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FCC: Media Regulation in the Biden Era

What will a Biden FCC mean for the broadcasters,
social media platforms; and big tech?

Chairs: Kathleen Kirby, Wiley Rein; Mark Prak, Brooks Pierce

Media Ownership/SCOTUS victory; 2018 Quadrennial Record Refresh; Affiliates/Networks Sparring Over Dual Network Rule; NAB TV Duopoly Ask;

SDNY’s Locast decision; FCC Chairmanship and Commissioner Nominations; Sec. 230 and more.

**COMMUNICATIONS LAW Media Ownership**Kathleen A. Kirby Ari S. Meltzer Wiley Rein LLP
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<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Communications-Law-MLRC-Excerpts-4837-4965-3499-v.1.pdf>

Media Ownership

* Twenty-five years have passed since the Telecommunications Act of 1996 (the “1996 Telecom Act”)— with its requirement that the Commission periodically review its media ownership rules in light of changes to the competitive marketplace—became law. Although in the past quarter-century we have witnessed transformative alterations to the media landscape, including a proliferation of alternatives to the so-called “traditional” media that has forever altered media consumption habits, the near-term fate of the media ownership rules still remains in question.
* Under the Pai administration, the Commission took steps to relax or remove certain limitations on the ownership of broadcast stations, including the local and national television ownership rules, the newspaper/broadcast cross-ownership rule, and the radio/television cross-ownership rule. Ensuing litigation culminated in the Supreme Court’s decision in FCC v. Prometheus Radio Project upholding many of those deregulatory changes. Broadcasters, however, remain subject to limitations on local and national television station ownership and local radio ownership, among others, while their multi-media competitors are unhampered by analogous regulation. Now again under Democratic leadership, the Commission still has not concluded its last review of the media ownership rules—initiated in 2018 —and so it has sought renewed comment on media ownership matters. The agency is obligated to conduct another review in 2022.
* In previous Democrat-led administrations, the media ownership rules remained virtually intact and were, if anything, tightened on the margins. And each of the Commission’s review proceedings has been subject to legal challenge by either industry parties seeking deregulatory changes or consumer interest organizations opposed to media consolidation, with litigation concentrated in the U.S. Court of Appeals for the Third Circuit between 2003 and this year’s Supreme Court decision.
* In those agency and judicial proceedings, representatives of the broadcast and newspaper publishing industries have taken the position that the FCC’s ownership rules are overly burdensome in today’s highly competitive and increasingly challenging media marketplace. Accordingly, these parties maintain that the rules either should be eliminated or relaxed significantly, and that the agency has acted unlawfully when it has failed to deregulate. On the other hand, a number of consumer interest organizations have maintained that strict prohibitions are necessary to preserve the amount, caliber, and diversity of viewpoints reflected in local news and other programming and have consistently challenged deregulatory decisions through court appeals. Although these groups found a sympathetic forum in a three-judge panel of the Third Circuit, this year’s Supreme Court decision concluded that the FCC reasonably determined to eliminate the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule and to relax the local television ownership rule and, accordingly, reversed the Third Circuit’s most recent decision that faulted the FCC for adopting modest deregulatory changes. Moreover, although the Third Circuit panel had purported to retain jurisdiction over the agency’s media ownership rule review proceedings since 2004, its judgment following its most recent Prometheus ruling makes clear that neither the court nor that panel any longer retain jurisdiction.
* The discussion below explains the legal framework for the FCC’s broadcast ownership reviews, provides background of the current proceeding, and describes the present status of each of the broadcast ownership rules following the FCC’s recent orders and the Supreme Court’s decision in Prometheus. It then discusses issues related to the National Television Ownership Cap and UHF Discount and the possibility of future changes.

