30 Ownership

HISTORICALLY, THE FCC'S CONCERN regarding media ownership has focused largely on how ownership affects the diversity of voices, localism, and competition—including the availability of news and information on a local level.

We will turn to those issues shortly but it is worth noting two other factors highlighted in Part One:

- the profit expectations that come with being part of a large, publicly-traded media corporation, and
- the debt levels incurred as a result of consolidation.

It is possible, in other words, that a transaction might meet the legal requirements related to diversity, localism, and competition—yet still not be in the best interest of local communities. As we saw in both the newspaper and local TV sections of Part One, some traditional media businesses have remained viable, and even relatively healthy, but pursued short-term cost-cutting strategies in order to keep profit levels high. The drive to maximize profit is so integral to the nature of the modern publicly-traded company, and policies that attempt to change that dynamic are destined to fail. That's why this report looks at not only at traditional ownership rules, but also at the potential of nonprofits and "hybrid" corporate entities to better address the information needs of communities in those cases when commercial media is not doing so. (See Chapters 6–15.)

Now we turn to the more traditional focus of the FCC: broadcast ownership rules.

FCC Ownership Rules

Congress requires the FCC to review its media ownership rules every four years.[1] These rules seek to promote localism, diversity, and competition in broadcasting by limiting the number of broadcast stations a single party can own, both in a local market and nationally. "[T]he Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."[2] The core goals of the ownership rules are:

Localism: Historically, the FCC has tried through regulation to ensure that broadcasters are responsive to "localism," or, the needs and interests of their local communities.[3] To measure localism in broadcasting markets, the Commission primarily had considered two measures: "the selection of programming responsive to local needs and interests, and local news quantity and quality."[4] *Diversity*: The FCC focuses in particular on viewpoint diversity (the availability of media content reflecting a variety of perspectives) and outlet diversity (the presence of independently owned outlets in a local broadcasting market).[5] To gauge viewpoint diversity, the Commission looks at news and public affairs programming: "Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media."[6] The idea behind outlet diversity is that because programming decisions are left to owners' discretion, a diversity of ownership will result in more diverse programming.[7] Critics, however, argue that consolidation better positions firms to achieve economies of scale and scope, which means that they are more likely to have the financial resources to provide more robust programming, not necessarily catering to the masses. A company that owns several stations might, for instance, have incentive to expand its reach by targeting each entity toward a different, narrower audience.

Competition: It has long been a basic tenet of communications policy that robust competition allows for more voices and a healthier media system.

The current ownership rules are:

Local Television Ownership Limit: An entity may own two television stations in the same designated market area (DMA) only if: (1) the Grade-B contours of the stations (as determined by 47 C.F.R. section 73.684) do not overlap, or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience

share, and at least eight independently owned-and-operated commercial or noncommercial full-power broadcast television stations would remain in the DMA after the combination.[8]

Local Radio Ownership Rule: A person or entity may own, operate, or control: (1) up to eight commercial radio stations, not more than five of which are in the same service (e.g., AM or FM) in a radio market with 45 or more radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market unless the combination of stations comprises not more than one AM and one FM station.[9]

Newspaper/Broadcast Cross-Ownership Rule: The newspaper/broadcast cross-ownership rule generally prohibits common ownership of a full-service broadcast station and a daily newspaper if their coverage areas overlap.[10] But it allows for waivers of the rule if a combination is viewed as advancing the public interest.[11] The rule provides for a presumption in favor of a waiver where (i) a daily newspaper seeks to combine with a radio station in a top 20 DMA, or (ii) a daily newspaper seeks to combine with a television station in a top 20 DMA; and (a) the television station is not ranked among the top four stations in the DMA; and (b) at least eight independently owned and operating "major media voices" would remain in the DMA after the combination.[12]

For markets below the top 20 DMAs, the Commission presumes that a proposed combination would not be in the public interest. The Commission requires an applicant attempting to overcome a "negative presumption" to demonstrate that the merged entity will increase the diversity of independent news outlets and competition among independent news sources in the relevant market.[13] The Commission will reverse the negative presumption in two limited circumstances: (i) when the proposed combination involves a failed/failing station or newspaper, or (ii) when the proposed combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news after the combination.[14]

