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Calendar No. 731

110TH CONGRESS, 2d Session | SENATE | REPORT 110–334

JOINT RESOLUTION DISAPPROVING THE RULE SUBMITTED BY THE FEDERAL COMMUNICATIONS COMMISSION WITH RESPECT TO BROADCAST MEDIA OWNERSHIP

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S.J. Res. 28

MAY 8, 2008.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
69–010 WASHINGTON : 2008

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

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MAY 8, 2008.—Ordered to be printed

Mr. INOUYE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S.J. Res. 28]

The Committee on Commerce, Science, and Transportation, to which was referred the joint resolution (S.J. Res. 28), disapproving the rule submitted by the Federal Communications Commission with respect to broadcast media ownership, having considered the same, reports favorably thereon without amendment, and recommends that the joint resolution do pass.

PURPOSE OF THE RESOLUTION

The purpose of S.J. Res. 28 is to disapprove, pursuant to the Congressional Review Act (Public Law 104–121), a recently adopted Federal Communications Commission (FCC) rule relaxing the agency's prior prohibition on the cross-ownership of newspapers and broadcast television and radio stations.

BACKGROUND AND NEEDS

For decades the FCC has sought to ensure that the allocation of broadcast licenses serves the public interest and promotes the core values of competition, diversity, and localism. As was noted by the Supreme Court more than 50 years ago, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1 (1945).

The Communications Act of 1934 provides the FCC with the authority to grant licenses for the use of broadcast facilities, consistent with the "public interest, convenience, and necessity." The FCC views broadcasters as trustees of the public airwaves and imposes restrictions and obligations on broadcasters accordingly. The Supreme Court has upheld the regulation of broadcasters pursuant to public trustee constraints as constitutional since the *Red Lion* case was decided (*Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969)). Pursuant to this authority, the FCC has policies limiting both the national and local ownership of broadcast licenses.

Initially, the FCC reviewed common ownership issues on a case-by-case basis. As the industry developed, the FCC adopted bright line rules addressing license ownership in national and local media markets, consistent with the public interest. Among other things, FCC rules limit the number of television stations and radio stations a single company can own in one market. In addition, the FCC's newspaper/broadcast cross-ownership rule prohibits the ownership of a television or radio station and the daily newspaper in the same market.

With the enactment of the Telecommunications Act of 1996 (1996 Act), Congress significantly loosened media ownership limits. The 1996 Act eliminated limits on national radio ownership and raised the cap on national television audience reach from 25 to 35 percent. The 1996 Act also eased local radio ownership limits by creating a sliding scale limit that allowed for as many as eight co-owned radio stations in the largest markets. The 1996 Act also mandated that the FCC review its media ownership rules every two years to "determine whether any of such rules are necessary in the public interest as the result of competition."

2002 BIENNIAL REVIEW

In 2002, the FCC released a notice of proposed rulemaking announcing that the agency would review its full range of broadcast ownership rules. The public was asked to comment on the continued viability of these rules, in light of changes in the media marketplace and recent court decisions.[1] On June 2, 2003, led by then-FCC Chairman Michael Powell, the agency adopted its *2002 Biennial Review* decision, relaxing many of the FCC's media ownership rules.

The revised rules included a national television audience reach cap of 45 percent. With respect to local television ownership, the revised rules permitted one company to own two stations in markets with five or more television stations and three stations in markets with 18 or more television stations. With respect to local radio ownership, the revised rule retained existing caps, but adjusted the way stations are counted. The revised rules combined the radio/television and newspaper/broadcast cross-ownership restrictions into a single new media cross-ownership rule. Under this proposed rule, in markets with three or fewer television stations, no cross-ownership was permitted among television stations, radio stations, and daily newspapers in the same market. In markets with four to eight television stations, combinations were limited to one of the

[1] See *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

following: (1) a daily newspaper, one television station, and up to half of the radio station limit for that market; (2) a daily newspaper and up to the radio station limit for that market; or (3) two television stations and up to the radio station limit for that market. In markets with nine or more television stations, any combination that otherwise complies with the local television and local radio ownership rules was permitted. As a result, in a large market, one company could theoretically own as many as eight radio stations, three television stations, a daily newspaper, and the cable company.

