DAVID SLAYS GOLIATH: THE FIGHT AGAINST THE FCC'S RECENT RELAXATION OF THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE

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Michael Anderson is an average upper-middle class American living in an average major metropolitan area. He is an educated man, with a college degree and a job in middle management (though that may change if this promotion comes through), and he prides himself on trying to be informed of the world around him. He has a subscription to *Newsweek* and the Sunday *New York Times*; he's a regular down at the local library; and, after his college-age daughter lectured him about global warming and how it is going to affect all of the penguins down in Antarctica, he procured a copy of that movie with Al Gore to see what all the fuss is about.[1] Lately, however, Michael has noticed a disconcerting trend. He wakes up early every morning and reads the local newspaper to learn about the latest catastrophe in the ongoing War on Terror, how high gas prices are expected to rise, and which local politician was caught doing something scandalous this week. Michael goes to work, comes back home, eats dinner with his family, maybe tinkers with that old muscle car he's been trying to restore for ages, and then settles down to watch the evening news. But what does Michael see? He sees the exact same story about terrorist activity, the exact same story about how gas prices may hit $6.00, the exact same story about Councilman So-and-So getting caught with his hand in the proverbial cookie jar. Sure, a few new pieces pertain to events that occurred during the day, but those new stories are just repeated in the next morning's newspaper with little to no variation. The facts are the same, how they are

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[1] AN INCONVENIENT TRUTH (Paramount Pictures 2006).

presented is the same, and the opinions that accompany them are the same. Michael is curious: he is trying to get his news from two different mediums and yet he is getting essentially the same thing. Neither medium provides any additional facts to supplement what he heard or read. Neither medium provides different viewpoints or opinions on the event. So, how can he truly be informed about the world around him when those charged with informing the population are all disseminating the same thing?

What Michael does not know is why he is receiving the same news everywhere he turns. He also does not know what news he is missing. And why is that? The same media conglomerate owns both Michael's local newspaper and his preferred television station. And this media giant strongly encourages the local editors and station managers to follow a particular policy in determining what events are going to be reported, what opinions are going to be printed and broadcast, and what spin those events that are reported will receive. As a result, Michael hears one opinion on the war, and he hears nothing at all about many events that suggest a contrary position. Michael hears the basics about the crooked councilman, but hears nothing about how the councilman's actions will end up raising local taxes. Michael hears nothing, period, about a new local zoning ordinance that will allow chemical manufacturing companies to build facilities near local schools and residential areas, or about a local school board decision to cut funding for fine arts programs in the district's secondary schools. And, in a presidential election year, Michael (a political moderate who has not yet decided for whom he will vote) hears only the negatives about a particular candidate—like offhand statements made years prior and taken out of context—and nothing about positives, such as commitments to humanitarian efforts. Imagine the effect on Michael if he were a man of lesser means, without access to national publications or local news and information sites on the Internet.

Michael's predicament is not out of the realm of possibility. On December 18, 2007, the Federal Communications Commission ("FCC") voted to adopt a new rule relaxing the thirty-three year ban on newspapers also owning a broadcast station in the same media market (hereinafter "2007 Rule").[2] Prior to the adoption of this rule, a complete ban on a single

[2] *See In re* 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, (Feb. 4 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf [hereinafter "2007 Rule"].

entity owning both a newspaper and broadcast station in the same market existed (subject, of course, to waivers granted by the FCC). This new rule creates a presumption that a newspaper-broadcast station combination in the Top 20 Nielsen Designated Market Areas ("DMAs") is in the public interest if, when a television station is involved, the station is not ranked among the top four stations in the DMA and at least eight "major media voices" remain in the DMA after the combination.[3] All other newspaper-broadcast combinations are presumed to not be in the public interest, though the FCC retains the right to issue waivers and allow a combination that, on its face, falls within this negative presumption.

One thing is certain: the 2007 Rule has not been met with calm acceptance. On February 27, 2008, just six days after the 2007 Rule was formally published in the *Federal Register*, the Media Access Project filed a petition with the Third Circuit to vacate the rule.[4] In December 2007,

[3] *See infra* Part II.B.

[4] *See* John Eggerton, *They're Back! Prometheus Asks Court to Vacate Ownership-Rule Change*, BROADCASTING & CABLE, Feb. 26, 2008, *available at* http://www.broadcastingcable.com/article/CA6535600.html?industryid=47168; *see also* 47 U.S.C. § 402(c) (2000) ("[An appeal of the Commission's actions] shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decisions or order complained of."). Media Access Project was one of the groups that challenged the FCC's 2003 attempt to relax the cross-ownership ban, resulting in the Third Circuit remanding the rule to the FCC for further justification. Prometheus Radio Project v. FCC, 373 F.3d 372, 377, 403 (3d Cir. 2004).

In the fourteen day period after the FCC formally published the 2007 Rule in the *Federal Register*, fifteen different challenges were filed by fifteen different petitioners in five different circuits: Prometheus Radio Project (Third Circuit); Free Press (First Circuit); Media Alliance (Ninth Circuit); Office of Communications of the United Church of Christ, Inc. (Sixth Circuit); Newspaper Association of America, Fox Television Stations, Tribune Company, Sinclair Broadcast Group, Bonneville International Corp., The Scranton Times, L.P., National Association of Broadcasters, Cox Enterprises, Inc., Media General, Inc., The Coalition of Smaller Market Television Stations and Raycom Media, Inc. (D.C. Circuit). Notice of Multicircuit Petitions for Review, Petitions for Review of the Federal Communications Commission's *2006 Quadrennial Regulatory Review Report and Order*, Attachment A (J.P.M.L. Mar. 7, 2008). Under 28 U.S.C. § 2112(a), if, within ten days after the issuance of an order, the agency receives two or more petitions of review in at least two courts of appeal the agency shall notify the Judicial Panel on Multidistrict Litigation, which will then randomly designate one of the courts of appeal in which a petition was filed to hear the consolidated appeals. 28 U.S.C. § 2112(a) (2000). The Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit to hear the consolidated appeals. *See* John Eggerton, *Ninth Circuit Court Gets Appeal of Cross-Ownership Rules*, BROADCASTING & CABLE, Mar. 11, 2008, *available at*

both Houses of Congress introduced versions of the Media Ownership Act of 2007, which has the express goal of mandating a sixty-day comment period and a thirty day reply period for all rules involving media-ownership issues.[5] The Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce launched an investigation into the fairness, efficiency, and transparency of the FCC's rulemaking procedures.[6] Both houses also introduced "resolutions of disapproval" regarding the 2007 Rule—the Senate version of the resolution, declaring that the 2007 Rule shall have no force and effect, was passed on May 15, 2008.[7]

Why all the fervor? Why has a "modest step in loosening the complete ban on cross-ownership" resulted in a maelstrom of court challenges, resolutions, and investigations into the transparency of an agency's processes?[8] The 2007 Rule represents the latest battle in the ongoing war regarding the consolidation of media ownership. On one side stand those in favor of consolidation, those who argue, like the majority of the FCC Commissioners, that the technology and media landscape and industry has changed drastically since the 1970s, and that the cross-ownership rule should reflect those changes. Newspapers all over the country are ailing, suffering from dramatic reductions in circulation and newsroom staff, and the loosening of the cross-ownership ban is one way to make newspapers competitive in the marketplace once more.[9] On the other side stand those such as Commissioners Michael J. Copps and Jonathan S. Adelstein, the dissenting voters against the 2007 Rule, who oppose this viewpoint. These two Commissioners, backed by strong public support, argue that further deregulation not only eradicates diversity and focus on local news and interests, but also stifles minority ownership of broadcast outlets, leading to

http://www.broadcastingcable.com/article/112818-Ninth_Circuit_Court_Gets_Appeal_of_Cross_Ownership_Rules.php.

[5] H.R. 4835, 110th Cong. (2007); S. 2332, 110th Cong. (2007).

[6] Letter from John D. Dingell, U.S. Congressman, to Kevin J. Martin, Chairman of the Federal Communications Commission (Jan. 8, 2008), *available at* http://energycommerce.house.gov/Press_110/110-ltr.010808.FCC.Martin.pdf. Since the inauguration of President Obama, Commissioner Kevin Martin stepped down as Chairman of the FCC and President Obama named Commissioner Michael Copps as Acting Chairman. For simplicity's sake, throughout this Comment, I refer to both gentlemen as Chairman Martin and Commissioner Copps, respectively.