US Supreme Court Decision in FCC v. Promethus Radio Project
<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Prometheus.pdf>

Syllabus

Held: The FCC’s decision to repeal or modify the three ownership rules was not arbitrary and capricious for purposes of the APA. In analyzing whether to repeal or modify its existing ownership rules, the FCC con- sidered the record evidence and reasonably concluded that the three ownership rules at issue were no longer necessary to serve the agency’s public interest goals of competition, localism, and viewpoint diversity, and that the rule changes were not likely to harm minority and female ownership.

In challenging the FCC’s order, Prometheus argues that the Com- mission’s assessment of the likely impact of the rule changes on mi- nority and female ownership rested on flawed data. But the FCC acknowledged the gaps in the data sets it relied on, and noted that, despite its repeated requests for additional data, it had received no countervailing evidence suggesting that changing the three ownership rules was likely to harm minority and female ownership. Prometheus also asserts that the FCC ignored two studies submitted by a commenter that purported to show that past relaxations of the ownership rules had led to decreases in minority and female ownership levels. But the record demonstrates that the FCC considered those studies and simply interpreted them differently.

In assessing the effects of the rule changes on minority and female ownership, the FCC did not have perfect empirical or statistical data. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. And nothing in the Telecommunications Act requires the FCC to conduct such studies before exercising its discretion under Section 202(h). In light of the sparse record on minority and female ownership and the FCC’s findings with respect to competition, localism, and view- point diversity, the Court cannot say that the agency’s decision to re- peal or modify the ownership rules fell outside the zone of reasonable- ness for purposes of the APA

**Quadrennial Regulatory Review**

**Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules.
Comments of National Association of Broadcasters**<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/AcroBrwEx_Quadrennial_Ownership_Update_Comments_2021.pdf_ADW5926.pdf>

When the Commission first adopted rules prohibiting common ownership of more than one AM, FM or television station serving substantially the same area, Franklin D. Roosevelt occupied the White House. Now in the third decade of the 21st century, FCC rules still prevent ownership of more than one TV station in small markets and significantly restrict local common ownership of AM and FM stations separately by service and in total. The National Association of Broadcasters (NAB)1 and many radio and TV broadcasters have previously demonstrated the absurdity of imposing analog-era ownership restrictions in a media and advertising marketplace completely upended by digital technology.

In response to the Public Notice seeking to update the record in this quadrennial review,2 NAB provides additional information and data showing the substantial and growing pressures on ad-supported broadcast stations in a radically altered competitive landscape and the resulting need to modernize the FCC’s rules. As documented below, marketplace changes since early 2019, including but not limited to the COVID-19 pandemic and recession, have made reform of the local ownership rules more urgent than ever.

To begin, NAB reminds the FCC that the broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”3 Indeed, to fulfill Congress’s intent in the Communications Act and subsequent legislation, the FCC must ensure that its broadcast regulatory framework, including its ownership rules, enable radio and TV stations to operate as viable private enterprises in a competitive market and to effectively serve the public interest and their local communities. As Congress found in a much less competitive marketplace, permitting “common ownership of stations will promote the public interest” and “increas[e] competition and diversity.”4

The FCC’s long-standing ownership restrictions in fact have failed for decades

to meaningfully promote diverse ownership of broadcast stations. The primary cause of low levels of new entry and minority/female ownership is lack of access to capital, which structural ownership rules do not address. But even if capital were more accessible, the FCC’s continued insistence on heavily regulating broadcasters – including through outdated ownership rules – is a clear disincentive to investment and new entry. In a world where investors and new entrants have countless other media and communications options, the Commission itself is a major impediment to increased diversity in the broadcast industry.

Beyond failing to promote ownership diversity, the FCC’s rules also impede localism. Congress has recognized the current competitive threat to local journalism, and NAB and other parties have shown that the giant technology platforms that dominate both content discovery and digital advertising imperil the ability of news providers to reach online audiences with their local content and to derive ad revenue from that content. Given this increasing duress on stations and their local news operations, the FCC must allow broadcasters to leverage the strong economies of scale in local news production, especially in smaller markets with limited advertising bases. Indeed, a recent FCC study concluded that most TV markets are likely unable to sustain four or more independent news operations.

