and radio/television combinations, even as it asks whether structural relief would suffice to bolster local news and information in light of the fragmentation of news sources. Consideration also will be given to the impact of technological changes upon defining the relevant market.

More generally, the Commission asks whether its overall approach to structural regulation should remain in terms of “bright line” rules, which define the precise criteria under which ownership combinations are permitted and thus are efficient and predictable. Alternatively, the Commission may consider case-by-case analyses, which can be custom-tailored to the needs of a particular market, but which are time-consuming and can generate uncertainty as standards evolve through variable precedents. A “hybrid” approach would define parameters that would predict a likely outcome while incorporating additional factors to be weighed. However, the factors that are mentioned in the *Notice of Inquiry* seem so vague and complex as to mitigate against the benefits of the current, largely objective, approach; these might include local economic and financial conditions, an applicant’s financial status and ability to access capital, the holdings of the applicant’s competitors in the market, the applicant’s history of promoting innovation and the effect of the digital transition. Even more indistinct is a final “broad cross-media” alternative approach to regulation that would “look at all conditions in a geographic market in determining the degree of permissible combined ownership in that market.”

In separate statements, the two most senior Commissioners illustrated the range of opinion that is likely to emerge in response to the *Notice of Inquiry*. Commissioner Copps views the current underrepresentation of

women and minorities in broadcast ownership as “appalling” and urges a review that, for the first time asks “the questions that really need to be asked. ... Anyone who actually thinks that who owns the media doesn’t significantly affect how our country is being informed is not paying attention. Shortchanging media ownership diversity is shortchanging our civic dialogue.” Commissioner McDowell, though, while supporting the inquiry, finds “some of its premises and questions disquieting. ... The possibility of the government monitoring core protected speech should send shivers down the spine of anyone who cherishes liberty. ... I am confident that the answers will come from those actively engaged in media enterprises and not from Washington bureaucrats.”

Reading the complete *Notice of Inquiry* is essential to describe the full scope of the Commission’s consideration of the matters we have only briefly summarized. It can be accessed on the FCC website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf.

Comments will be due 30 days after publication in the Federal Register. If you would like to discuss any aspect of this inquiry, please contact [Peter Gutmann](#), [John Garziglia](#) or [Gregg Skall](#), of our [Telecommunications practice group](#).

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