No matter which presumption applies, the Commission's analysis will consider four factors: "(1) the extent to which cross-ownership will serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the owner's commitment to invest significantly in newsroom operations."[15]

Radio/Television Cross-Ownership Rule: The radio/television cross-ownership rule allows a party to own up to two television stations (to the extent permitted under the local television ownership rule) and up to six radio stations (to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices would remain post-merger.[16] In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (where permitted under the current local television ownership rule) and up to four radio stations (where permitted under the local radio ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. The rule allows a combination of two television stations (where permitted under the local television ownership rule) and one radio station regardless of the number of voices remaining in the market.[17] For purposes of this rule, media voices include television stations, radio stations, newspapers, and cable systems.[18]

The Dual Network Rule: The Commission's dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks (that is, ABC, CBS, Fox, and NBC)."[19]

National TV Ownership: In 2004, Congress set the national television multiple ownership cap at 39 percent of television households.[20]

Attribution Rules: The broadcast attribution rules define which financial or other interests of a licensee must be counted in applying the broadcast ownership rules, and "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the

programming decisions of licensees or other core operating functions."[21] At the same time, the attribution rules "permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry."[22]

2010 Quadrennial Review

The Commission is in the midst of its 2010 "Quadrennial Review" of ownership rules.[23] A Notice of Proposed Rulemaking is expected within a few months of the release of this report, so we are reluctant to offer our own detailed analysis of ownership issues. We note, too, that the ownership review must consider a different set of factors than this report does. We therefore restrict ourselves to a few general observations:

The nature of the "diversity" calculus may have changed: In an earlier day, it was reasonable to assume that a diversity of media outlets indicated generalized media health. What we have seen in Part One of this report is that a media market can simultaneously have a diversity of news and information outlets and yet a scarcity of local reporting.

More is not necessarily better: Another assumption of past regulatory efforts is that more choices leads to greater benefits for consumers. We believe that the changes in the media market may sometimes call this assumption into question. For instance, it might be better to have nine TV stations in a market than 10, if consolidation leads the remaining stations to be economically healthier and therefore more able to invest in local news, information, and journalism.

Resources matter: As we have seen throughout the report, the new media system excels at creating more and cheaper ways of distributing content. This creates new challenges for regulators. In the past, the safest way to assess the health of a media market was through quantitative assessments of news output. Yet, these days, an increase in output—more stories, more shows, more channels, more websites—does not necessarily mean an increase in resources dedicated to such coverage. In some cases, the resources actually get spread thinner and quality declines. Given that it is extremely difficult—constitutionally and practically—to assess quality, regulators may need to consider looking at different measures. This is tricky business, too, as the station that devotes the most money to news might be the one that is the most committed—or it might just be inefficient in how it spends its money.

The former tax certificate policy was generally lauded as an effective and nonintrusive tool to encourage media ownership diversity

Just because a merger could *lead to more journalism does not mean it will*: The FCC's ownership proceeding record includes comments from those who argue that relaxing the cross-ownership or other ownership rules would allow media companies more flexibility to create multiplatform business models that might help sustain local journalism in the long run. However, others argue that excessive deregulation in the 1980s and 1990s led to a reduction in news on the radio side, and that previous mergers have led to media layoffs, not staff increases. It is possible that both of these assessments can be true: savings and efficiencies produced by mergers could well lead the merged company to invest "significantly in newsroom operations"—or the money saved could flow to the bottom line, and lead to a *decline* in journalistic resources.

Though debates about ownership tend to focus on the ownership caps, these are not necessarily the only ways to influence ownership patterns. For instance, Ava Seave, an adjunct professor at the Columbia Business and Journalism schools and co-author of *Curse of the Mogul: What's Wrong with the World's Leading Media Companies*, has proposed what she calls a "flip tax"—a fee levied against media consolidations. Arguing that few media consolidations have worked out well for shareholders, Seave suggests that a merger tax would force the companies involved to internalize the true cost of the transaction and help to subsidize the media ecosystem in the communities or states where they are located, helping to insure that the net effect is positive. To explore the volume of deals and the amount of money involved, she looked at deals of more than $1 million from 2005 through the first quarter of 2010 and found an average of about $1 billion per year that closed. If those deals had been taxed at between .25 percent and .5 percent, the revenue raised would have been between $250 million and $500 million per year, nationwide.[24] A variant of Seave's idea would be to allow for more mergers on the condition that payments would be made to strengthen independent media in the community, perhaps by funding local nonprofit media.