Not only should the FCC focus here on the competitive viability of local stations as a matter of sound policy, but Section 202(h) of the 1996 Telecommunications Act also requires the FCC to focus on competition as the key consideration in its ownership reviews. As NAB explains, the statutory text, structure, purpose and history all show Section 202(h) to be a competition-based, deregulatory tool. Those straining to interpret Section 202(h) as non-deregulatory downplay, if not virtually ignore, the statutory phrase “necessary in the public interest as the result of competition,” disregard Congress’s manifest deregulatory intent, read statutory terms out of their context and slight the statutory structure.

In assessing competition, the FCC can no longer maintain the fiction that broadcast stations compete only against other broadcast stations. The record compiled in 2019 showed that broadcasters compete against myriad traditional and digital platforms for both audiences and ad revenue. Earlier this year, the Department of Justice submitted additional evidence, including a study by NERA Economic Consulting, which found that digital platforms compete with local TV broadcasters for local ad dollars and that the relevant market for analyzing local TV station combinations should include advertising on digital platforms. This study provides yet more evidence that the FCC cannot justify its ownership rules by acting as though broadcast stations are still the only relevant electronic outlets, as in the days of President Roosevelt’s famous fireside chats. In fact, the FCC recently found that “three categories of participants” – MVPDs, online video providers and broadcast TV stations – “have defined the [video] market for the past decade” and continue to dominate it.5

Recent events and marketplace developments, moreover, have only exacerbated broadcasters’ economic challenges and notably accelerated consumer and advertiser use of digital platforms. As Deloitte concluded in its 2020 digital media trends report, “the COIVD- 19 story isn’t so much ‘before and after’ as it is ‘before and faster.’”6

Since the Commission began this review, consumer adoption of digital devices that enable access to virtually unlimited audio and video content 24/7/365 has continued apace. Consumers are acquiring more smart devices, from phones to watches to speakers, and record numbers are now streaming audio (and video), paying for subscription music services and listening to podcasts. These trends have further fragmented the formerly mass audience for AM/FM broadcasting and reduced listening to terrestrial radio. The pandemic’s shock to the advertising market also harmed local radio stations. The radio industry’s experience following the pandemic recession is projected to mirror radio stations’ struggles after the 2008-2009 recession – a modest recovery but not again reaching the levels of advertising revenue earned prior to the recession.

Similarly, “[t]he past year has categorically shifted the television viewing landscape.”7 Consumers are acquiring more internet-connected TV devices, smart TVs and mobile devices, and using them to spend more time viewing increased numbers of streaming services, both subscription and ad-supported, the latter of which competes directly with broadcast TV for advertising. In this fragmented sea of video (and audio) choice, the formerly mass audience for traditional broadcast TV has declined in size, diverted to cable/satellite, over 300 video streaming services, video games and more. Due to these audience trends and the increasing dominance of digital platforms in the ad market, local TV stations’ ad revenues have dropped significantly in real terms.

Given the record evidence and Section 202(h)’s mandate, the FCC must conclude that its local ownership rules are no longer necessary in the public interest as the result of competition. NAB accordingly urges the FCC to reform its local radio and TV rules as we proposed in 2019. For terrestrial radio to remain a competitive and meaningful provider of audio programming, the Commission should: (1) eliminate caps on AM ownership in all markets; (2) permit a single entity to own up to eight commercial FM stations in Nielsen Audio markets 1-75 (with the opportunity to own up to ten FMs by successfully participating in the FCC’s incubator program); and (3) remove restrictions on FM ownership in Nielsen markets 76 and lower and in unrated areas. This proposal reflects the challenging competitive position of the local radio industry overall and accounts for the economic struggles of smaller-market stations and AM stations in particular.

