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FCC Media Ownership Rules: Issues for Congress

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Summary

The Federal Communications Commission is reviewing all of its media ownership rules both to meet the requirement in the 1996 Telecommunications Act to perform a biennial review and to be responsive to Court rulings that the Commission had failed to provide sufficient justification for specific thresholds incorporated in two of the rules. The Commission is expected to adopt an order on June 2, 2003 that will retain, modify, or repeal each rule based on a determination of whether the rule continues to serve its diversity, competition, and localism goals.

The media ownership rules strongly influence both the structure of the media sector and the relative negotiating power of individual companies and entire segments of the sector. Therefore the FCC proceeding has gained a lot of attention from companies, trade associations, and individuals concerned about the media.

The media ownership rules that have attracted the greatest attention are:

(1) The National Television Ownership Rule that restricts a broadcast network from owning and operating local broadcast stations that reach, in total, more than 35 percent of U.S. television households.

(2) The 50 percent “UHF discount” used to calculate market share for the National Television Ownership Rule, by which a UHF station that, for example, reaches 2 million TV households would be measured as if it reaches only 1 million.

(3) The Newspaper-Broadcast Cross-Ownership Rule that prohibits common ownership of a full-service broadcast station and a daily newspaper in the same market.

(4) The Local Television Multiple Ownership Rule (sometimes referred to as the “TV Duopoly” Rule) that restricts an entity from owning two television stations in the same market unless at least one of the stations is not among the four highest-ranked stations and there are at least 8 independently owned and operated commercial or non-commercial full power stations in the market.

(5) The Radio/Television Cross-Ownership Rule that limits the number of commercial radio and television stations one entity may own in a market.

(6) The Local Radio Ownership and Radio Market Definition Rules that limit the number of radio stations one entity may own in a market.

A number of bills and resolutions have been introduced in the 108th Congress that reflect a range of positions on many of these rules. These include H.R. 1035, which would increase the national television ownership cap to 45 percent, codify the 50 percent UHF discount, eliminate the newspaper-broadcast cross-ownership rule, and allow for ownership of two TV stations in markets with 6 stations; H.R. 2052 and S. 1046, which would explicitly keep the national television ownership at 35 percent; H.R. 1763 and S. 221, which have a number of provisions to tighten up the radio multiple ownership rules; and H.Res. 218, which among other things would make it the sense of the House that the FCC should not weaken any current media ownership rules.

This report will be updated as events warrant.

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FCC Media Ownership Rules: Issues for Congress

The Federal Communications Commission's media ownership rules are currently under review and the FCC is expected to make decisions about their retention, modification, or repeal on June 2, 2003.[1] Because of the potential for far-reaching changes to a number of long-standing rules (including the current 35% national television ownership cap, prohibition on cross-ownership of newspapers and broadcast stations in a market, limits to multiple station ownership in the same market, limits on cross-ownership of radio and television in a market, and limits to radio station ownership in the same market), a number of bills have been introduced in the 108th Congress that reflect a range of positions on each of these issues. This report analyzes each of the major areas that may change either as a result of action by the FCC or as a result of congressional action. The various positions in the debate also are summarized.

Background

Pursuant to Section 202(h) of the Telecommunication Act of 1996,[2] the FCC must conduct a biennial review of its broadcast ownership rules and repeal or modify any regulation it determines to be no longer in the public interest. In addition, the Commission must revisit several of these rules as a result of Court rulings that the Commission had failed to provide sufficient justification for specific thresholds incorporated into the rules. The Commission is expected to adopt an order retaining, modifying, or repealing each of these rules on June 2, 2003.

The 2002 Biennial Review was initiated on September 12, 2002;[3] review of the Commission's broadcast-newspaper cross-ownership rule and waiver policy was initiated on September 13, 2001;[4] and review of the Commission's local radio

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[1] *See, e.g.*, Communications Daily, Friday, May 2, 2003, at p. 1: "[FCC Chairman] Powell said the date for the vote — June 2 — essentially was set in stone."

[2] Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56, § 202(h).

[3] Notice of Proposed Rule Making, *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, released September 23, 2002.

