

**STATEMENT OF  
COMMISSIONER MICHAEL P. O'RIELLY**

*Re:* *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*, MB Docket No. 14-50; *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*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256.

The Commission’s role with regard to the Quadrennial Review is quite straightforward. While I strongly disagree with parameters set by past precedent – such as the idea that the pendulum can swing in both deregulatory and regulatory directions, or the misinterpretation of the word “necessary” contained in the law – we still are obligated to review the media landscape and determine whether each of our media ownership rules is “necessary in the public interest as the result of competition.”<sup>1</sup> I still believe that the Commission can – and must – thoughtfully update our ownership rules while preserving competition, localism, and diversity. For numerous reasons, however, the Commission has failed to comply with Congress’ directive for almost a decade. And yet, we were told by the Chairman almost two years ago that this time would be different.<sup>2</sup> The end result, as represented in this item, is more of the same obfuscation, ignorance, hyper-partisanship and defiance as before.

Prodded at long last by court order into completing the statutorily-mandated Quadrennial Review, the Commission has managed to produce a thoroughly objectionable document divorced from the realities of today’s media marketplace. Social media giants, online news sites, over-the-top video content, traditional pay TV, and many other media sources are eating away at the audiences of broadcasters and newspapers by the day. Congress anticipated this type of upheaval in the dynamic media environment, and designed the Quadrennial Review requirement to address it by forcing us to adjust our media ownership rules in response. However, it seems that to my colleagues, all evidence of the myriad new challenges to the past dominance of newspapers and broadcasters serves merely as fodder for interesting gee-whiz anecdotes to be trotted out, never as a prompt for any responsive action by the Commission.

Incredibly, the only significant changes this Commission is willing to make are those that serve to render current media ownership rules, last effectively amended in 1999, even *more* restrictive. While grudgingly allowing for Congress’ damage-minimizing directive to grandfather existing Joint Service Agreements (JSAs), the Order reinstalls the Commission’s 2014 JSA attribution rule, ignoring the evidence that JSAs have served the public interest well in many circumstances, and narrowing the options for broadcasters attempting to stretch scarce resources.<sup>3</sup> And the Order doubles down on this punitive stance by requiring disclosure of Shared Service Agreements (SSAs) as a waystation en route to a promised proceeding regarding SSA attribution.<sup>4</sup>

Those are the only real modifications this Commission approves for media ownership rules that in some cases date back to the 1960’s. No proposal to loosen or eliminate any rule, including proposals made by this same majority in the 2014 FNPRM to eliminate the restrictions on newspaper/radio and radio/television combinations, made the cut. These cross-ownership bans create artificial silos that are

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<sup>1</sup> Telecommunications Act of 1996, P.L. 104-104, §202(h), 110 Stat. 56, 111-12 (1996).

<sup>2</sup> See FNPRM, 29 FCC Rcd at 4582.

<sup>3</sup> *Supra* para. 62.

<sup>4</sup> *Supra* paras. 338, 377.

preventing broadcasters and newspapers from competing with new entrants and serving the needs of consumers. With newspapers, in particular, facing well-documented struggles and in some instances, fighting for their very survival, eliminating the cross-ownership bans might provide some with much-needed relief in the form of committed and knowledgeable investors. But it seems my colleagues would rather throw the newspaper industry to the wolves than consider so much as a tweak to their article of faith that media ownership rules are forever. And the new exception for failed or failing newspapers is an obvious procedural cover rather than a potential means of any relief, as it is highly unlikely that anyone will want to partner with a company that is in such distress.<sup>5</sup> By then, it's too late.

The Commission also insists on maintaining the television duopoly rule, a restriction on ownership of two television stations in the same market, that may have made sense at its origin in 1964 when consumers' video options were limited to a few broadcast networks via rabbit ears. To say it is still needed in an era of literally hundreds of competitive pay TV channels and essentially unlimited competitive Internet content defies belief. And keeping this rule ensures that several other equally anachronistic regulatory artifacts will make it to the year 2020 intact, such as the "Eight Voices Test." This condition for duopoly ownership was previously struck down by the D.C. Circuit in 2002,<sup>6</sup> and a previous Commission concluded that it could not be justified.<sup>7</sup> Fourteen years later, it makes even less sense. Why should the arbitrary number of eight stations be needed in order for a market to be considered competitive? Why has this number never changed despite the changes in the media landscape? More than half of U.S. markets do not have – and cannot support – eight independently owned stations,<sup>8</sup> so potentially pro-competitive combinations that would benefit stations, and their viewers, cannot even be considered in most of the country.

