U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

September 22, 2015

TO: Members, Subcommittee on Communications & Technology

FROM: Committee Majority Staff

RE: "Broadcasting Ownership in the 21st Century"

I. INTRODUCTION

On Friday, September 25, 2015, at 9:30 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing entitled "Broadcasting Ownership in the 21st Century."

II. WITNESSES

1. Paul Boyle, Senior Vice President of Public Policy, Newspaper Association of America;
2. Kim Keenan, President and CEO, Multicultural Media, Telecom and Internet Council;
3. Jason Kint, CEO, Digital Content Next;
4. Todd O'Boyle, Program Director, Media and Democracy Reform Initiative, Common Cause;
5. Michael Scurato, Vice President, Policy, National Hispanic Media Coalition; and
6. Gerry Waldron, Partner, Covington & Burling LLP (on behalf of the National Association of Broadcasters).

III. BACKGROUND

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.

IV. DISCUSSION

The Subcommittee examined this topic in a hearing last Congress, receiving testimony from the FCC and various players in the industry. The feedback collected during the hearing concluded the need for a thorough review of the current media ownership rules as today's

technological marketplace has changed significantly. The purpose of this hearing is to focus on broadcaster ownership rules and examine their relevancy in the modern media industry.

A. 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 the competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."[1] Unfortunately, the FCC has neglected its statutory obligation for the last eight years, and its most recent attempts – in the mid-2000s – 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.[2] 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.[3]

While the second Third Circuit review of the 2006 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.[4] An Order for the 2010 Review has never been issued. Rather, in response to rising concerns that the FCC's proposed rules could negatively impact minority ownership, the FCC requested a study from the Minority Media and Telecommunications Council, which was made available for public comment.[5] The study, which was released on June 7, 2013, stated that the proposed rules would have little impact on minority ownership.[6] There was no further action on the 2010 Quadrennial Review until the FCC adopted an NPRM on the 2014 Quadrennial Review on March 31, 2015.[7] The FCC Chairman noted that the Commission would likely conclude this review in 2016. As a result, the media ownership rules have existed in regulatory stasis for over twelve years.

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

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[1] 47 U.S.C. § 303 note.

[2] *See Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3d Cir. 2004) (remanding *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003)) ("*Prometheus 1*").

[3] *See Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (remanding *2006 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*, Report and Order, 23 FCC Rcd 2010 (2008)).

[4] *See 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*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011).

[5] *See Media Bureau Invites Comments on Study Submitted by the Minority Media and Telecommunications Council in 2010 Quadrennial Review of Broadcast Ownership Rules,* Public Notice, MB Docket Nos. 09-182, 07-294, DA 13-1317 (Jun. 7, 2013).

[6] Mark R. Fratrik, The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations, 2013

[7] *See 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*, Report and Order, NPRM, Order, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371 (2014).

Newspaper/Broadcast Cross-Ownership Ban. This rule prohibits ownership of both a broadcast property and a daily newspaper in the same market.[8] The rule was established in 1975 (with some existing broadcaster-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 not on jurisdictional grounds, but due to insufficient analysis.[9]

Local Television Ownership Limits. This rule prohibits ownership of more than one broadcast television station in the same market, unless two conditions are met: (1) that the second station is *not* in the top four stations by ratings; and (2) that there are at least eight independently owned full-power television stations in the market.[10] 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 the FCC has the authority to make such a change, but that the Order lacked sufficient reasoned analysis.[11]

Local Radio Ownership Limits. This rule, as initially set by Congress, permits a single party to own up to eight radio stations in markets containing forty-five or more commercial radio voices. Even so, owners are restricted to five of the same service – either AM or FM (the "AM-FM Sub-cap"). The rule sets limits for markets with thirty to forty-four commercial radio stations, fifteen to twenty-nine stations, and fourteen or fewer stations.[12] 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.[13] In the 2002 Quadrennial Review Order, the FCC raised the cap from thirty-five percent to forty-five percent. Congress intervened and limited national ownership to thirty-nine percent of households and prohibited the FCC from further reviewing or modifying the national cap, reserving the rule for Congress' discretion.