[4] Order and Notice of Proposed Rule Making, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235 and *Newspaper/Radio Cross-Ownership Waiver Policy*, MB Docket No. 96-197, September 20, 2001.

ownership rule and radio market definition rule was initiated on November 8, 2001.[5] The FCC has sought comment on whether each specific rule continues to serve the Commission's goals of diversity, competition, and localism — and if the rule serves some purposes while disserving others, whether the balance of the effects argue for maintaining, modifying, or eliminating the rule.[6]

Partly as a result of the court remands, the FCC has been reviewing the advantages and disadvantages of implementing rules that incorporate specific market share or number of competitor threshold levels that are applicable across the board to all entities vs. implementing some sort of flexible, yet quantifiable "diversity index" that would allow for case-by-case reviews that more readily take into account market-specific or company-specific characteristics. It is possible that a "hybrid" rule could be developed that continues to employ threshold levels, but calculates those levels using a weighting methodology based on a diversity index.

As explained below, several bills and a resolution have been introduced relating to a number of these ownership rules.

National Ownership Rules

National Television Ownership (The 35% Cap)

The Commission's National Television Ownership Rule prohibits an entity from owning multiple television stations "which have an aggregate national audience reach exceeding thirty-five (35) percent."[7] In practice, this rule applies to the major broadcast networks, limiting them to ownership and operation of local broadcast stations that reach, in total, 35 percent of U.S. television households. The rule codifies statutory language from the 1996 Telecommunications Act that sets the 35 percent cap.[8] In 2002, the United States Court of Appeals for the District of Columbia Circuit remanded the rule to the Commission on the grounds that the Commission had failed to provide a justification for the 35 percent level.[9]

Under the rule, when calculating the total audience reached by an entity's stations, audiences of UHF stations are given only half-weight. That is, if an entity owns a UHF station with an audience of 2 million households, that audience would only be counted as 1 million households when calculating the entity's market reach.

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[5] Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Market,* MM Docket No. 01-317 and *Definition of Radio Markets,* MM Docket No. 00-244, released November 9, 2001.

[6] *See e.g.,* 67 FR 65751, ¶ 75.

[7] 47 C.F.R. 73.3555(e)(1).

[8] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, § 202(c)(1)(B).

[9] *See* Fox Television Stations, Inc. v. Federal Communications Commission, 280 F.3rd 1027 (DC Cir. 2002).

This is sometimes known as the "UHF discount." This discount was implemented because UHF signals tend to have a smaller geographic reach than, and are of inferior quality to, VHF signals.

The proposals of various parties have ranged from retaining the rule, to raising the cap to 45 percent, to replacing a numerical cap with a "diversity index" based on antitrust models, to eliminating the cap altogether.

The arguments of proponents of retaining the 35 percent rule include:

(1) locally owned and operated stations are more likely to be responsive to local needs and interests than network owned and operated stations (for example, they are more likely to pre-empt network programming when non-network programming of special local interest, such as local sports events, is available or when network programming does not meet community standards);

(2) if there are fewer independently owned and operated affiliates, they will be under much greater pressure from the networks not to pre-empt network programming even if programming of special local interest is available;

(3) some broadcast networks that also own cable networks have refused to give local cable systems permission to retransmit their local broadcast stations' signals unless they also carried the integrated company's cable networks; if these broadcast networks could own and operate additional local broadcast stations, they could extend this practice to those stations.

The arguments of proponents of raising or eliminating the 35 percent rule include:

(1) it does not make sense to limit the national ownership reach of broadcast entities in light of cable and satellite alternatives available to the viewing public;

(2) empirical evidence submitted by broadcast networks in the FCC proceeding shows that network owned and operated stations provide more local news programming than independently owned and operated stations;

(3) network owned and operated stations continue to be run by local station managers who must be responsive to local demands to be successful;

(4) broadcast networks are less profitable than local broadcast stations, so to help broadcast networks compete against cable networks for rights to expensive sports programming (and keep such programming free to the public), the networks must be able to own and operate more local broadcast stations.

Proponents of a diversity index argue that approach will allow for review on a case-by-case basis, analogous to case-by-case antitrust reviews, rather than relying on a one-size-fits-all cap. But opponents of a diversity index claim it will be difficult to construct an objective index, and once constructed it will be difficult to administer, adding uncertainty to players in the marketplace.

Some parties also have called for elimination of the UHF discount, especially if the 35 percent cap is increased. They claim that the UHF discount in effect raises the current cap to as high as 70 percent and if retained while the cap was increased to 45 percent would raise the effective cap to as high as 90 percent. The provision in the Balanced Budget Act of 1997 relating to digital television requires all television stations that currently broadcast over the VHF band to migrate to the UHF band by December 31, 2006 unless certain conditions are not met. If those conditions are met, all stations will then be UHF stations. Parties for retention of the UHF discount argue that UHF signals remain weaker than VHF stations and thus reach fewer households.

