The Committee on Energy and Commerce

Memorandum

June 9, 2014

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Hearing on "Media Ownership in the 21st Century"

I. Overview

The Subcommittee on Communications and Technology will hold a hearing on Wednesday, June 11, 2014, at 10:30 a.m. in 2123 Rayburn House Office Building entitled "Media Ownership in the 21st Century." One panel of witnesses will testify.

1. David Bank, Managing Director, RBC Capital Markets;
2. Paul Boyle, Senior Vice President of Public Policy, Newspaper Association of America (NAA);
3. Jessica J. Gonzalez, Executive Vice President and General Counsel, National Hispanic Media Coalition (NHMC);
4. William T. Lake, Chief, Media Bureau, Federal Communications Commission;
5. Bernard Lunzer, President, Newspaper Guild-CWA; and,
6. Jane Mago, Executive Vice President and General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters (NAB).

The media market has changed significantly since the current media ownership rules were established. Americans have access to even more news and information via traditional media outlets – newspapers, television, and radio – and through newer pay-TV networks and Internet platforms. Competition for viewers, readers, and consumers is fiercer than it has ever been during the history of the Communications Act. And as barriers to entry are significantly lower in non-broadcast media, the marketplace increasingly offers greater diversity of voices. As broadcasters – and newspapers – face increasing competition for Americans' attention, additional regulatory flexibility will permit them to increase efficiencies and compete against unregulated competitors. The Commission's decades-old ownership rules simply have not kept up with changes in the media marketplace and are hampering traditional media's ability to compete.

II. Introduction

The Federal Communications Commission ("FCC" or "Commission") regulates ownership of broadcast stations and, by proxy, newspapers, with the stated goal of promoting competition, localism, and diversity of voices in the public interest. The FCC's regulation of media ownership is intended to balance the information needs of local communities, citizen access to airwaves, and the competitive health of the broadcast industry; however, they have faced criticism from both within the broadcast industry and without. Critics have argued that the rules should be strengthened to prevent consolidation in the industry, which they claim is detrimental to diversity and localism. Others have argued that the rules should be liberalized to permit the broadcast industry to compete in a media landscape transformed by the Internet. Very few believe that the rules suffice as they stand today.

III. The Quadrennial Review

The Commission's history on reforming its media ownership rules is rife with missteps and setbacks. The FCC is charged with reviewing its media ownership rules every four years (the "Quadrennial Review") to determine "whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." Unfortunately, the FCC's recent attempts to do so have been rejected by the courts. The Commission's 2002 Quadrennial Review was appealed to the Third Circuit Court of Appeals and struck down and remanded in 2004. And the FCC Order issued at the end of 2007 as part of the 2006 Review also was struck down with much of the Order remanded to the Commission in 2011.

While the second Third Circuit review was pending, the FCC began gathering information for its 2010 Quadrennial Review. However, the Commission did not issue a Notice of Proposed Rulemaking ("NPRM") for the 2010 Review until the end of 2011. An Order for the 2010 Review has never been issued. Rather, the FCC deferred release of a proposed Order in order to respond to rising concern that the proposed rules might impact minority ownership negatively. This prompted the FCC to request a study from the Minority Media & Telecommunications Council, which was made available for public comment. The study, which stated that the proposed rules would have little impact on minority ownership, generally was panned by the public as too anecdotal and insufficiently rigorous. There was no further action on the 2010 Quadrennial Review until the FCC adopted an NPRM on the 2014 Quadrennial Review on March 31of this year. In this most recent NPRM, the Chairman noted that the Commission likely would conclude this review in 2016. In effect, the media ownership rules have existed in regulatory stasis for the past eleven years.

A brief overview of some of the rules in question in the Quadrennial Review follows:

Newspaper/Broadcast Cross-Ownership Ban. This rule prohibits ownership of both a broadcast property and a daily newspaper in the same market. The rule was established in 1975 (with some existing broadcast-newspaper combinations grandfathered) and has not changed since. Attempts to liberalize the rule in the 2002 and 2006 Quadrennial Reviews were struck down by the Third Circuit, who agreed that repeal was reasonable, but held that the new cross-media limits proposed by the Commission were not supported by "reasoned analysis."

Local Television Ownership Limits. This rule prohibits ownership of more than one broadcast television station in the same market, unless the second station is *not* in the top four station by ratings and there are at least eight independently owned full-power television stations in the market as well. The 2002 Quadrennial Review Order proposed to change the rule to recognize emerging cross-media competition, but the court struck it down. The court again agreed that repeal could be reasonable, but the new cross-ownership limits were not supported by "reasoned analysis."