[7] S.J. Res. 28, 110th Cong. (2008) (enacted); *see also* H.R.J. Res. 79, 110th Cong. (2008).

[8] 2007 Rule, ¶ 13.

[9] *See id.* ¶ 24, 27–33, 35

the inevitable result of fewer and fewer people deciding what the public will see on their television screens, hear from their radios, and read in their newspapers.[10]

This Comment focuses on the developments leading up to the promulgation of the 2007 Rule and the future of this rule. Section I discusses the historical background behind cross-ownership regulation, from the early regulations of ownership to the 1975 cross-ownership ban, from the Telecommunications Act of 1996 to the FCC's failed 2003 attempt to loosen the cross-ownership ban. Section II examines the 2007 Rule, both procedurally and substantively. Section III compares the 2003 and 2007 Rules, specifically focusing on how, if at all, the 2007 Rule "fixed" what the Third Circuit determined were the infirmities of the 2003 Rule, and whether the 2007 Rule is likely to withstand judicial challenge. Finally, Section IV chronicles how Congress is currently fighting the 2007 Rule by attacking the procedures under which it was promulgated.

I. HISTORICAL BACKGROUND

A. Early Media Ownership Regulation

Prior to the creation of the Federal Communications Commission (and its predecessor, the Federal Radio Commission), radio broadcasters "used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard."[11] To remedy the problem, Congress eventually created the FCC in the Communications Act of 1934 to "protect the national interest involved in the new and far-reaching science of broadcasting, [and to formulate] a unified and comprehensive regulatory system for the industry."[12] Like all agencies, of course, the FCC does not have unfettered licensing power with the ability to grant a license to any broadcaster who wants one.[13] Instead, the key to the FCC's licensing power is that it may only grant a license if it is in the "public interest, convenience, or necessity."[14]

[10] *See* 2007 Rule, 114 (Dissenting Statement of Commissioner Jonathan S. Adelstein).

[11] Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1943).

[12] *Id.* at 214.

[13] *See* 47 U.S.C. § 307(a) (2000); *see also Nat'l Broad. Co.*, 319 U.S. at 215.

[14] *Nat'l Broad. Co.*, 319 U.S. at 215.

In attempting to ensure that the broadcasting licenses the FCC granted would serve the public interest, convenience, or necessity, the FCC made viewpoint diversity an early regulatory goal.[15] The primary method of achieving this goal was requiring diversity of broadcasting ownership, and indeed, the Supreme Court has recognized this:

> In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power. This perception of the public interest has been implemented over the years by a series of regulations imposing increasingly stringent restrictions on multiple ownership of broadcast stations.[16]

In the early days of regulation, the FCC "presum[ed] that a single entity holding more than one broadcast license in the same community contravened public interest."[17] As a reflection of this presumption, early FCC ownership regulations include (1) licensing only one broadcasting station in a particular area to a single network organization,[18] (2) limiting the number of AM and FM radio stations and VHF television stations that a single person or entity can own,[19] and (3) limiting the common ownership

[15] The FCC has defined "viewpoint diversity" as "the availability of media content reflecting a variety of perspectives." *In re* 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, 18 F.C.C.R. 13,620, 13,627 (2003) [hereinafter "2003 Rule"]. The FCC has stated the reasoning behind its goal of viewpoint diversity:

> Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content.

Id. at 13,627–28.

[16] FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 773, 780 (1978) (citation omitted).

[17] Prometheus Radio Project v. FCC, 373 F.3d 372, 383 (3d Cir. 2004).

[18] *See* 8 Fed. Reg. 16,065–66 (1943).

[19] *See* United States v. Storer Broad. Co., 351 U.S. 192, 193 (1956).

of a television station and any radio station in the same market.[20] The FCC did not solely consider viewpoint diversity and diversity of ownership in deciding whether to grant a broadcasting license, but it also considered a goal that, still today, may conflict with diversity: ensuring "the best practicable service to the public."[21] To this end, the FCC also considered "the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant . . . in making initial comparative licensing decisions."[22]

B. The 1975 Cross-Ownership Ban

In 1970, the FCC began a rulemaking proceeding to propose regulations "that would eliminate all newspaper-broadcast combinations serving the same market" and would culminate in a rule that would remain virtually untouched for over thirty years throughout the storm of ownership deregulation.[23] The Commission's proposal would prospectively ban forming or transferring newspaper-broadcast combinations and require dissolution of existing combinations within five years.[24] The FCC noted that these requirements "may be in the public interest" and would serve the purpose of "promoting competition among the mass media involved, and maximizing diversification of service sources viewpoints . . . ."[25] The FCC adopted the final version of the cross-ownership rule in 1975, notably stating its view that "[t]he term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'"[26]

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[20] *See In re* Amendment of Section 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 28 F.C.C.2d 662, *1 (1970).

[21] *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 782.

[22] *Id.*

[23] *Id.* at 784.

[24] *Id.*

[25] *In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 339, *7 (1970).

[26] *In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046, ¶ 9 (1975) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). Indeed, this philosophy also reflects another earlier Supreme Court statement that "[i]t is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately

Not surprisingly, this controversial rule was challenged almost immediately. The National Association of Broadcasters and the American Newspaper Publishers Association challenged the cross-ownership ban as exceeding the FCC's statutory rulemaking authority, as well as violating the First Amendment rights of newspaper owners.[27] The Supreme Court upheld the cross-ownership ban against the attacks, stating that longstanding policy of the FCC has given great significance to diversification of ownership in granting or denying broadcasting licenses to newspaper owners.[28] Additionally, the Court found that the FCC had acted rationally in determining that diversifying media ownership would improve the possibility of greater viewpoint diversity[29] and that the cross-ownership ban was a "reasonable means of promoting the public interest in diversified mass communications . . . ."[30] In the final order promulgating the cross-ownership ban, the FCC justified its decision by explaining that, even though newspaper owners had previously been encouraged to apply for broadcasting licenses in the same media market due to a shortage of qualified potential licensees, "a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the number of channels open for new licensing had diminished substantially."[31] Therefore, the Court reasoned, the FCC did not interpret the public interest requirement irrationally by deciding to prospectively ban all newspaper-broadcast combinations in the same media market.[32]

C. The Telecommunications Act of 1996

In 1996, in the midst of deregulation, Congress amended the Communications Act of 1934 by enacting the Telecommunications Act of 1996.[33] Congress did not include any substantive changes to the newspaper-broadcast cross-ownership rule. Instead, Congress directed the FCC to review all of its media ownership rules biennially, to determine

prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[27] *Nat'l Citizens Comm. for Broad*., 436 U.S. at 792.

[28] *Id.* at 794–95.

[29] *Id.* at 796.

[30] *Id.* at 802.

[31] *Id.* at 797.

[32] *Id.*

[33] *See* Pub. L. No. 104-104, 110 Stat. 110.

whether any of the rules are "necessary in the public interest," and to repeal or modify any regulation if the Commission determines that the rule is no longer necessary in the public interest.[34] The purpose of the biennial review requirement is "'to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace' resulting from the Act's relaxation of the Commission's regulations, including the broadcast media ownership regulations."[35]

To determine if an ownership rule is "necessary in the public interest," the Third Circuit, in *Prometheus Radio Project v. FCC*, adopted the FCC's interpretation of "necessary" (the "plain public interest standard") to "mean 'useful,' 'convenient' or 'appropriate' rather than 'required' or 'indispensable.'"[36] The *Prometheus* court also noted that under section 202(h) of the Telecommunications Act of 1996, the FCC's job is not finished if it determines that a particular ownership rule is not necessary in the public interest—if the FCC finds that an ownership regulation does not meet this standard, the Commission then must repeal or modify the given rule.[37] Therefore, under the Telecommunications Act, the FCC must "periodically . . . justify its existing regulations, an obligation it would not otherwise have."[38] Indeed, no other requirement exists in the FCC's enabling legislation or in its own rules stating that the Commission must justify its rules continually in light of the statutory criteria. It is unclear whether the FCC would have engaged in a review of the newspaper-broadcast cross-ownership rule *sua sponte*, but the Telecommunications Act's requirements are a likely culprit for the two subsequent attempts at revising the rule.