Several bills have been introduced in the 108th Congress that address the National Television Ownership Rule. Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would amend the Telecommunications Act of 1996 by raising the ownership cap to 45 percent and by incorporating the 50 percent UHF discount. Rep. Burr has introduced the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003 (H.R. 2052) that would explicitly keep the ownership cap at 35 percent. Sen. Stevens has introduced an identical bill (S. 1046).

Dual Network Ownership

As currently constructed, this rule prohibits the four major networks — ABC, CBS, Fox, and NBC — from merging with one another.[10] In 2001, as part of its previous biennial review of media ownership rules, the FCC modified this rule to allow the four major networks to own, operate, maintain, or control broadcast networks other than the four majors. With this change, Viacom, the owner of CBS, was allowed to purchase UPN, and NBC was able to purchase Telemundo, the second largest Spanish-language network in the U.S.

Although the Dual Network Ownership rule is formally included in the current biennial review, and the Commission has sought comment on the impact on localism, diversity, and competition of allowing the four major networks to merge, there is no expectation that the Commission currently is considering any changes in this rule.

[10] The rule "permits broadcast networks to provide multiple program streams (program networks) simultaneously within local markets, and prohibits only a merger between or among [the four major networks]." 67 FR 65751 at ¶ 156.

Local Ownership Rules

Cross-Ownership of Broadcast Stations and Newspapers

The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[11] When it adopted the rule in 1975, the Commission not only prohibited future newspaper/broadcast combinations, but also required existing combinations in highly concentrated markets to divest holdings to come into compliance within five years. The Commission grandfathered combinations in less concentrated markets, so long as the parties to the combination remained the same. The Commission adopted a policy of waiving the rule, for existing or future combinations, if

(1) a combination could not sell a station;
(2) a combination could not sell a station except at an artificially depressed price;
(3) separate ownership and operation of a newspaper and a station could not be supported in a locality; or
(4) for whatever reason, the purposes of the rule would be disserved.[12]

There are more than 70 grandfathered newspaper-broadcast combinations. The Commission also has granted waivers since adopting the rule.

The proposals of various parties have ranged from retaining the rule, to allowing cross-ownerships in larger markets only, to replacing the rule with a "diversity index" that would identify on a case-by-case basis whether a merger might reduce independent voices in a particular market, to eliminating the rule.

The arguments of proponents of retaining the rule include:

(1) any cross-ownership reduces the number of independent voices in the community, especially in small markets with only a small number of voices;

(2) the merged entities, facing less competition for local news service and in the name of cost savings, will reduce the total amount of resources going to produce local news in the community;

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[11] 47 C.F.R. § 73.3555(d). For AM radio stations, the service contour is the 2mV/m contour, *id.* § 73.3555(d)(1); for FM radio stations, the service contour is the 1mV/m contour, *id.* § 73.3555(d)(2); for TV stations, the service contour is the Grade A contour, *id.* § 73.3555(d)(3). A daily newspaper is defined to be one that is published in the English language four or more times per week. *Id.* § 73555 n.6.

[12] Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, *Second Report & Order,* 50 FCC 2d at 1085 (1975).

(3) especially given that there are few communities with multiple newspapers, cross-ownership will give the merged company a competitive advantage in the advertising market over a broadcast-only competitor.

The arguments of proponents of modifying or eliminating the rule include:

(1) in many cases, local broadcasters cannot afford to commit any resources to local news, or can only provide minimal news coverage, but by sharing the newspaper's resources they could expand local broadcast news coverage;

(2) two studies in the record in the proceeding, one commissioned by the FCC and one by the Project for Excellence in Journalism at Columbia University, concluded that the broadcast stations of grandfathered and waived combinations provide more and better local news coverage than non-combined stations;

(3) newspapers and broadcast stations in combinations maintain independent editorial voices.

Proponents of a diversity index claim that such an index can appropriately weight the diversity impact of the individual broadcast stations and newspapers in a specific market to make informed case-by-case decisions about a proposed merger. But opponents of a diversity index claim it would be difficult to construct an objective index, and once constructed it would be difficult to administer, adding uncertainty to players in the marketplace.

This represents a situation where economic and diversity goals can be in strong conflict. On one hand, it is in small markets, where resources are limited, that broadcasters are most likely to lack the wherewithal to produce local news programming on their own, so that cross-ownership might allow for a broadcast news voice that would not otherwise exist. On the other hand, it is exactly in these small markets that there are very few voices to begin with, so that cross-ownership might reduce what little diversity already exists.

Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would direct the FCC to eliminate its newspaper-broadcasting cross-ownership rule.