Local Radio Ownership Limits. The rule, as set initially by Congress, permits a single party to own up to eight radio stations in markets containing 45 or more commercial radio voices. Even so, owners are restricted to five of the same service –either AM or FM. The rule sets limits for markets with 30-44 commercial radio stations, 15-29 stations, and 14 or fewer stations. The 2002 Quadrennial Review Order proposed to change the rule to recognize emerging cross-media competition, but the court struck it down. No additional changes have been proposed since.

National Television Ownership Cap. This rule limits the reach of a single broadcast ownership group to a specific percentage of households. In the 2002 Quadrennial Review Order, the FCC raised the cap from 35 percent to 45 percent. Congress intervened and limited the national ownership cap to 39 percent and prohibited the FCC from further reviewing or modifying the national cap, reserving the rule for Congress' discretion.

Diversity Concerns. Congress and the FCC have attempted to foster minority and female ownership of broadcast properties, and the courts have maintained a strict eye on the FCC's efforts. The agency must walk a fine line; on one hand, the Commission must issue rules that implement the policy of promoting minority ownership, but it also must tailor its efforts narrowly to avoid violating the Equal Protection Clause of the U.S. Constitution. To date, the FCC has met with little success in its efforts to address ownership diversity through the Quadrennial Review.

The Quadrennial Review also covers other rules: a prohibition against affiliation with more than one broadcast network; cross-ownership limits on radio and television ownership within a single market; and the failed station solicitation rule (a rule requiring the seller of a failing station to provide notice to out-of-market buyers before selling to an in-market buyer and thus, requiring a waiver of the local ownership rule.). However, the grounds upon which the Third Circuit continues to strike down the Commission's Quadrennial Reviews stem from the Commission's inability to provide adequate justification that the new rules meet its statutory obligation to promote diverse voices.

IV. Merger Review and Waiver Processes

The Quadrennial Review is not the only method by which the FCC promulgates policy and guidance on media ownership. Merger review and the waiver process is another way in which the FCC shapes the media industry. The FCC's merger review authority stems from Title III of the Communications Act, which requires the agency to ensure that any transfer of spectrum licenses occurs in the public interest. The public interest standard necessarily distinguishes an FCC merger review from an antitrust review conducted by the Department of Justice or Federal Trade Commission. Critics remark that the public interest standard lacks predictability and clear benchmarks, allowing for political rather than policy judgments to drive Commission decision-making. Waiver standards are similarly difficult to pin down, but both waiver and merger reviews allow the agency flexibility in meetings its public interest mandate.

Both the waiver and the merger review processes can permit non-compliance with the current ownership rules. For example, a temporary or conditional waiver from the FCC may span years. Merger review likewise can create situations in which a broadcaster acquires a fifthranked station in the same market and then manages the station well enough to have the station rise in the rankings to a top-four station. In either of these cases, time and investment from the purchaser has benefited the media property and the community it serves. Divestiture would create significant hardships for the owners, station, and community.

While the FCC is loath to grant outright waivers of its media ownership rules, it has had a history of reviewing and blessing shared service agreements. Critics argue that such shared service arrangements are a "workaround" the local ownership rules, but the Commission has blessed these arrangements in multiple transaction reviews until very recently. On March 12, the FCC issued new guidelines on its review of shared service agreements in the context of broadcast mergers. The agency noted that it would scrutinize closely any transaction that proposed two or more stations in the same market would enter into an arrangement that provided the buyer with a contingent financial interest in the purchased station. The National Association of Broadcasters has appealed this policy, essentially stating that the FCC has created new law without the required notice and comment rulemaking.

V. Attribution Rules

In complying with media ownership caps, it is important to understand how the FCC counts the stations that may be attributed toward a single broadcaster for purposes of media ownership limits. Earlier this year, the FCC also initiated a rulemaking on eliminating the UHF discount, which would double the impact of each UHF station as they are counted toward ownership limits. Despite its failure to complete the statutorily mandated Quadrennial Review, the FCC is proceeding with changes to how such stations are counted, which could force broadcasters to divest stations in order to come back into compliance with ownership limits.

Additionally, on March 31, the FCC changed its attribution rules to include stations in joint sales agreements ("JSAs") when counting stations toward the local ownership cap. JSAs allow broadcasters to, among other things, share the high costs of maintaining a sales force and producing local content, particularly in areas where the economy might not otherwise support additional stations. These types of agreements have been approved by the Commission for quite some time and are actively in use in markets across the country. This change in attribution rules could force broadcasters to divest stations or dissolve agreements that are beneficial to bringing local content to smaller markets. The change in the attribution of JSAs is troubling, given the benefit generated from such arrangements.

If you need more information, please call David Redl or Grace Koh at (202) 225-2927.