D. The 2003 Rule and the "Cross Media Limits"

As required by Section 202(h) of the Telecommunications Act, the FCC reviewed its media ownership rules in 2002, leading to the promulgation of

[34] *Id.* § 202(h), 110 Stat. 111–12. This particular requirement was amended by Congress in 2004: now, instead of biennial review of the media ownership regulations, the FCC only has to conduct a quadrennial review. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 100.

[35] Prometheus Radio Project v. FCC, 373 F.3d 372, 391 (3d Cir. 2004) (citing *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, ¶¶ 16, 17 (2003)).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 395.

a new set of ownership rules in 2003.[39] In the final order adopting the rules, the Commission stated that the newspaper-broadcast cross-ownership rule must be repealed because the rule was no longer necessary to promote competition or localism (the broadcasting of local news and programming), and since most media markets were already diverse, the blanket ban on cross-ownership was no longer necessary for all markets.[40] The FCC found that the complete ban was no longer necessary to promote the broadcasting of local news and information programming, and some evidence even indicated that the blanket ban actually inhibited such programming.[41] Additionally, the Commission found that newspaper-broadcast cross-ownership "creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public."[42]

In the 2003 Rule, the FCC also created a measure entitled the "Diversity Index." The Diversity Index measured the availability of media outlets that contribute to viewpoint diversity in local markets by examining the relative importance of various types of media as sources for local news and ownership concentration.[43] The FCC then derived the "Cross Media Limits" from the Diversity Index to both identify "at risk" media markets (markets that were already "moderately concentrated" for diversity), and to identify types of transactions that would pose the greatest risk to diversity.[44] Based on this distinction, the FCC then promulgated specific limits on cross-ownership transactions in "at risk" markets and separate restrictions on transactions occurring outside the "at risk" markets.[45] In addition to the

[39] 2003 Rule, at 13,748.

[40] *Id.*

[41] *Id.* at 13,753.

[42] *Id.* at 13,760.

[43] *Id.* at 13,775. For a discussion of the problems with the Diversity Index and the Cross Media Limits as found by the *Prometheus* court, see *infra* Part III.A.

[44] *Id.* at 13,793 ("[I]t is apparent, based on the record in this proceeding, that certain types of transactions in certain markets present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.").

[45] *Id.* at 13,793–94. In markets with three or fewer television stations (the "at risk" markets), the FCC did not permit common ownership of newspapers-broadcast stations in the same media market. *Id.* at 13,799. The FCC stated that for markets with four to eight television stations, the goals of the Cross Media Limits were to protect diversity and foster high quality programming. *Id.* at 13,803. To that end, in a radio/television/newspaper combination, an owner could not exceed fifty percent of the local radio or television caps in the market; in a radio or newspaper combination, the owner could own up to one hundred percent of the local radio cap; and in no

restrictions, the FCC continued the trend from the 1975 cross-ownership ban of allowing waivers if the prospective owner could demonstrate that an otherwise prohibited newspaper-broadcast combination would enhance the quality and quantity of broadcast news in the media market.[46]

The 2003 Rule was challenged almost immediately and the Third Circuit Court of Appeals eventually vacated it.[47] The court remanded the rule back to the FCC to provide further justification for the Cross Media Limits.[48] Although the *Prometheus* court did find numerous problems with the 2003 Rule, particularly the use of the Diversity Index to derive the Cross Media Limits,[49] the court agreed with the FCC that the blanket cross-ownership ban was no longer in the public interest.[50] This ruling paved the way for the 2007 Rule.

II. THE 2007 RULE

A. The Procedure

After the Third Circuit remanded the 2003 Rule to the FCC to provide further justification for the Cross Media Limits, on June 21, 2006, the FCC instituted the rulemaking proceeding that eventually culminated in the 2007 Rule.[51] First Notice was published in the *Federal Register* on July 24, 2006, with the initial comment period ending on October 23, 2006 and the reply period ending on January 16, 2007.[52]

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instances could a newspaper own two television stations (a television "duopoly") in the same market. *Id.* In markets with nine or more television stations, any newspaper-broadcast combination was permitted, as long as the owner complied with the local television and radio ownership rules. *Id.* at 13,804. The FCC found that these markets have "robust media cultures" with a large number of media outlets with a wide variety of owners; therefore, no cross-ownership restrictions were necessary. *Id.*

[46] *Id.*, at 13,806–07.

[47] *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 412 (3d Cir. 2004).

[48] *Id.* at 403.

[49] *See infra* Part III.A.

[50] *See Prometheus*, 373 F.3d at 398–401.

[51] *See generally In re* 2006 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, 21 F.C.C.R. 8834 (2006).

[52] *See id.*; Attachment: Timeline of Media Ownership Review Process, Statement of Chairman Kevin J. Martin, 2007 Rule, 103.

In September of 2006, the FCC began announcing that it would hold public hearings in various cities around the nation on media ownership, with announcements generally made one month prior to the date of the actual hearing.[53] However, not all of the hearings were so timely announced. The hearing in Seattle was announced on November 2, 2007; the agenda and the witnesses were announced on November 8, 2007, and the hearing itself was held on November 9, 2007.[54] Then, on November 13, 2007, a mere four days later, FCC Chairman Kevin Martin published the revisions to the rule in an Op-Ed that ran in the *New York Times*:

> The commission should modify only one of the four rules under review—the one that bars ownership of both a newspaper and a broadcast TV or radio station in a single market. And the rule should be modified only for the largest markets.
>
> A company that owns a newspaper in one of the 20 largest cities in the country should be permitted to purchase a broadcast TV or radio station in the same market. But a newspaper should be prohibited from buying one of the top four TV stations in its community. In addition, each part of the combined entity would need to maintain its editorial independence.[55]

This Op-Ed appeared the next business day after the last public hearing in Seattle, with the FCC also issuing a unilateral public notice giving the public twenty-eight days to comment on the revisions to the cross-ownership rule with no opportunity for reply comments.[56] This raises the

[53] *See* Attachment: Timeline of Media Ownership Review Process, Statement of Chairman Kevin J. Martin, 2007 Rule, 103. For example, the hearing in Los Angeles was announced on September 8, 2006 and was held on October 6, 2006. *Id.* Hearings on media ownership were held in Los Angeles, Nashville, Harrisburg, Tampa-St. Petersburg, Chicago, and Seattle. *Id.* at 103–05. Additionally, hearings on localism were held in Portland, Maine, and Washington D.C. *Id.* at 104–05.

[54] Attachment: Timeline of Media Ownership Review Process, Statement of Chairman Kevin J. Martin, 2007 Rule, *Id.* at 105.

[55] Kevin J. Martin, Op-Ed, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007.

[56] *See* 2007 Rule, 107 (Dissenting Statement of Commissioner Michael J. Copps) ("The agency received over 300 comments from scholars, concerned citizens, public interest advocates, and industry associations—the overwhelming majority of which condemned the Chairman's plan. But little did these commenters know that on November 28, two weeks *before* their comments

question of whether the FCC even considered the comments and opinions of those who spoke at the Seattle hearing or if the hearing was held solely so the FCC could tell opponents of the rule that it heard the concerns of citizens across the nation prior to adoption.[57]

B. The Substance

The 2007 Rule changes the blanket ban on newspaper-broadcast cross—ownership combinations. It creates a presumption that, in the Top 20 Nielsen Designated Market Areas ("DMAs"), it is not inconsistent with the public interest for an entity to own (1) a newspaper and a radio station, or (2) a newspaper and a television station, as long as the television station is not ranked in the top four stations in the DMA and at least eight major media voices remain in the DMA after the combination.[58] In all other instances (for example, in a non-Top 20 DMA, or in a Top 20 DMA when the television station is ranked in the top four stations or eight major media voices do not remain after the combination), a presumption still exists that the particular combination would not be in the public interest, and the FCC likely would not approve the transaction.[59] Based on comments received, the FCC found that some newspaper-broadcast combinations actually could enhance localism.[60] It also found that some newspaper-broadcast combinations are positively associated with local news and political

were even due, the draft Order on newspaper-broadcast cross-ownership had already been circulated.").

Id.; *see also infra* Part IV (discussing criticisms of the process of promulgating the 2007 Rule in greater depth).

[57] *See* 2007 Rule, 107 (Dissenting Statement of Commissioner Michael J. Copps) ("Despite the minimal warning, 1,100 citizens turned out to give intelligent and impassioned testimony on how they believed the agency should write its media ownership rules. Little did they know that the fix was already in, and that the now infamous *New York Times* op-ed was in the works announcing a highly-detailed cross-ownership proposal.").