Local Television Multiple Ownership

Under this rule, sometimes referred to as the "TV duopoly" rule, an entity may own two television stations in the same Designated Market Area (DMA) only if the following requirements are met: either

(1) the Grade B contours[13] of the stations do not overlap, or

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[13] The Grade B contours (which represent the required field strength in dB above one (continued...)

(2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination were consummated.[14] The latter is sometimes referred to as the "top four ranked/eight voices test."

In the 1996 Telecommunications Act, Congress directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[15] In 1999, the Commission performed a review and modified the rule. In 2002, that local ownership rule was remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit,[16] which ruled that the Commission failed to justify why it only included TV stations among the voices in the voice test, excluding other media.

The proposals of various parties have ranged from retaining the rule, to implementing a "10/10 plan" (that would allow pairs in smaller markets by permitting stations with a 10 audience share or greater to pair with ones with below 10 shares; allow case-by-case waivers for combinations that do not meet the 10/10 criteria; allow "triopolies" in big markets among bottom-rated and financially struggling stations; and count cable and satellite TV toward audience shares), to eliminating the eight voices test but retaining the prohibition on pairs among the top-four stations, to permitting combinations in any markets as long as the collective audience of the combination is 30 percent or less and the combination passes Department of Justice/Federal Trade Commission horizontal merger guidelines, to allowing combinations anywhere unless all local stations would end with one owner, to complete elimination of the rule.

The proponents of retaining the rule argue that the rule safeguards the number of independent local news voices in the market, given that broadcast television is the primary source of local news for Americans; that cable and satellite companies provide virtually no local news; and that radio news is not a substitute for television news. They also claim that the rule protects against a combination attaining market power in the local television advertising market.

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[13] (...continued)
micro-volt per meter, or dB/mv/m) are defined in Section 73.683 of the Commission's rules for each television channel, as follows:

Channels 2-6 .... 47 dB/µv/m
Channels 7-13 .... 56 dB/µv/m
Channels 14-69 .... 64 dB/µv/m

[14] 47 C.F.R. 73.3555(b); *Local TV Ownership Report and Order,* 14 FCC Rcd at 12907-08, ¶ 8.

[15] 1996 Act, § 202(c)(2).

[16] *See* Sinclair Broadcast Group, Inc. v. Federal Communications Commission, 284 F.3rd 148 (DC Cir. 2002)

The proponents of modifying or eliminating the rule argue that radio stations and some local cable systems provide alternative local voices that should provide the basis for loosening the current constraints. They also argue that the local advertising market is broader than just television advertising — it includes radio and other media advertising — and thus that the current rule is not needed to safeguard against market power in the local advertising market.

The proponents of a diversity index claim that a diversity index can accurately weight the diversity impact of the individual television stations in a specific market to make informed case-by-case decisions about a proposed merger. But opponents of a diversity index claim it would be difficult to construct an objective index, and once constructed it would be difficult to administer, adding uncertainty to players in the marketplace.

Rep. Stearns has introduced the Broadcast Ownership for the 21st Century Act (H.R. 1035) that would direct the FCC to revise its local television multiple ownership rule to allow an entity to own, operate, or control two TV stations in the same market if the grade B contours of such stations: (1) do not overlap, or (2) do overlap and at least six independent broadcast or cable television voices would remain in the market after transfer of the license of the station in question.

Radio/Television Cross-Ownership

The radio/TV cross-ownership rule limits the number of commercial radio and television stations one entity may own in a market. The rule allows common ownership of at least one television station and one radio station in a market. In larger markets, a single entity may own additional radio stations depending on the number of other voices in the market. The rule generally allows common ownership of one or two television stations and up to six radio stations in any market where at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market where at least ten independent "voices" would remain post-combination; and one TV and one radio station notwithstanding the number of independent "voices" in the market. For this rule, a "voice" includes independently owned and operating same-market, commercial and non-commercial broadcast TV, radio stations, independently owned daily newspapers of a certain circulation, and cable systems providing generally available service to television households in a DMA, provided that all cable systems within the DMA are counted as a single voice.[17] The rule was initially implemented in 1970. The Commission adopted a presumptive waiver policy to permit certain radio/TV combinations in 1989, and relaxed the rule to its current form in 1999.

The proposals of various parties have ranged from retaining the rule, to replacing the voice test with an advertising-revenue test, to eliminating the rule.

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[17] 47 C.F. R. § 73.3555(c). If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12953, ¶ 113.