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 sellers 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

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[8] 47 C.F.R. § 73.3555(d)
[9] *See Prometheus 1*¸ at 398 (concluding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest"); *see also Prometheus 1*, at 435 (noting that the FCC's new cross-media limits were based on an "unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets").
[10] 47 C.F.R. § 73.3555(b)
[11] *See Prometheus 1,* at 413-420 (noting that the Commission's authority was not duplicative of antitrust regulation, nor was the FCC's notice procedure inadequate, but remanding the cross-media limits nonetheless for failure to justify the assumptions on which the cross-media limits were based).
[12] 47 C.F.R. § 73.3555(a).
[13] 47 C.F.R. § 73.3555 (e).

failure to provide adequate justification that the new rules it proposes meet its statutory obligation to promote diverse voices.

B. Joint Sales Agreements

A joint sales agreement ("JSA") is an arrangement between two television stations in the same market to share advertising staff and resources. JSAs allow broadcasters to 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 some time and are in use across the country.

In March 2014, the FCC changed its rules for determining ownership (the "attribution rules") to include stations in joint sales agreements when counting stations toward the local ownership cap. The new rule states that joint sales agreements accounting for over fifteen percent of a television station's weekly advertising time in the same market will be counted towards ownership totals.[14] This change could force broadcasters to divest stations or dissolve agreements that are beneficial to bringing local content to smaller markets. In July, Representative Shimkus introduced H.R. 3148, legislation that would protect JSAs existing at the time the rules were put into effect and permit stations to continue using such agreements.

C. Minority Tax Certificate

Up until 1995, the FCC was able to use tax certificates to encourage minority ownership.[15] The FCC established a minority tax certificate program that allowed an owner of a broadcast or cable property to defer payment of Federal income taxes due from the sale of a qualified property to a minority purchaser. This was intended to encourage the investment in minority-controlled broadcast/cable entities by enabling minority purchasers to use the beneficial tax consequences to negotiate better terms. As a result, financial institutions would be more willing to provide access to capital for minority purchasers.

While the tax certificate program was in place – approximately fifteen years – minority purchasers acquired 288 radio stations, forty-three television stations, and thirty-one cable systems.[16] This increase stands in stark contrast to the mere forty stations out of 8,500 stations owned by minorities in 1978,[17] before the program was established. In fact, the program was successful enough to spur Congress to authorize the FCC to use the certificate to spur diversity in ownership of spectrum-based services.[18]

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[14] Report and Order, MB Docket No. 14-50, FCC 14-28 (Rel. Apr. 15, 2014)

[15] The minority tax certificate was based on section 1071 of the Internal Revenue Code, now repealed, which allowed a seller to defer the tax consequences of a transaction, if that transaction were impelled by the adoption of a new policy or change in existing policy at the FCC.

[16] Erwin G. Krasnow, Lisa M. Fowlkes, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death*, FED. COMMS. L. J., Vol. 51: Iss. 3, Article 8 (1999) ("*Minority Tax Certificate").*

[17] *Id.*

[18] *See Implementation of Section 309(j) of the Communications Act-Competitive Bidding,* Fifth Report and Order, 9 FCC Rcd 5532, paras. 142-47 (1994); *Implementation of Section 3090) of the Communications Act-Competitive Bidding*, Fourth Report and Order, 9 F.C.C.R. 2330, paras. 48-52 (1994).

The minority tax certificate program was ended by Congress, as an offset to the costs of restoring a healthcare tax deduction for farmers and self-employed workers.[19] Congress also was concerned that the tax certificate program would allow large companies to arbitrage the tax deferrals – permitting large companies to sell to small shell companies in order to take advantage of the tax break. Implemented properly, however, a minority tax certificate program could produce diversity in ownership and programming without triggering constitutional concerns that can accompany programs intended to benefit women and minorities.

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Grace Koh or Charlotte Savercool of the Committee staff at (202) 225-2927.

[19] *See Minority Tax Certificate* at 671.