The Commission's multiple errors stem from its indefensible failure to acknowledge any non-broadcast or non-newspaper competitors as market participants in any context. As the Order asserts, "[t]raditional 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."<sup>9</sup> But it is possible to agree to this sentiment while also realistically assessing and acknowledging the impact of new media on the marketplace. In a recent Pew Research Center study focusing on the flow of local news in three U.S. markets, between 45 and 33 percent of residents stated that the internet is very important in keeping up with local news, while about 10 percent went so far as to say that social media are the *most* important way they get local news.<sup>10</sup> And while it is true that some online news sources have a relationship with legacy print or TV players, 25 out of the 143 identified local news providers in one of the markets

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<sup>5</sup> *Supra* para. 174. Specifically, a "failed" newspaper must show that it "had stopped circulating ... due to financial distress for at least four months immediately prior to the filing of the assignment or transfer of control application, or that it was involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings." A "failing" newspaper would need to show a negative cash flow for the previous three years, and in addition that "the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper ... and that selling the newspaper ... to any out-of-market buyer would result in an artificially depressed price."

<sup>6</sup> *Sinclair*, 284 F.3d at 165.

<sup>7</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13671.

<sup>8</sup> Letter from Rick Kaplan, NAB to Marlene Dortch, FCC, MB Docket Nos. 14-50, 09-182 (filed July 19, 2016) <https://ecfsapi.fcc.gov/file/1071905276260/OwnershipExParte8VoicesStudy071916nm.pdf>.

<sup>9</sup> *Supra* para. 1.

<sup>10</sup> Pew Research Center, *Local News in a Digital Age* (March 5, 2015), <http://www.journalism.org/2015/03/05/local-news-in-a-digital-age/>.

studied, Denver, were pure digital-only outlets.<sup>11</sup> The digital media future is here. And it is, of course, having a tangible impact on local markets:

Taken together, the data illustrate that when it comes to news ecologies, the greater digital orientation and array of providers in Denver widen the local news system somewhat with less reliance on the major legacy providers, especially the local newspaper, and a greater mix of coverage more often driven by enterprising work from journalists.<sup>12</sup>

Further, to the extent that social media may have once predominantly used traditional media links in timeline updates, tweets and the like, that practice has changed significantly. Online media platforms have become much more news first environments as crowdsourcing users often post faster and more accurately than traditional media sources. In reality, consumers are more likely to learn about the latest Michael Phelps gold medal at the Rio Olympics on a Twitter feed than to wait for an update to a sports or news website or to see the local ten p.m. newscast.

While the evolution of the legacy media world is clearly far from complete, the Commission's duty is to respond to the obvious and far-reaching changes that Americans, and our legacy media, are living under today. However, while "recogniz[ing] that broadband Internet and other technological advances have changed the ways in which many consumers access entertainment, news and information programming,"<sup>13</sup> the Commission fails to reflect that recognition by changing a single one of its media ownership rules, thus missing the entire point of the Quadrennial Review exercise. What good does it do for the Commission to "recognize" the full 2016 media landscape if it does absolutely nothing in response? With many news stories being broken over social media or news websites already this year, it is hard to imagine what it would take for reality set in and convince this Commission to budge, absent a court mandate or change in law.

One reason provided for inaction on the media ownership rules involving television is that the Commission is in the midst of the broadcast spectrum incentive auction, creating uncertainty for the future of the media marketplace.<sup>14</sup> This excuse rings extremely hollow when considering that despite Congress' full knowledge of section 202(h), it declined to include an exemption or delay of the Quadrennial Review when it crafted and enacted the incentive auction legislation. As I have previously argued, this Commission can't read an exemption in the law where one does not exist. Does the on-going incentive auction make our job more complex? Perhaps, but not impossible. Thus, no weight should be given to this weak and misapplied argument.

In a disturbing echo of process fouls past, the Chairman chose to continue his practice of only approving an item if the majority party commissioners are in unison. Clearly, there were at least three votes, and perhaps four, for eliminating the cross-ownership rules, especially the newspaper/radio prohibition. But that wasn't good enough. The fact that one Democratic member objected effectively meant that no changes were permitted. This blatant political move should be seen for what it is. In some regards, it is hard to be surprised at this approach in the current political atmosphere in Washington D.C., except that is not how an "independent" Commission should operate. How can any claimed attempt at

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Supra* para. 1.

<sup>14</sup> See Fact Sheet: Updating Media Ownership Rules in the Public Interest (June 27, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-340033A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-340033A1.pdf).

consensus-building be taken seriously when the consensus supposedly sought can and will be so easily set aside?

In retrospect, the biggest problem with the Quadrennial Review that Congress likely couldn't anticipate was that those seeking to maintain the status quo could continuously "win" through Commission intransigence and court remands. In fact, the more flawed the item is, the more likely the court can be used as an instrument of delay. More specifically, court review of the Commission's work in this area has served as just another tool of the public "interest" groups seeking to prevent any modernization of our rules. By remanding the item back to the Commission to comply with some objective, the court merely extends the life of all the media ownership rules – a total victory for the forces of inertia.

In short, rarely have I seen a proceeding take so long and a document say so much in order to accomplish nothing of value. I dissent.