The revised rules faced significant public criticism. In response to the *2002 Biennial Review* decision, more than three million individuals complained to the FCC. Congress also voiced its opposition. On September 16, 2003, the Senate voted 55–40 to support a "resolution of disapproval" of the FCC decision, pursuant to the Congressional Review Act. In addition, in omnibus appropriations legislation in 2004, Congress rolled back the FCC's new national television ownership cap from 45 to 39 percent.

Appeals of the FCC's *2002 Biennial Review* decision were consolidated in the Third Circuit. On June 24, 2004, the Third Circuit affirmed the FCC's general authority "to regulate media ownership" but remanded to the FCC the bulk of its rule changes in the *2002 Biennial Review* decision for further justification and record support.[2] The court also largely stayed the FCC's new rules from the *2002 Biennial Review* decision. As a result, the agency's previous rules continue to govern media ownership in this country. On June 13, 2005, the Supreme Court denied the petitions for the writ of certiorari seeking review of *Prometheus*.

On June 21, 2006, the FCC adopted a notice of proposed rulemaking seeking comment on the issues raised by the *Prometheus* remand, pursuant to its duty under section 202(h) of the 1996 Act which now requires the agency to review its media ownership rules on a quadrennial basis.[3] As part of its efforts to seek public comment, the FCC held six public field hearings across the United States. On November 13, 2007, FCC Chairman Kevin Martin published an editorial in *The New York Times* calling for the FCC to revise its media ownership rules in order to permit newspaper/broadcast cross-ownership in the top 20 markets. Subsequently, on December 13, 2007, the Committee held a hearing on FCC oversight during which several members requested the FCC take additional time to solicit comment and consider its proposed changes to its media ownership rules. Just a month after the Martin editorial, on December 18, 2007, the FCC concluded its rulemaking by approving revised ownership rules under which newspaper/broadcast cross-ownership is presumptively permissible in the top 20 markets. For other markets, the Commission determined that it would review transactions on a case-by-case basis, subject to a negative presumption, which may be overcome through evaluating: the level of concentration in the market; whether or not the combined entity

[2] See *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3rd Cir. 2004) (*Prometheus*).

[3] *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*, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006); see also *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*, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215 (2007).

will significantly increase the amount of local news in the market; whether or not the combined newspaper and broadcast outlets will continue to employ their own editorial staff; and the financial condition of the newspaper or broadcast station in the proposed combination, or if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

INDUSTRY CONSOLIDATION

The decade leading up to the *2002 Biennial Review* decision was a period of significant change in the media marketplace. In the broadcast television industry, the number of television station owners decreased by approximately 40 percent between 1995 and 2003. According to studies recently conducted by the FCC, these trends have continued, albeit at a slower pace. Between 2002 and 2005, the number of commercial television station owners decreased by about four percent and the number of commercial radio station owners decreased by eight percent.[4] During the same period the number of television/radio combinations increased by more than 20 percent.[5] As a result of this increase in concentration, there are fewer local owners of radio and television broadcast stations. Studies suggest that local owners of broadcast media provide more local news programming.[6]

Consolidation in the media marketplace has left women and minorities with only limited ownership interest. According to a recent Government Accountability Office (GAO) investigation, "[w]hile there are no reliable government data on ownership by women and minorities, ownership of broadcast outlets by these groups appears limited. According to the industry stakeholders and experts we interviewed, the level is limited, and recent studies generally support this conclusion.[7]

In testimony before the Committee on November 8, 2007, Alex Nogales, President of the National Hispanic Media Coalition, stated "[m]ore than a third of Americans are people of color. Yet they own less than 3% of television stations and less than 8% of radio stations—and these numbers are going down, not up."

CONGRESSIONAL REVIEW OF FEDERAL AGENCY RULES

Pursuant to the Congressional Review Act (CRA), 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. The resolution of disapproval on the 2003 FCC media ownership rule changes is one of only three times that the Senate voted to disapprove an agency rule. Only one joint resolution of disapproval under the CRA has been passed by both the Senate and the House and become law, Public Law 107–5, which dealt with a rule submitted by the Department of Labor relating to ergonomics.

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[4] *Media Ownership Study Two: Ownership Structure and Robustness of Media* by Kiran Duwadi, Scott Roberts, and Andrew Wise revised September 5, 2007 at 5–6.

[5] Id. at 5.

[6] See e.g. Alexander, Peter J. and Brown, Keith. "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News" FCC Working Paper (2004).

