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UNITED STATES

Are the FCC Media Ownership Rules Still Relevant in the Digital Age?

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In August 2016, then-Commissioner Ajit Pai of the Federal Communications Commission (Commission or FCC), wrote a 14 page dissent to the FCC's *2014 Quadrennial Second Report and Order (Second Report and Order, released 8/16)* addressing the 2010 and 2014 Quadrennial Regulatory Review of the FCC's Broadcast Media Ownership Rules.



Chérie R. Kiser

He opened with: 'The more things change the more they stay the same.' When French journalist Jean-Baptiste Alphonse Kerr first expressed that sentiment 167 years ago, he obviously didn't have the FCC's media ownership regulations in mind. But his words ring true as the Commission finally gets around to finishing the 2010 Quadrennial Review.

Pai's frustration was no doubt a product of both the perceived lack of changes adopted by the 2016 *Second Report and Order* after more than eight years of review, and the 13 year history of unresolved issues associated with the FCC's review of its media ownership rules generally. But now Commissioner Pai is Chairman Pai – and things may soon no longer be the same at all.

As background, the media ownership rules limit who may "own" a broadcast media outlet and how many such outlets may be "owned" by the same entity in any given market. They also impose restrictions on cross-ownership by one entity of different outlets such as newspapers and television stations in the same market. The restrictions can be triggered by actual ownership, exercise of control, or significant financial investment, including affiliated interests as defined by the FCC's attribution rules.

All transactions involving media outlets (applications for new licenses, mergers, acquisitions, and financial investments) need to be structured in a manner that complies with the FCC's requirements. Failure to comply, or the acquisition of additional assets, can require parties to enter a transaction to divest currently held ownership interests to satisfy the ownership limits set by the FCC's rules.

The FCC is required by statute to review its broadcast media ownership rules every four years. As then-Commissioner Pai explained in his dissent, Congress required this review because it "recognised that regulations designed to promote localism, diversity, competition, and investment in media could have exactly the opposite effect if they didn't keep up."

Accordingly, in its 1996 amendment to the Communications Act of 1934, Congress directed the FCC to review the media ownership rules every four years to determine whether they "are necessary in the public

interest as a result of competition.” Congress also directed the FCC to “repeal or modify any regulation [the Commission] determines to be no longer in the public interest.”

The FCC’s media ownership rules have been mired in litigation from the outset. Every review since 2002 has been challenged in court, with those challenges taking years to resolve. In April 2014, the FCC ended its 2010 Quadrennial Review, releasing a Further Notice of Proposed Rulemaking and Report and Order implementing new rules and seeking comment on proposed rule changes, and initiated the 2014 Quadrennial Review. Several parties challenged the FCC’s decision in federal court, and on 25 May 2016, the Third Circuit remanded the matter back to the FCC.

The FCC then released the *Second Report and Order* in August 2016 (the order that prompted Pai’s dissent.) It too was promptly appealed to the Third Circuit, where it is currently pending. The FCC has asked the court to hold that case in abeyance pending its ongoing proceeding to amend its ownership rules.

The *Second Report and Order* acknowledged that broadband, internet, and other traditional technological advances have changed the way in which many consumers access entertainment, news, and information programming. However, it concluded “traditional media outlets are still of vital importance to their local communities and essential to achieving the Commission’s goals of competition, localism, and viewpoint diversity.”

The Commission found this to be particularly true with respect to local news and public interest programming, with traditional media outlets continuing to serve as the primary sources on which consumers rely. Based on this analysis, the FCC concluded it was in the public interest to retain its existing rules with minor modifications.

Three months later there was a presidential election, and in 2017 President Trump appointed Commissioner Pai Chairman of the FCC. As noted in Pai’s dissent, he views the time since the media ownership rules were adopted and the “near-decade since the FCC last finished a ‘quadrennial’ review” as a period in which the media marketplace has been transformed by over-the-top providers, online video networks, and dramatically more competition. Shortly after he became Chairman, Pai set about implementing his vision.

Later in 2017, under the leadership of Chairman Pai, the FCC issued an *Order on Reconsideration* of the 2016 *Second Report and Order*, finding it had “manifestly failed to adopt any meaningful changes to [the media ownership rules] – and *effectively tightened* the Local television Ownership Rule.”

Relying on the same considerations as the original review - viewpoint diversity, localism and competition - the new FCC reached very different conclusions. It eliminated or greatly reduced many of the rules restricting the cross-ownership of media outlets and the number of outlets that may be owned by any one provider.

In keeping with the litigious response to prior FCC decisions addressing its media ownership rules, the FCC’s *Order on Reconsideration* was appealed to the District of Columbia Circuit by Free Press. Free Press asserts that the FCC’s “relaxations of its cross-ownership and local television rules, failure to consider the impact of its decisions on ownership diversity, failure to adopt a definition of ‘eligible entity,’ and continued failure to properly attribute ownership of stations that use Joint Sales Agreements and Shared Services Agreements are not supportable as a matter of fact or law.” The order was also appealed to the Third Circuit by *Prometheus Radio Project*.