Id.

[58] 2007 Rule, ¶ 13. Major media voices are defined by the FCC as "full-power commercial and noncommercial television stations and major newspapers" within a given media market. *Id.* ¶ 57. Requiring that eight major media voices remain after the combination "provides an appropriate benchmark for indicating that a minimum number of sources of local news and information are present before [the FCC] presume[s] that a combination of a newspaper and a television station is not inconsistent with the public interest." *Id.* ¶ 60.

[59] 2007 Rule, ¶ 13.

[60] *Id.* ¶ 42.

coverage.[61] Finally, it found that the blanket ban does not recognize the diversity of media markets across the country and the diversity of media transactions.[62]

The FCC will, however, continue the practice of granting waivers from the cross-ownership rule if the prospective owner can defeat the presumptions and show that the particular combination is in the public interest.[63] The FCC named four factors that it will consider in determining whether to allow an otherwise-prohibited newspaper-broadcast combination: (1) whether the combination will increase the amount of local news disseminated through the media outlets; (2) whether each media outlet in the particular combination will exercise its own independent news judgment; (3) the level of ownership concentration in the DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the outlet is in distress, the owner's commitment to investing significantly in newsroom operations.[64]

Additionally, two new circumstances exist in which the FCC will "reverse the negative presumption that applies to those proposed combinations that do not otherwise qualify for a positive presumption."[65] If the newspaper or broadcast outlet is "failed or failing," then there will be a positive presumption that the combination is in the public interest.[66] In these situations, the prospective owner must demonstrate that they, as the "in market buyer," are the only reasonably available candidate willing and able to acquire and operate the station or newspaper, and that selling to an "out of market buyer" would result in an artificially depressed selling price.[67] The FCC will also reverse the negative presumption when:

> [A] proposed combination results in a new source of a significant amount of local news in a market . . . . [The]

[61] *Id.*

[62] *Id.* ¶ 50.

[63] *Id.* ¶ 20.

[64] *Id.* ¶ 13.

[65] *Id.* ¶ 65.

[66] *Id.* A failed station is defined as a newspaper or broadcast outlet that has either stopped circulating or "gone dark" for at least four months immediately prior to the filing of an assignment or transfer of control application, or one involved in court-supervised bankruptcy or involuntary insolvency proceedings. *Id.* A failing station is one in which (1) the broadcast station has had a low "all day" audience share, (2) the financial condition is poor, and (3) the combination will have public interest benefits. *Id.*

[67] 2007 Rule, ¶ 65.

> combination is not inconsistent with the public interest when it initiates local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations.[68]

The FCC justified this reversal of presumption by stating that "[a] positive presumption under this limited circumstance will increase diversity of choices, provide more local programming, and allow better local service by media outlets."[69]

C. The Internal Conflict

FCC Commissioners Michael J. Copps and Jonathan S. Adelstein are two of the most vocal objectors to the relaxation of the newspaper-broadcast cross-ownership ban (and, indeed, media ownership deregulation in general). Both dissented from the adoption of the 2007 Rule.[70] Commissioner Copps focused his complaints on the process by which the FCC adopted the 2007 Rule; namely, Commissioner Copps believed that the process was too rushed and did not fully consider public comment—especially given the extraordinarily quick turnaround from the last public hearing in Seattle to the publication of the revisions to the cross-ownership rule.[71] Commissioner Copps also argued that the job losses in the newspaper industry that had so concerned the majority of FCC Commissioners were actually the result of previous consolidation, and further consolidation would lead to further job losses as "[n]ewly-merged entities will attempt to increase their profit margins by raising advertising rates and relentless cost-cutting."[72] Additionally, if the protection of the "dying" newspaper industry is the concern of the FCC with this rule, then

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[68] *Id.* ¶ 67.

[69] *Id.*

[70] *See* 2007 Rule, 107 (Dissenting Statement of Commissioner Michael J. Copps); *see also* 2007 Rule (Dissenting Statement of Commissioner Jonathan S. Adelstein).

[71] 2007 Rule, 107 (Dissenting Statement of Commissioner Michael J. Copps) ("Their comments were not going to be part of the agency's formulation of a draft rule—it was just for show, to claim that the public had been given a chance to participate."). Commissioner Copps stated: "This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process . . . . At the end of the day, process matters. Public comment matters. Taking the time to do things right matters." *Id.* at 108.

[72] 2007 Rule, 108 (Dissenting Statement of Commissioner Michael J. Copps).

that concern is misplaced. As Commissioner Copps explains, "[The FCC's] job is not to ensure that newspapers are profitable—which they mostly are. [Its] job is to protect the principles of localism, diversity, and competition in our media."[73]

Commissioner Adelstein echoed these concerns and criticisms, arguing that the law does not require the FCC to serve those in the media industry "who seek to profit by using the public airwaves," but instead requires the FCC to serve the public interest, "[a]nd the public has repeatedly told [the FCC] that they are not interested in further media consolidation."[74] Allowing this relaxation of the cross-ownership rule takes away opportunities to own media outlets from local owners, women, and minorities; furthermore, it "raises the already exorbitant price of station ownership, the biggest barrier to new entrants and aspiring local owners."[75] Limiting the relaxation to the Top 20 markets still affects forty-three percent of American households, roughly equivalent to 120 million people.[76] So this change is not as modest and limited as the majority of Commissioners would have the public and critics of the 2007 Rule believe. According to Commissioner Adelstein, the major place where the FCC went wrong was ignoring the warnings of Congress telling the Commission to slow down and consider any changes to the cross-ownership rule carefully and methodically.[77] Commissioner Adelstein has stated that "[t]he FCC has never attempted such a brazen act of defiance against Congress. Like the Titanic, we are steaming at full speed despite repeated warnings of danger ahead. We should have slowed down rather than put everything at risk."[78] Given the enormous impact and probable detrimental effects of this rule, Commissioner Adelstein argued that the FCC should have conducted a more thorough investigation of diversity and localism in local markets and the effects of further consolidation, as was urged by Congress.[79]

[73] *Id.* at 109.

[74] 2007 Rule, 113–14 (Dissenting Statement of Commissioner Jonathan S. Adelstein).

[75] *Id.* at 115.

[76] *Id.*

[77] *See id.* at 113.

[78] *Id.*

[79] *Id.* at 113–15.

III. COMPARISON OF THE 2003 AND 2007 RULES

A. Problems with the 2003 Rule

In *Prometheus*, the Third Circuit found that the goal of the 2003 Rule's Cross Media Limits was to create narrow limits for allowable newspaper—broadcast combinations, identify "at risk" markets that need continued regulation to ensure diversity, and avoid overregulation in markets that already have sufficient viewpoint diversity.[80] Although the Third Circuit found this to be a worthy goal, the major problem is that in attempting to implement this goal, the Cross Media Limits "employ several irrational assumptions and inconsistencies," particularly involving the instrument from which the limits are derived: the Diversity Index.[81] According to the Third Circuit, the Diversity Index gives too much weight to the Internet as a media outlet, the Index irrationally assigns the same market shares to media outlets of the same type, and the Cross Media Limits are inconsistently derived from the Diversity Index results.[82]

In an FCC survey of media consumers, 18.8 percent responded that the Internet was a source of local news, though they did not identify which websites they used.[83] This lack of identification is problematic since some websites are independent sources of local news, but other websites just republish what already has been broadcast in another medium (for example, a television station or a newspaper's website).[84] If a site merely republishes news and information that has been published elsewhere, no independent, diverse viewpoint is being presented, and thus these responses should be discounted as a source for local news.[85]

The Third Circuit also found that the FCC's decision to assign an equal market share to all media outlets of a given type (*e.g.*: all television stations, all radio stations, all newspapers) was problematic.[86] The court reasoned that the assumption that each outlet of a given type has an equal market share is "inconsistent with the Commission's overall approach to its Diversity Index and also makes unrealistic assumptions about media

[80] Prometheus Radio Project v. FCC, 373 F.3d 372, 402 (3d Cir. 2004).

[81] *See id.* at 402–03.

[82] *Id.*

[83] *Id.* at 405.

[84] *Id.* at 406.

