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Revised Newspaper/Broadcast Cross-Ownership Rule

On February 4, 2008, the Federal Communications Commission ("FCC") released its Report and Order and its Order on Reconsideration ("Order") revising the newspaper/broadcast cross-ownership rule so as to allow a combination of a newspaper and one television station or one radio station in the 20 largest U.S. markets, subject to satisfaction of specific criteria.[1] The FCC declined to revise, relax or eliminate the other FCC ownership rules relating to the television or radio broadcast markets, and let stand the existing local television duopoly rule, the local radio ownership rules, the local radio-television cross-ownership rule and the dual network rule currently in place.[2]

The new newspaper/broadcast cross-ownership rule, for the first time since 1975, allows newspaper/broadcast cross-ownership in the largest 20 markets.[3] The FCC will presume a proposed combination of one daily newspaper and one broadcast station to be in the public interest if the market at issue is one of the top 20 markets, and, in the case of a television station, there will be still at least eight

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1 This memorandum updates the December 21, 2007 firm memorandum regarding the FCC's December 18, 2007 vote on the cross-ownership rules.

2 The Order concludes the 2006 Quadrennial Review of the FCC's broadcast ownership rules and addresses the issues on remand from the decision in *Prometheus Radio Project, et al. v. FCC,* 373 F.3d 372 *stay modified on rehearing*, No. 03-3388 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) ("*Prometheus"*) which reviewed the FCC's 2002 Biennial Review Order regarding broadcast ownership rules.

3 The FCC's study of Nielsen Designated Market Areas ("DMAs") provided the basis for the determination to eliminate the rule in the top 20 markets only, primarily because these markets have a higher concentration of major newspapers, as determined by circulation, compared to smaller markets, and because combinations in such markets raise fewer diversity concerns.

independently owned and operating major media voices[4] in such market following the transaction and the television station involved is not one of the top four stations in the market.

All other proposed newspaper/broadcast transactions would continue to carry the presumption of not being in the public interest, except that there are two limited circumstances in which the negative presumption would be reversed: 1) where the newspaper or broadcast outlet is "failed" or "failing"[5]; and 2) where the proposed combination results in a new source of the local news in a market and it would initiate at least seven hours of local news programming per week on a broadcast station that had not previously aired local news.

To overcome this negative presumption against other newspaper/broadcast combinations the FCC requires an applicant requesting an exception to demonstrate through clear and convincing evidence that the post-merger entity would 1) increase competition among independent news sources in the market and 2) increase diversity of independent news outlets (*e.g.*, through separate editorial and news coverage decisions). The FCC will weigh four criteria in making such determination: 1) the level of concentration in the market; 2) a showing that there would be a significant increase of local news; 3) a showing that there would be independent news judgment and separate news and editorial staff of the newspaper and broadcast units; and 4) the financial state of the broadcast and newspaper units, including the commitment to invest in a distressed newspaper's newsroom. The FCC will review such applications on a case-by-case basis.

<u>Further Background and Developments.</u>

The Order explains that in order to satisfy the FCC's longstanding policy goals of competition, diversity, and localism, the newspaper/broadcast cross-ownership rule — the only rule not modified in three decades — needed to be updated to reflect current market conditions. In 1975, newspapers and broadcast radio and television dominated the media, and the rules were designed to stop further consolidation to curb their unchallenged power. Today, the FCC concludes, newspapers, radio and television are faced with strong competition from a myriad of newer alternative media, and newspapers, in particu-

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4 Major media voices are defined as major newspapers and full-power television stations.

5 A "failed" newspaper/station has ceased circulation or been dark for at least four months immediately prior to the filing of the assignment or transfer of control application, or must be involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. A "failing" newspaper/station must show that 1) the station has had an all-day audience share of 4% or below, 2) the financial condition of the newspaper or broadcast station is poor, as demonstrated by a negative cash flow over the prior three years, and 3) the combination will benefit the public interest. The applicant must also show that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the newspaper/station and that a sale to any out-of-market buyer would result in an artificially depressed price.

lar, have been economically declining, with many failing and closing. The Order asserts that newspapers may better survive by efficiently sharing resources with co-owned electronic media.

The FCC declined to revise its other cross-ownership rules, while affirming those specific changes to the radio ownership rules (e.g., the definition of radio markets, attribution of joint sales agreements, etc.) made in 2002 that had been upheld in *Prometheus*.

The new change to the newspaper/broadcast ownership rules made by the Order remains controversial, as evidenced by legislation introduced in Congress to stop the new newspaper/broadcast ownership rules, and by statements by public interest groups expressing an intention to challenge the revised newspaper/broadcast ownership rules in court. The 3 to 2 vote by FCC Commissioners resulted in the issuance of separate statements, which include detailed justifications and criticisms of the decision-making process and the outcome.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to contact Kathy Strom at (202) 862-8944 or stromk@cgrdc.com or Erica Mijares at (212) 701-3860 or emijares@cahill.com.