The proponents of retaining the rule argue that the rule safeguards the number of independent local voices in the market and that the voice definition in the rule includes all the significant local voices in a market — that satellite and Internet voices are not local and therefore do not contribute to local diversity. They also claim that the rule protects against a combination attaining market power in the overall local advertising market.

The proponents of modifying or eliminating the rule argue that satellite and Internet services provide alternative local voices that should provide the basis for loosening the current constraints. They also argue that the local advertising market is broader than just television and radio advertising — it includes other media advertising — and thus that the current rule is not needed to safeguard against market power in the local advertising market.

The proponents of a diversity index claim that a diversity index can accurately weight the diversity impact of the individual television and radio stations in a specific market to make informed case-by-case decisions about a proposed merger. But opponents of a diversity index claim it would be difficult to construct an objective index, and once constructed it would be difficult to administer, adding uncertainty to players in the marketplace.

Local Radio Ownership and Radio Market Definition

The FCC's current local radio ownership rule codifies the language in Section 202(b)(1) of the 1996 Telecommunications Act, entitled "Local Radio Diversity — Applicable Caps," which required the Commission to revise its local radio ownership rules to provide that:

> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
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> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
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> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that

> a party may not own, operate, or control more than 50 percent of the stations in such market.[18]

The market size, for purposes of the local ownership limits, is measured through use of a complex system of overlapping signal contours. This methodology tends to result in very expansive local markets and therefore increases the number of stations that individual entities can own. In its 1998 biennial review, the Commission decided to examine the method by which it defined geographic market. In the current biennial review, it has sought additional comments on its radio market measurement methodology. One consideration is to move away from a market definition methodology based on technical signal characteristics to a methodology based on market-driven characteristics, such as Arbitron audience rating boundaries.

The proposals of various parties relating to the current local radio ownership rule range from retaining the rule; to applying additional requirements to the rules (e.g., assessing the impact of each acquisition on minority ownership, eliminating temporary waivers for proposed mergers exceeding current ownership limits, requiring station sales needed to comply with existing limits to be made at the time of merger, "flagging" and giving extra scrutiny to mergers that allow one owner in a market to control 40 percent of radio advertising revenues or two owners to control 60 percent, making local marketing agreements count toward an operator's ownership total); to eliminating the rules.

The proposals of various parties relating to measurement of the radio market range from retaining the current methodology; to ignoring the signal contours of powerful out-of-town stations that boost market size and therefore the number of stations permitted to one owner; to decreasing the number of stations a company can own locally by measuring markets based on the Arbitron model rather than on overlapping signals.

The proponents of retaining or eliminating the rule argue that the rule, and the resultant consolidation in the industry, has turned around the industry financially, from one in which more than half the radio stations were losing money to one that is very profitable and attracting an increasing share of the total advertising market. They also claim that the number of program formats has increased.

The proponents of modifying the rule to tighten ownership requirements claim that the rule has resulted in both horizontal and vertical consolidation (e.g., ownership of concert promotion companies, concert venues) that has resulted in anticompetitive behavior by the large vertically integrated companies that has reduced competition in the radio, advertising, music, and concert markets, reduced program format diversity, and reduced local programming.

Sen. Feingold has introduced the Competition in Radio and Concert Industries Act of 2003 (S. 221) that, among other things, would (1) prohibit the FCC from

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[18] Section 202(b) also provides that the Commission may permit a party to exceed these limits "if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation." 1996 Act, § 202(b)(2), 110 Stat. at 10-11.

loosening the current limitations on multiple ownership of radio stations and exclude these radio ownership rules from the required biennial review; (2) require the Commission to designate for hearing any license application that would result in an entity having as aggregate national radio audience reach exceeding 60 percent; and (3) require the Commission to prescribe regulations to prohibit the transfer or assignment to operate, or the use of, a local marketing agreement with respect to a commercial radio station if the transfer or assignment, or such agreement, will permit the applicant, or brokers of such agreement, to own, operate, or have an attributable interest in commercial radio stations that are in aggregate more than 35 percent of the audience of the local market of such radio stations or more than 35 percent of the radio advertising revenue in the local market of such radio stations. Rep. Weiner has introduced an identical bill (H.R. 1763).

Rep. Hinchey has introduced a resolution (H.Res. 218) that it is the sense of the House of Representatives that the FCC should not weaken any current media ownership rules and should allow for extensive public review and comment on any proposed changes to current rules before issuing a final rule. In addition, some Members of Congress have sent letters to the FCC relating to the substance or the timing of the Commission's review of its media ownership rules.