[7] Letter from JayEtta Z. Hecker, GAO, to the Honorable Edward J. Markey, dated December 14, 2007, at 9.

LEGISLATIVE HISTORY

On November 8, 2007, the Committee held a FCC oversight hearing titled "Localism, Diversity, and Media Ownership." Senator Dorgan introduced S. 2332 on the same day with Senators Lott, Kerry, Bill Nelson, Cantwell, Snowe, Biden, Clinton, Feinstein, and Obama as original cosponsors. The bill would require the FCC to seek public comment on any proposed changes to media ownership rules, to conduct a rulemaking to examine the impact of media ownership on local programming, and to solicit expert recommendations on how to increase minority and female ownership of broadcast media. The bill, as modified by a manager's amendment offered by Senator Dorgan, was approved by voice vote at an executive session on December 4, 2007.

On December 13, 2007, the Committee held a hearing on FCC oversight, during which several members spoke at length about Chairman Martin's proposed rule changes, as described in his editorial in *The New York Times*. On December 14, 2007, twenty-six Senators signed a letter to Chairman Martin urging a further period of comment on the Chairman's proposed rule changes. On December 18, 2007, the FCC approved a revised set of ownership rules under which newspaper/broadcast cross-ownership is permissible in the top 20 markets.

On March 5, 2008, Senator Dorgan introduced S.J. Res. 28, a joint resolution disapproving the FCC rule. On April 24, 2008, the Committee held an executive session at which S.J. Res. 28 was considered. The resolution was approved by voice vote.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

MAY 6, 2008.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S.J. Res. 28, a joint resolution disapproving the rule submitted by the Federal Communications Commission with respect to broadcast media ownership.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S.J. Res. 28—A joint resolution disapproving the rule submitted by the Federal Communications Commission with respect to broadcast media ownership

S.J. Res. 28 would disapprove the rule adopted by the Federal Communications Commission (FCC) on December 18, 2007, ending a ban on common ownership of newspaper and broadcast outlets in the same market (also known as cross-ownership). The new rule

generally allows a newspaper in any of the nation's 20 largest media markets to own one television station or one radio station.

S.J. Res. 28 would invoke a legislative process established by the Congressional Review Act (Public Law 104–121) to disapprove the cross-ownership rule. If S.J. Res. 28 is enacted, the published rule would have no force or effect. Based on information from the FCC, CBO estimates that voiding this rule would have no effect on the federal budget.

S.J. Res. 28 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

By voiding the FCC's cross-ownership rule and reinstating the ban on common ownership of newspaper and broadcast outlets, the bill would impose a private-sector mandate on companies that wish to own a newspaper and a television or radio station in a single market area. By law, the FCC bases each decision to grant a broadcast license on the determination of whether those actions will serve the "public interest" among other criteria. The cross-ownership rule changes the approval process for obtaining broadcast licenses in some cases because it would allow the FCC to presume that such mergers, under the circumstances specified in the rule, are in the public interest.

Under the ban of cross-media mergers that the legislation would reinstate, companies could apply for a license for such a merger as long as they make the case that waiving the ban was in the public interest. According to some industry experts, however, fewer such mergers are likely to occur under the ban than would occur under the cross-ownership rule. The cost to the private sector of the mandate would be the incremental cost of applying for a license (because the waiver process is more costly), plus any forgone net profit attributable to the cross-media ban. CBO has no basis for estimating those costs. CBO, therefore, cannot determine whether the cost of the mandate would exceed the annual threshold established in UMRA for private-sector mandates ($136 million in 2008, adjusted annually for inflation).

The CBO staff contacts for this estimate are Susan Willie (for federal costs), and Jacob Kuipers (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The number of persons covered by this legislation would be consistent with current levels of individuals affected.

ECONOMIC IMPACT

S.J. Res. 28 would have a positive impact on the nation's economy by overturning rules to allow consolidation in ownership of media outlets. Thus, the bill could encourage more diverse ownership of these outlets.

PRIVACY

S.J. Res. 28 is not expected to have an adverse effect on the personal privacy of any individuals that will be impacted by this legislation.

PAPERWORK

S.J. Res. 28 would have minimal impact on current paperwork levels.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

S.J. Res. 28 would disapprove the rule submitted by the FCC relaxing the agency's media ownership rules with respect to newspaper/broadcast cross-ownership.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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