[85] *Id.*

[86] *Id.* at 408.

outlets' relative contributions to viewpoint diversity in local markets."[87] Automatically assigning an equal market share, even when a particular broadcast outlet does not provide any local news, "almost certainly presents an understated view of concentration in several markets" and can "generate[] absurd results."[88]

Additionally, although the Commission's decision on where to draw the line between what is an acceptable and unacceptable increase in a market's scores on the Diversity Index is generally entitled to high deference, in the case of the Cross Media Limits, these lines are drawn inconsistently.[89] The limits "allow some combinations where the increases in Diversity Index Scores were generally higher than for other combinations that were not allowed," and the Commission's failure to justify and explain these inconsistencies is arbitrary and capricious.[90]

Lastly, the *Prometheus* court found that the formal rulemaking notices published in the *Federal Register* were insufficient, particularly given that the Commission failed to set forth the methodology of the Diversity Index in a notice such that the interested public could have an opportunity to comment upon this method.[91] For notice to be adequate and sufficient, it must "fairly apprise interested persons of the 'subjects and issues' before the agency."[92] The Commission only stated that it was "considering 'creating a new metric' to 'reformulate [its] mechanism for measuring diversity and competition in a market,' and that it was contemplating 'design[ing] a test that accords different weights to different outlet types.'"[93] An agency may withhold notice of comment-derived data (such as the Diversity Index, which the FCC argued was created in response to received public comments) only when no prejudice exists, and given the flaws of the Diversity Index, the decision to withhold the Index from public comment was prejudicial.[94] The Third Circuit concluded their criticisms of the 2003 Rule by offering a word of advice to the FCC for the remand

[87] *Id.*

[88] *Id.*

[89] *Id.* at 411.

[90] *Id.*

[91] *See id.* at 411–12.

[92] *Id.* at 411.

[93] *Id.* at 412 (quoting *In re* 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, 17 F.C.C.R. 18,503, ¶¶ 113–15 (2002)).

[94] *Id.*

process: "[I]t is advisable that any new 'metric' for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule."[95]

B. Differences of the 2007 Rule

The primary difference between the 2003 Rule's Cross Media Limits and the 2007 Rule is that the 2007 Rule completely does away with the Diversity Index as a measure for determining media concentration and "at risk" markets. Based on the extensive criticism of the Diversity Index and the inherent difficulty in quantifying some aspects of diversity, "[The Diversity Index's] deficiencies are fatal to the cross-media limits. Thus, on remand and reconsideration, [the FCC] will not reinstate the cross-media limits or rely on the Diversity Index."[96]

Under the 2003 Rule, no cross-ownership restrictions in markets with nine or more television stations existed.[97] The 2007 Rule modifies this by creating a presumption that a combination is in the public interest only in the Top 20 DMAs, if the television station involved is not one of the top four ranked stations in the market, and at least eight major media voices remain after the combination.[98] Therefore, under the 2007 Rule, even if a given market has more than nine television stations, if that market is not also within the Top 20 DMAs in the nation or if the proposed combination involves a top four television station, the combination will be presumed not to be in the public interest and the Commission will then consider other factors to determine if a waiver should be granted.[99] Similarly, under the 2003 Rule, limited combinations were permitted in markets with four to eight television stations.[100] Under the 2007 Rule, combinations in these markets will be presumed not in the public interest, and the Commission will then have to consider whether the particular combination will meet the public interest standard by examining the four waiver factors.[101]

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[95] *Id.*

[96] 2007 Rule, ¶ 17.

[97] 2003 Rule, at 13,804.

[98] 2007 Rule, ¶ 20.

[99] For a discussion of the particular factors the Commission will weigh in determining whether to grant a waiver, see *supra* Part III.B.

[100] 2003 Rule, at 13,803. For example, for a radio-television-newspaper combination, the owner could not exceed fifty percent of the local radio or television caps.

[101] 2007 Rule, ¶ 20.

One important difference from the 2003 Rule is that the 2007 Rule establishes presumptions—a presumption now exists, in limited circumstances, that a combination is in the public interest.[102] In the vast majority of circumstances, however, the presumption is that a combination is not in the public interest.[103] These are, of course, presumptions—parties will be able to rebut these presumptions by showing that a particular newspaper-broadcast combination either is or is not in the public interest. This appears to yield greater flexibility and a stronger emphasis on individual market circumstances and case-by-case evaluation than the 2003 Rule, which did not establish presumptions. According to the FCC, the 2007 Rule is an "appropriately cautious measure" that will "allow newspapers and broadcast stations to explore synergies in certain circumstances, but maintain[] safeguards to ensure that consumers continue to enjoy the benefits that flow from the operation of multiple, competing sources of news and information."[104]

C. The 2007 Rule is Likely to Withstand Judicial Scrutiny.

Under the Administrative Procedure Act, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[105] Reviewing courts may not:

> [S]et aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute . . . .The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'[106]

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[102] *Id.* ¶ 52.

[103] *Id.*

[104] *Id.* ¶ 51.

[105] 5 U.S.C. § 706(2)(A) (2000).

[106] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

Agency rules generally are set aside on arbitrary and capricious grounds when the agency (1) considers irrelevant factors that Congress did not intend for it to consider, (2) entirely fails to consider an important aspect of the issue, (3) gives an explanation for the decision running counter to the evidence before the agency, or (4) gives an explanation so implausible that it "could not be ascribed to a difference in view or the product of agency expertise."[107]

The FCC "has wide discretion to determine where to draw administrative lines,"[108] such as deciding that the presumption that a combination is in the public interest will exist for the Top 20, as opposed to the Top 25 DMAs. Indeed, courts are "generally 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that the lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'"[109] The FCC explained that in considering the media outlets available in Top 20 and non-Top 20 DMAs, "diversity in those largest markets is healthy and vibrant in comparison to all other DMAs."[110] The FCC found that, for example:

> [W]hile there are at least 10 independently owned television stations in 18 of the top 20 DMAs, none of the DMAs ranked 21 through 25 have 10 independently owned television stations . . . . Moreover, the top 20 markets, on average, have 15.5 major voices (independently owned television stations and major newspapers), 87.8 total voices (all independently owned television stations, radio stations, and major newspapers), and approximately 3.3 million television households. Markets 21 through 30, by comparison, have, on average, 9.5 major voices, 65.0 total voices, and fewer than 1.1 million television households, representing drops of 38.5 percent, 25.9 percent, and 56.3 percent from the top 20 markets, respectively.[111]

[107] *Id.* at 43.

[108] AT&T Corp. v. FCC, 220 F.3d 607, 627 (D.C. Cir. 2000).

[109] Sinclair Broad. Group v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002) (quoting Cassell v. FCC, 154 F.3d 478, 485 (D.C. Cir. 1998)).

[110] 2007 Rule, ¶ 56.

[111] *Id.*

Therefore, a court probably would not find "patently unreasonable" the FCC's decision to make the cut off point for the positive presumption the Top 20 DMAs.[112]

Similarly, the FCC defines "major media voices" as full-power commercial and non-commercial television stations and major newspapers—the media outlets that consumers are most likely to rely upon for local news.[113] This is to "ensure that [the FCC does] not presume that sufficient diversity of major local news sources will remain in a top 20 market if such a presumption is not warranted."[114] The minimum number of major media voices that must remain after a combination is set at eight, an amount that "will assure that these markets continue to enjoy an adequate diversity of local news and information sources . . . . [T]here are at least 10 independently owned television stations and two major newspapers in the great majority of the top 20 markets."[115] Given the FCC's explanation of its reasoning and the courts' policy of high deference to how an agency exercises its line drawing power, this distinction also would likely pass the "patently unreasonable" test.

On review, the primary issue will be whether the 2007 Rule is rational. The major obstacle to the 2003 Rule being upheld by the Third Circuit was the use of the Diversity Index to derive the Cross Media Limits; the way in which the Index was formulated and applied was irrational and inconsistent.[116] The *Prometheus* court agreed with the Commission that a complete ban on newspaper-broadcast cross-ownership was no longer in the public interest, was no longer necessary to promote competition, actually could undermine localism, and was not necessary for diversity.[117] The "improvement" of the 2007 Rule over the 2003 Rule is that the FCC has done away with the Diversity Index completely, and unlike with the Cross Media Limits, did not use this measure to formulate any of the substance of the 2007 Rule. The use of this Index and all of its inherent problems was the main barrier to the Third Circuit upholding the 2003 Rule, and getting rid of the Diversity Index is the major factor that will likely lead to the 2007 Rule being upheld by the courts. The Third Circuit already has agreed that

[112] *See Sinclair Broad. Group*, 284 F.3d at 162.