Ownership Diversity

From the 1960s to the 1990s, the Commission sought to diversify broadcast ownership through a variety of policies, including: (1) adopting a tax certificate program that allowed broadcast and cable companies to defer capital gains on the sale of media and cable properties to minority-owned businesses;[25] and (2) allowing for the "distress sale" of a broadcast station, thereby permitting broadcasters to sell properties to minority owners at reduced rates as an alternative to losing the broadcast assets due to non-renewal or revocation of their licenses.[26] Today, however, as a result of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, which struck down race-based initiatives aimed at fostering ownership diversity, there are no race-specific policies in effect.[27] The Commission suspended the minority distress sale policy, and, in 1995, Congress repealed the tax certificate policy.[28] However, the Commission has continued to adopt policies to expand ownership opportunities for small businesses, including those owned by minorities and women. Some major areas of policy related to diversity include:

Data Collection: The Commission requires all commercial full-power AM, FM, TV, low-power TV, and Class-A broadcasters to submit ownership data, including information on the race, ethnicity, and gender of broadcast station owners. The data on race, ethnicity, and gender must be submitted every two years. The FCC revised the ownership form in 2009 to improve the quality and usability of this data and to collect minority and gender data from previously exempted broadcasters.[29] It made these changes in response to concerns expressed by researchers and the Government Accountability Office about inconsistencies in the data and difficulties users had experienced in aggregating the data.[30] Critics asserted that these shortcomings made it difficult for the Commission to promote the ownership of broadcast stations by women and minorities.[31] Broadcasters claimed that some aspects of the revised form would be burdensome and that one change in particular raised privacy concerns. The Commission delayed the initial filing deadline for the revised form and devised a temporary measure to address broadcasters' privacy concerns.[32] Broadcasters began using the new form in 2010 and reported ownership data as of November 1, 2009. The next filing deadline is November 1, 2011. In February, 2011, the Commission posted to its website the data broadcasters submitted in 2010 using the new form.[33]

Bidding credits: Since 1994, when new TV and radio licenses have become available, they have been awarded through auction. In 1997,[34] Congress added provisions designed to encourage participation by rural telephone companies, small, women- and minority-owned businesses:[35] Now, if an eligible party wins, it can reduce its bid amount. Also, companies that own no mass media facilities get a 35 percent discount; and companies that own no more than three mass media broadcast facilities get a 25 percent break.[36]

Tax Certificates: The Commission voted unanimously to reinstate the "tax certificate program."[37] Created in 1978, the "tax certificate" program attempted to encourage sale of TV and radio stations to minorities by allowing broadcast and cable companies to defer capital gains on the sale of media and cable properties to minority-owned businesses.[38] The entity receiving the tax certificate could roll over or defer the capital gains from the sale of the property, if the gain was reinvested in a similar broadcast or telecommunications property within two years of the sale. Prospective buyers could use the policy to attract equity investors. Subsequently, the Commission enhanced the tax certificate program, expanding it to cover sales of cable systems to minorities.[39] The Commission adopted further tax deferral measures to encourage the participation of small, minority-owned, and women-owned enterprises in the auction of broadband PCS and other spectrum-based services.[40] But this was repealed by Congress in 1995 to generate revenue for the Treasury.

The tax certificate policy was generally lauded as an effective and nonintrusive tool to encourage media ownership diversity. Many industry stakeholders consider it to have been the "single most effective program in lowering market entry barriers" to spur an increase in minority ownership of broadcast radio, television and other media properties.[41] From 1978 to its repeal in 1995, the tax certificate policy is credited with making possible minority acquisition of 288 radio stations, 43 television stations, and 31 cable systems.[42] As Commissioner Robert McDowell noted, "Changes in our ownership rules alone won't achieve much if the intended beneficiaries [small enterprises and new entrants, including minorities and women] can't obtain the financing they need to make their aspirations a reality."[43]