Prometheus argues that the FCC ignores evidence in the record, misinterprets evidence, and fails to consider other important aspects in the record. Prometheus also asserts that the FCC’s proposed incubator program (a program designed to achieve greater diversity of media ownership) falls “far short of constituting action to address ownership diversity.” The Third Circuit has stayed the petitions for review in *Prometheus* until 07 August 2018, as the exact design of the FCC’s new incubator program remains subject to public comment through 09 April 2018.

Both the 2016 *Second Report and Order* and the *Order on Reconsideration* purport to apply the same standards in their evaluation of the FCC media ownership rules – diversity, competition, and localism – but they reach very different results. The standards and their measures were addressed in the FCC's 2003 *Report and Order* as longstanding goals that would be core agency objectives to guide its actions in regulating media ownership. They are broadly defined as follows:

Diversity covers viewpoint, program, outlet and minority and female ownership.

- **Viewpoint diversity** refers to the availability of media content reflecting a variety of perspectives based on the "basic tenant of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." There is deemed to be a positive correlation between viewpoints expressed and ownership of an outlet. The FCC has concluded that viewpoint diversity is most easily measured through news and public affairs programming.
- **Program diversity** refers to a variety of program formats and content.
- **Outlet diversity** requires that in any given market there are multiple independently-owned firms.
- **Minority and Female ownership diversity** speaks for itself and remains a goal of the FCC's media ownership policies.

Competition refers to the FCC's commitment to promoting competition by ensuring pro-competitive market structures. Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one firm or more exercises market power. The measurement of competition is focussed on the public interest, convenience, necessity of the public, not the individual broadcaster or media provider. Encouraging innovation enhances consumer welfare and promotes competition.

Localism refers to the Communications Act of 1934 goal of ensuring local television and radio licensees are responsive to the needs and interests of local communities. Localism is measured by the selection of programming responsive to local needs and interests, and local news and public affairs programming quantity and quality.

The FCC's *Order on Reconsideration* indicates that under the leadership of Chairman Pai the Commission no longer believes the restrictions on media ownership and markets contained in the old media ownership rules are necessary to promote these objectives.

It clearly reflects a belief that in the digital age, when so much of our news is received online via national and international providers, many restrictions on local media markets are akin to seeking to regulate the horse and buggy industry in the age of the automobile and jet airplane.

What should we make of this move to greatly relax the media ownership rules? At face value, the new rules appear to allow far greater concentration of media power in a smaller number of providers, both locally and nationwide. As the appeals wind their way through the federal courts, the true measure of the new rules may be tested by the FCC's and the Department of Justice's review of the merger application of Sinclair Broadcasting Group, Inc. and Tribune Media Co., which seeks to apply the new rules.

The proposed merger has been characterised as the largest in the history of local television, combining 42 stations in New York City, Los Angeles, Chicago, Philadelphia, Dallas, Denver, and other top 20 markets, with 173 other stations that include major markets such as Baltimore, Minneapolis, Seattle, St. Louis, District of Columbia, Ohio, Pennsylvania, and Wisconsin.

The application of the revised rules and the related analysis of diversity, competition, and localism to the Sinclair-Tribune transaction should prove interesting, and may shed light on some of the many issues raised by the FCC's actions, such as:

- Whether economies of scale will result in diverse viewpoints or provide more robust programming for local viewers.

- Whether more robust programming results in localism.
- Whether the lack of access to high-speed internet in rural areas of America or the digital divide in America generally suggests the Commission's relaxed media ownership rules may not be supported throughout the country uniformly by robust competition in all local markets.

Answers to these and many other questions are likely to require the FCC to engage in greater scrutiny to assess the public interest and consumer welfare. Despite Chairman Pai's desire that things no longer stay the same, true change is likely to come about slowly as these issues work their way through the courts.

Biography

Chérie R. Kiser leads the Cahill Gordon & Reindel LLP communications practice group and serves as managing partner of Cahill's Washington, D.C. office. She represents leading telecommunications, video, and data communications providers in all aspects of their businesses. Her clients include cable companies, competitive local exchange carriers, internet, VoIP, Cloud, and integrated service providers relying on broadband, wireline and wireless networks. She acts as regulatory counsel for clients before the Federal Communications Commission and state regulatory agencies, represents clients in complex litigation involving regulatory, contract, and taxation issues. Ms Kiser also acts as corporate regulatory counsel in connection with initial public offerings, mergers and acquisitions, debt issuances and financing, and other transactions. She provides advice and representation concerning state and federal legislative actions affecting communications and related industries. In 2015 she was named one of the 75 "Outstanding Women Lawyers" in the United States by *The National Law Journal*. Special thanks to **Emily B. V. Harrison**, Associate, Cahill Gordon & Reindel, LLP, for her research in connection with this article.

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