[113] 2007 Rule, ¶ 57 n.183.

[114] *Id.*

[115] *Id.* ¶ 60.

[116] *See supra* Part III.A.

[117] Prometheus Radio Project v. FCC, 373 F.3d 372, 398–400 (3d Cir. 2004).

a blanket ban on newspaper-broadcast cross-ownership is no longer in the public interest, and the 2007 Rule is more narrow and provides greater opportunities for flexibility and case-by-case determinations in deciding whether to allow a particular combination. These factors all weigh heavily in favor of the 2007 Rule being upheld.

In promulgating the 2007 Rule, the FCC did consider relevant comments and used those comments to derive the specifics of the 2007 Rule. For example, the FCC reviewed comments relating to the financial condition of the newspaper industry and concluded that the evidence paints a picture of a struggling industry, "an industry containing fewer newspapers, facing declining circulation, bringing in stagnant revenues, suffering from increased costs, and employing fewer journalists."[118] Based on this data, the FCC agreed with the commentators arguing for a relaxation of the cross-ownership ban as a method to relieve the woes of the newspaper industry. The FCC also discussed evidence presented that some combinations can increase the amount of diversity and local news disseminated in a given market and concluded that "the weight of the evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets."[119] Additionally, one of the factors that the FCC will examine in determining whether a rebuttal of the negative presumption is appropriate is whether the proposed combination will increase the amount of local news disseminated throughout the market.[120] Several commentators indicated that their combinations had increased the quantity and quality of local news in the given market, thus leading to the FCC to state that this now will be a factor for consideration.[121]

Given that the scope of review is "arbitrary and capricious," a highly deferential standard, courts reviewing the 2007 Rule will likely uphold it. This rule is more narrow and focused than the 2003 Rule and the problematic Diversity Index was nowhere to be found in deriving the 2007 Rule. Of course, for a court to uphold the 2007 Rule, the 2007 Rule must first survive the attempts by the current Congress to reverse these recent changes to cross-ownership policy.[122]

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[118] 2007 Rule, ¶ 34.

[119] *Id.* ¶¶ 39–46.

[120] *Id.* ¶ 69.

[121] *See id.*

[122] *See infra* Part IV.

IV. CONGRESSIONAL SCRUTINY

The regulated public is not the only group concerned about the impact of the new changes to the newspaper-broadcast cross-ownership rule—significant numbers of Senators and Representatives are concerned as well. This is good news for the affected public: members of Congress are powerful allies because they have the ability to nullify any rules passed by the FCC. Indeed, in late 2007 Senator Byron Dorgan (D-ND) and Representative Jay Inslee (D-WA) emerged as major leaders in the Congressional fight to stem the tide of increasing consolidation of media ownership. Both Congressmen sponsored bills to "promote transparency in the adoption of new media ownership rules" by requiring a specific length for the comment and reply periods.[123] In early 2008, both Congressmen then sponsored joint resolutions to disapprove of the 2007 Rule.[124] This Section chronicles the various Congressional efforts to nullify the 2007 Rule and address the more systemic problem of a perceived lack of transparency and fairness in the FCC's rulemaking procedures.

A. Concerns About Transparency and Fairness

Prior to the adoption of the 2007 Rule, Representatives sitting on the House Committee on Energy and Commerce (which has oversight authority over the Federal Communications Commission) recognized the importance and widespread impact of decisions regarding how many different media outlets a given individual or entity can own. On November 2, 2007, the Committee announced that it would hold a hearing to "explore issues relating to media ownership and the Federal Communications Commission's pending media ownership proceeding."[125] The Chairmen of the Committee and the relevant Subcommittees (the Subcommittee on Oversight and Investigations and the Subcommittee on Telecommunications and the Internet) all stressed that given the importance of the issue and the need for viewpoint diversity to have a "free flow of

[123] Media Ownership Act of 2007, S. 2332, 110th Cong. (2007); Media Ownership Act of 2007, H.R. 4835, 110th Cong (2007).

[124] S.J. Res. 28, 110th Cong. (2008) (enacted); H.R.J. Res. 79, 110th Cong. (2008).

[125] Press Release, House Committee on Energy and Commerce, Committee Announces Media Ownership Hearing (Nov. 2, 2007), *available at* http://energycommerce.house.gov/Press_110/110nr121.shtml.

information in our democracy,"[126] the Committee intended to ensure that the FCC was considering the rule changes "carefully and thoughtfully" and was not just rushing through the process to get to the end result of further consolidation.[127] This hearing was held before the Committee on December 6, 2007.

On November 13, 2007, the *New York Times* published FCC Chairman Martin's Op-Ed containing the proposed changes to the newspaper-broadcast cross-ownership rule.[128] Later that same day, the FCC released a statement including the proposed revisions and an invitation for public comment, with all comments due on December 11, 2007.[129] Two days later, on November 15, Representative Dingell sent a formal letter to Chairman Martin regarding the proposed revisions to the cross-ownership rule and stating his concerns over the speed at which the FCC was proceeding:

> I have serious concerns, however, that the timeline you have set forth is insufficient to allow for meaningful comment and evaluation of comments on the proposed rule. *First*, the Commission is not affording interested parties the opportunity to file reply comments on the proposal. *Second*, if the Commission adheres to your stated deadline of December 18, 2007, for adopting a final rule, Commissioners will have just one week to evaluate comments on the proposal. Amending media ownership regulations, including a rule that has been on the books for more than three decades, is a grave matter that deserves the Commission's full and fair consideration. I strongly urge

[126] *Id.* (statement of Rep. Stupak (D-MI), Chairman of the Subcommittee on Oversight and Investigations).

[127] *Id.* (statement of Rep. Stupak Dingell (D-MI), Chairman of the Committee on Energy and Commerce).

[128] Kevin J. Martin, Op-Ed., *The Daily Show*, N.Y. TIMES, Nov. 13, 2007.

[129] Press Release, Federal Communications Commission, Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule (Nov. 13, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-189A2.pdf.

> you to give a matter of this import the complete analysis and reflection it warrants.[130]

Chairman Dingell then sent another letter to Chairman Martin on December 3, 2007, once again expressing his concerns over the transparency of FCC rulemaking procedures.[131] In the letter, Chairman Dingell reiterated his earlier concerns over the short length of time in which the final stage of this rulemaking proceeding was occurring: (1) the text of the proposed rule was not published for public notice and comment; (2) proposed Commission actions, such as field hearings regarding media ownership, received little public notice; and (3) the Commissioners themselves often did not receive information on the minutiae of the rule drafts until shortly before they are scheduled to act on the drafts, leaving little time for "the necessary scrutiny and analysis that is so important to reasoned decision-making."[132]

Chairman Dingell's last concern, that the Commissioners were not receiving adequate time to review and analyze the particulars of the rule, is perhaps best illustrated by Commissioner Copps' experience with changes to the 2007 Rule, all occurring within the eighteen hours immediately prior to the FCC's vote on adopting the rule. In his dissenting statement to the 2007 Rule, Commissioner Copps describes the last minute revisions to the 2007 Rule as follows:

> Then, last night [December 17] at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the 20-market limit. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place,

[130] Letter from John D. Dingell, U.S. Congressman, to Kevin J. Martin, Chairman of the Federal Communications Commission (Nov. 15, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.111507.FCC.ltr.pdf.

[131] Letter from John D. Dingell, U.S. Congressman, to Kevin J. Martin, Chairman of the Federal Communications Commission (Dec. 3, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.120307.FCC.Martin.transparency.pdf.