Also as NAB earlier proposed, the FCC should no longer retain the per se restrictions that ban combinations among top-four rated TV stations, regardless of their audience or advertising shares, and that prevent ownership of more than two stations in all markets, regardless of their competitive positions. This across-the-board approach irrationally ignores actual competitive conditions in disparate local markets. And as a previous study showed, it is a myth that top-four stations in all-sized markets occupy positions of competitive power.

The FCC should act now to fulfill both Section 202(h)’s deregulatory mandate, and Congress’s even longer-standing goal of a competitively viable broadcast service capable of serving local communities, by modernizing its local radio and TV ownership limits. The

American public cannot afford for the FCC to remain asleep at the regulatory wheel.

**Review of the Commission’s Broadcast Ownership Rules and Other Rules.
Comments of ViacomCBS Inc., Fox Corporation and NBCUniversal Media**<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Final-Network-Commenters-Quadrennial-Review-Comments-9-2-2021.pdf>

Specifically, in response to the request for “information regarding the industry’s evolution since early 2019 and its current trajectory,” the Network Commenters document the many reasons that the Dual Network Rule decidedly is no longer “necessary in the public interest as the result of competition.”

**Reply Comments of ABC and NBC Affiliates**
<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/ABC-and-NBC-Television-Affiliates-2018-Quadrennial-Regulatory-Review.pdf>

**Quadrennial Regulatory Review -Chart of Comments**

[**https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Affiliates-2018-Quadrennial-Review-Record-Refresh-Comment-Synthesis-Sept.-2021.pdf**](https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Affiliates-2018-Quadrennial-Review-Record-Refresh-Comment-Synthesis-Sept.-2021.pdf)

**FCC Public Notice Applications**

<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Public-Notice-__-Licensing-and-Management-System-Admin-__-FCC.pdf>

**LOCAST DECISION**

**Court Grants Summary Judgment to Broadcaster Plaintiffs**
<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Locast.2021.08.31-Judge-Stanton-order-granting-partial-summary-judgment-for-plaintiffs.pdf>

The Locast service [] captures over-the-air ("OTA") broadcast signals and retransmits them over the internet, enabling viewers to stream live television on their preferred internet-connected viewing device . The signals include copyrighted transmissions from plaintiffs ' broadcast stations. Locast has not paid for a license or obtained plaintiff's consent to retransmit those programs….

Locast was created in order to provide Americans free access to local, free television which, for technical and geographic reasons, they are unable to access without commercial Pay-TV services (provided by multichannel video programming distributors, or "MVPDS") or other subscription-based internet services such as YouTube TV and Hulu+ Live TV.

Locast’s retransmissions are available online to any registered user in the designated geographic area, even those who can access the original OTA signal using OTA television antennas. Locast recipients have free access to the full repertory of news and entertainment channels; but non- paying users' programming is interrupted after every fifteen minutes of watching a single channel with a fifteen - second video requesting donations, and viewers then lose time re - acquiring the program….

Summary judgment is appropriate with respect to the requirement that defendants ' service is conducted". . without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service."

Based on the undisputed facts, it is clear that the Locast service is not offered without charges other than those "necessary to defray the actual and reasonable costs of maintaining and operating" its service.

**SECTION 230 & OTHER TECHNOLOGY ISSUES**

**Comments of Consumer Technology Association on Sec. 230**
<https://live-medialaw.pantheonsite.io/wp-content/uploads/2021/09/Comments-of-CTA-RM-11862.pdf>

* The unique balance of protections afforded by Section 230 has enabled the United States to be the global leader in internet innovation. In the United States, with a few important exceptions, internet companies are not subject to countless lawsuits and legal liability for allegedly unlawful statements made by their users or other third parties, or for the companies’ attempts to remove objectionable content from their platforms. This deliberate design has catalyzed enormous growth and innovation in the internet ecosystem. It differentiates the United States from other countries, like China, that suppress internet speech and exercise heavy-handed control over the online platforms that enable it. Section 230’s protections remain vital, both for large providers with tens of millions of users and for startups building the internet platforms of the future, to continue providing services to consumers and to maintain America’s leading role in the innovation economy.