[132] *Id.*

> the new draft simply contained the cryptic words "[Revised discussion to come]." . . .
>
> At 1:57 this morning, we received a new version of the proposed test for allowing more newspaper-broadcast combinations. I can't say I fully appreciate the test's finer points given the lateness of the hour and the fact that there was no time afforded to parse the finer points of the new rule . . . . Finally, this morning at 11:12 am, as I was walking out of my office door to come to this meeting, we received an e-mail containing additional changes. The gist of one of these seems to be that the Commission need not consider all of the "four factors" in all circumstances.
>
> This is not the way to do rational, fact-based, and public interest-minded policy making.[133]

Commissioner Copps' description of the revisions gives credence to Chairman Dingell and Representative Stupak's concerns that the FCC was not considering the impact of the revisions to the cross-ownership rule as carefully as it should. Instead, it was trying to push through a rule allowing further media ownership concentration.[134]

Given the committee members' existing concerns over the transparency and fairness of the FCC's rulemaking procedures and Commissioner Copps' account of the egregiously rushed nature of the proceedings, the formal investigation initiated by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce came as no surprise. On January 8, 2008, Chairman Dingell sent yet another letter to Chairman Martin. This letter informed Chairman Martin that the purpose of the formal investigation was to "determine if [the FCC's regulatory procedures] are being conducted in a *fair, open, efficient, and transparent manner*."[135] The Committee anticipated a "comprehensive document request in the near future," and investigators would "interview FCC

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[133] 2007 Rule, 107–08 (Dissenting Statement of Commissioner Michael J. Copps).

[134] *See* Press Release, House Committee on Energy and Commerce, Committee Announces Media Ownership Hearing (Nov. 2, 2007), *available at* http://energycommerce.house.gov/Press_110/110nr121.shtml.

[135] Letter from John D. Dingell, U.S. Congressman, to Kevin J. Martin, Chairman of the Federal Communications Commission (Jan. 8, 2008), *available at* http://energycommerce.house.gov/Press_110/110-ltr.010808.FCC.Martin.pdf (emphasis added).

employees and other witnesses in preparation for an oversight hearing this year."[136]

On December 9, 2008, the House Committee on Energy and Commerce published its report on the fairness and transparency of FCC regulatory procedures (hereinafter "House Report").[137] According to Representative Stupak, this extensive bi-partisan investigation into FCC procedures "confirm[s] a number of troubling allegations raised by individuals in and outside the FCC . . . . The Committee staff report details some of the most egregious abuses of power, suppression of information and manipulation of data under Chairman Martin's leadership."[138] A comprehensive review and analysis of the committee's findings is beyond the scope of this Comment, however, given the specific congressional concerns relating to cross-ownership regulation, it is worth noting that the committee explicitly found that "[i]mportant Commission matters have not been handled in an open and transparent manner, thereby raising suspicions both inside and outside the Commission that some parties and issues are not being treated fairly."[139] Although the committee report identified numerous problems with FCC procedures and operations, both Representative Stupak and Representative Dingell are hopeful that the identification and awareness of these problems will lead to ongoing efforts throughout the new era of the FCC under the Obama administration to ensure that action is taken in a fair, open, and transparent manner.[140]

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[136] *Id.*

[137] House Committee on Energy and Commerce, Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin, 110th Cong. (Dec. 2008), *available at* http://energycommerce.house.gov/ (hereinafter "House Report").

[138] Press Release, House Committee on Energy and Commerce, Committee Releases Staff Report on Findings of FCC Investigation (Dec. 9, 2008) (statement of Rep. Stupak (D-MI), Chairman of the Subcommittee on Oversight and Investigations), *available at* http://energycommerce.house.gov/.

[139] House Report, at 3. This specific finding relates to Chairman Martin's reversal of conclusions regarding "a la carte" cable and satellite television service to be included in a report to Congress, without allowing for public comment or undertaking further studies. *See id.* Although this finding and the committee's report do not specifically address problems with promulgating the cross-ownership regulations, it is not unreasonable to assume that similar openness and transparency problems existed during that process as well. *See supra* notes 133–34 and accompanying text.

[140] *See* Press Release (statement of Rep. Stupak) ("It is my hope that this report will serve as a roadmap for a fair, open and efficient FCC under new leadership in the next administration."); Press Release (statement of Rep. Dingell) ("It is my hope that the new FCC Chairman will find

B. The Media Ownership Act of 2007

On November 8, 2007, prior to Chairman Martin's announcement regarding the revisions to the cross-ownership rule, Senator Dorgan introduced Senate Bill 2332, the Media Ownership Act of 2007.[141] The stated goal of the Media Ownership Act is to "promote transparency in the adoption of new media ownership rules by the Federal Communications Commission, and to establish an independent panel to make recommendations on how to increase the representation of women and minorities in broadcast media ownership."[142] As Senator Dorgan stated upon introducing the Media Ownership Act, "[E]ven if we disagree with the rules the FCC issues, and even if we think the FCC should break up the big media companies rather than allow them to consolidate, the FCC must go through an honest and thorough process."[143] Instead, the FCC is on a "fast march toward easing media ownership rules."[144] Understanding how the public interest can be served by rushing through this process is difficult.

The Media Ownership Act would amend the Telecommunications Act of 1996 to require that, in all modifications, revisions, or amendments of any regulations relating to broadcast ownership, the FCC shall, at least

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this report instructive and that it will prove useful in helping the Commission avoid making the same mistakes.").

[141] S. 2332, 110th Cong. (2007). On December 18, 2007, the day the FCC adopted the 2007 Rule, Representative Inslee introduced H.R. 4835, the House companion bill to S. 2332. H.R. 4835, 110th Cong. (2007).

[142] S. 2332, 110th Cong. (2007).

[143] 152 CONG. REC. S14,200 (daily ed. Nov. 8, 2007) (statement of Sen. Dorgan).

[144] *Id.* at S14,199–14,200. After all, the Senate originally voted to block such consolidation:

> The last time the FCC tried to do rush [sic] to consolidate media ownership, the United States Senate voted to block it. On September 16, 2003, the Senate voted 55-40 to support a 'resolution of disapproval' of the FCC's previous decision to allow further concentration. If we have to do this again we will. A number of us have sent numerous letters to the FCC stating what needs to be done prior to a vote on media ownership limits and yet the Chairman is on track to move this proceeding to a vote. The FCC is clearly not listening and legislation is now necessary.

Id. at S14,200. The FCC's last effort of further consolidation, the 2003 Cross Media Limits, were of course remanded back to the FCC for further justification. Prometheus Radio Project v. FCC, 373 F.3d 372, 402–03 (3d Cir. 2004). Perhaps Senator Dorgan knows of what he speaks when he questions whether a rushed media ownership proceeding can be in the public interest. For a discussion on the Senate's efforts to pass a "resolution of disapproval" regarding the 2007 Rule, see *infra* Part IV.C.

ninety days prior to any vote by the Commissioners, publish the proposed change in the *Federal Register*.[145] Additionally, after publication, the FCC must provide at least sixty days for public comment, and at least thirty days for reply.[146] These requirements would apply "to any attempt by the Commission to modify, revise, or amend its regulations related to broadcast and newspaper ownership made after October 1, 2007."[147] If the FCC does not comply with the notice and comment requirements, then "such modification, revision, or amendment shall be vitiated and shall be of no force and effect."[148] If enacted, this proposed statute would void the 2007 Rule, which was an attempt to modify a regulation related to broadcast and newspaper ownership made after October 1, 2007, and the FCC only allowed twenty-eight days for public comment with no opportunity for reply.

Progress on this attempt to nullify the 2007 Rule has been limited. In the Senate, S. 2332 was referred to the Senate Committee on Commerce, Science, and Transportation on November 8[149] and was reported favorably with no amendments by that committee on December 4, 2007.[150] In the House, H.R. 4835 was referred to the Subcommittee on Telecommunications and the Internet on December 18.[151] Thus far, no further actions have been taken on these bills.

C. Resolutions of Disapproval

After the final version of the 2007 Rule had been published in the *Federal Register* on February 21, 2008, and the flood of court challenges began rushing in, Senator Dorgan and Representative Inslee decided that the pending Media Ownership Act and the formal investigation into FCC procedures were not sufficient.[152] They brandished a new weapon designed to thwart the 2007 Rule: the Congressional resolution of disapproval.[153]

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[145] S. 2332, 110th Cong. (2007).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] 152 CONG. REC. S14,199 (daily ed. Nov. 8, 2007).

[150] 152 CONG. REC. S14,734 (daily ed. Dec. 4, 2007).

[151] 152 CONG. REC. H16,833 (daily ed. Dec. 18, 2007).

[152] *See generally* 152 CONG. REC. S1597 (daily ed. Mar. 5, 2008); 152 CONG. REC. H1702 (daily ed. Mar. 13, 2008).

[153] *See id.*

Under the Congressional Review Act, "Congress may review and disapprove virtually all federal agency rules. For any rule, Congress may enact a joint resolution of disapproval, in which case the rule is deemed not to have had any effect."[154] Before rules can take effect, the federal agency must submit a report to each House of Congress containing a copy of the rule and a "concise general statement relating to the rule."[155] Within sixty days of the referral of the report, Senators and Representatives may introduce a joint resolution disapproving of the rule,[156] and if both Houses pass the joint resolution of disapproval, the rule shall not take effect.[157]

On March 5, 2008, Senator Dorgan introduced the following joint resolution before the Senate:

> Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership (Report and Order FCC 07-216) received by Congress on February 22, 2008, and such rule shall have no force or effect.[158]

The Senate Committee on Commerce, Science, and Transportation then ordered on April 24, 2008, that the resolution be reported favorably.[159] This resolution reached the end of its journey through the Senate on May 15, 2008, when the resolution was passed without amendment.[160]

At the time of the resolution's adoption, several Senators voiced their opinions on the effect of the 2007 Rule and the effect of the FCC's rushed rulemaking proceeding. Senator Snowe (R-ME) emphasized the negative effect of further media consolidation on the amount and quality of local news programming and broadcast station ownership by women and minorities.[161] She also chastised the FCC for taking actions that

[154] S. REP. No. 110-334, at 4 (2008).

[155] 5 U.S.C. § 801(a)(1)(A)(i)–(ii) (2000).

[156] *Id.* § 802(a).

[157] *Id.* § 801(b)(1).

[158] S.J. Res. 28, 110th Cong. (2008) (enacted).

[159] 152 CONG. REC. D493 (daily ed. Apr. 24, 2008).

[160] 152 CONG. REC. S4267–70 (daily ed. May 15, 2008).

[161] *Id.* at S4268 (daily ed. May 15, 2008) (statement of Sen. Snowe) ("[C]onsolidation in the media market has led to fewer locally owned stations, and less local programming and content . . . .

"demonstrate a litany of highly misguided priorities that neglect to consider the full impact of the FCC's rule change on American people," thus necessitating Congressional intervention via a resolution of disapproval "to rescind this haphazard approach."[162] Senator Menedez (D-NJ) echoed concerns of Commissioner Adelstein by stating that while the FCC has characterized the rule change as modest, since it only affects the top twenty media markets and only applies to television stations not ranked among the top four stations, forty-four percent of Americans live in the top twenty markets and if a company wants to purchase a top four station, it only has to receive a waiver from the FCC.[163] Lastly, Senator Dodd (D-CT) voiced his concerns about the FCC's practices in this rulemaking proceeding:

> Perhaps most disturbing is the way the FCC went about implementing this radical new rule. First, it completely ignored Congress's bipartisan bill, the Media Ownership Act . . . . Then it ignored the public. Indeed, the Chairman's proposed rule changes were first made in an op-ed he published in the *New York Times* outlining the changes for the first time—which might have been helpful had the public comment period not already closed the day his column appeared. Public comments are not merely a formality, Mr. President—they are a vital piece of the rulemaking process and an integral part of responsive, open government. Five years ago, more than 3 million

. . . .

[W]e know that locally owned stations aired more local news and programming than non-locally owned stations—and that is not just me talking. That is according to the FCC's own studies, which also found that smaller station groups overall tended to produce higher quality newscasts compared to stations owned by larger companies.

. . . .

Minority and women-ownership of media outlets are also at perilously low levels—currently only 6 percent of full-power commercial broadcast radio stations are owned by women and 7.7 percent are owned by minorities. Ownership of broadcast television is even lower—5 percent for women and 3.3 percent for minorities. Instead of being a catalyst promoting localism and ownership diversity, the FCC's action will actually hasten the decline in these crucial areas.").

[162] *Id.*

[163] *Id.* at S4269 (statement of Sen. Menedez) ("The standards for granting these waivers are vague at best. Here is an example: one of the standards a company must show in order for a waiver to be granted is whether the broadcast station has enough editorial independence. How does anybody quantify that?").

> Americans spoke out when the FCC voted without any public input whatsoever to allow a single company to own up to three television stations, a local newspaper, a cable system, and as many as eight radio stations in a single media market. In part because of the large public outcry, the courts overturned the rules.
>
> . . . .
>
> Must we act to ensure the strength and vitality of the American media in the 21st century? Absolutely. But that should be accomplished within an open and transparent framework as prescribed in the Media Ownership Act—a process that gives the public a voice in this fight.[164]

A common thread runs through the statements of the Senators supporting the resolution for disapproval: the FCC tried the same shenanigans with the 2003 Cross Media Limits when it attempted to rush through new rule changes in the haste to usher in more media consolidation and these Senators, at least, will fight these underhanded attempts with every resource available.

Although the Senate has passed the joint resolution, the House has taken no action on its version of the resolution since it was introduced on March 13, 2008. Both Houses of Congress must pass the resolution for it to be effective and thus rob the 2007 Rule of its effect.[165]

The legislative process is lengthy and generally slow. Political pressure, always looming over the shoulders of Senators and Representatives, is even more pronounced in election years and often leads to important legislation being placed on the backburner. Most of the legislative activity relating to the newspaper-broadcast cross-ownership rule (with the notable exception of the Senate's passage of the joint resolution of disapproval) has stalled in committee. If Congress is serious about fighting the war against further media consolidation, then it needs to see its efforts through to the end, and quickly. In particular, Congress needs to get the ball rolling on the Media Ownership Act. Both this act and the House Report will have long term, lasting effects on the way in which the FCC approaches further changes to the cross-ownership rule (and media ownership regulations in general). Therefore, the act should be enacted without unnecessary delay and undue

[164] *Id.* at S4270 (statement of Sen. Dodd).

[165] *See* 5 U.S.C. § 801(b)(1) (2000).

pressure from political forces. If the amount and content of the formal comments and statements at field hearings is any indication, the public—the Senators' and Representatives' true constituencies—is in favor of less media consolidation, not more.

V. CONCLUSION

The 2007 changes to the Federal Communications Commission's newspaper-broadcast cross-ownership rule have been hailed by the Commission as a modest loosening of the thirty-plus-year blanket ban on a newspaper owning a broadcast station in the same media market. However, critics point to decreased quality and quantity in local news and information coverage, decreased chances that women and minorities will be able to own newspapers and broadcast stations, and the fact that the public does not appear to be interested in further media consolidation.

Despite any potential effects on diversity (in both ownership of broadcast stations and in viewpoints presented) and localism, the 2007 Rule will likely withstand judicial challenge. Unlike the 2003 Cross Media Limits, which the Third Circuit found to be arbitrary and capricious, the 2007 Rule does not use a nonsensical measure such as the Diversity Index to derive the limits for what a particular individual or entity can own. The 2007 Rule does not create hard and fast limits for what an individual can own in a particular market—instead, presumptions are created. Certain combinations are presumed to be in the public interest and certain combinations are presumed to not be in the public interest. The FCC retains the authority to weigh factors, such as whether each media outlet will retain independent news judgment, to determine if a particular combination should reverse a negative presumption and whether it should grant a waiver. This methodology lends greater flexibility to the FCC, and the stronger commitment to a case-by-case determination is likely what will save this rule from also being found arbitrary and capricious.

Those who fear that this current battle over media consolidation will be lost in the courts need not despair completely: Congress has entered the fray, and if politics can be set aside and just one of the actions it is currently considering passes, the 2007 Rule will be but a memory. Although Congress took a step forward by concluding its formal investigation into FCC procedures, Congress also needs to pass the Media Ownership Act of 2007. The act would have the effect of nullifying the 2007 Rule, but both of these measures also address a problem that appears to be systemic: the FCC is rushing through rulemaking proceedings and either not allowing, or

not giving itself enough time to consider, public comment in its haste to usher in more media consolidation. The joint resolution of disapproval would render the 2007 Rule without force and effect. If passed, this is a powerful message from the body that has oversight authority over the FCC.

Although these are all noble gestures, it is not enough that they are all just pending before various Congressional committees. Congress needs to actually enact these measures. Rules about media ownership affect all of us: they affect what we see and how we see it; they affect what is brought to our attention and what flies under our radars. Further media consolidation is not the way to ensure an informed citizenry. Congress should do what is necessary to ensure that the FCC gets the message.