

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50; *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256; *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, MB Docket No. 17-289.

Let me start my statement with a quote: “Today, the modern media marketplace includes literally thousands of radio and broadcast television stations, hundreds of national, regional, and local non-broadcast television networks delivering a vast range of content over cable and direct broadcast satellite systems, and perhaps most significantly, the Internet and a host of digital technology-enabled interactive services.”¹ This statement is from Chief Judge Scirica of the Third Circuit. In 2004.

As the court has reminded this Commission, “Section 202(h) of the Telecommunications Act of 1996 uses unmistakably mandatory language in describing the Commission’s obligations.”² Despite what some of my colleagues would have you believe, our action today is not part of a larger master plan to favorably set the landscape for a future merger. Implying that is simply untrue and minimizes the repeated dereliction of duty by the Commission. Instead, today’s item – in 2017 – concludes the Commission’s 2010/2014 Quadrennial Review.

First, the Commission eliminates the Newspaper/Broadcast Cross-Ownership (“NBCO”) rule. As the item carefully explains, in today’s environment, the rule no longer makes sense. This is not a new idea. In fact, the Commission, in one form or another, has been unable to justify this rule for more than 15 years.

The Commission concluded as part of its 2002 review that a complete ban of newspaper and broadcaster cross-ownership was no longer in the public interest. Upon review, the Third Circuit agreed with this conclusion, but found the FCC’s alternative proposal to be arbitrary and capricious. As a result, the 1975 rule remained. Up next came the 2006 review. Once again, the FCC no longer believed it could justify the ban and modified its rules accordingly. But, once again, the court found process fouls and remanded the item. As a result, the 1975 rule remained.

The wounds are still fresh from the 2010/2014 Quadrennial Review. Prior to Commission action, the Third Circuit admonished the FCC for its delay³ and specifically highlighted the NBCO rule, stating that “the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest.”⁴ Perhaps determined to continue the process fouls of the past,

¹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 436 (3d Cir. 2004) (*Prometheus I*) (Scirica, Chief Judge, dissenting in part).

² *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (*Prometheus III*) (“It provides that the Commission ‘shall’ review its rules on broadcast ownership every four years, ‘shall determine whether any of such rules are necessary in the public interest as the result of competition,’ and ‘shall repeal or modify any regulation it determines to be no longer in the public interest.’”).

³ *Id.* at 51 (“The Commission’s delay keeps five broadcast ownership rules in limbo: the local television ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership (“NBCO”) rule, the radio/television cross-ownership rule, and the dual network rule.”).

⁴ *Id.*

when the Commission finally did act on this proceeding it examined the full media landscape then did nothing to adjust our rules in response to that landscape. In fact, despite having the votes to eliminate the cross-ownership rules, the Commission ignored precedent, consensus, and the record before it and in an about-face, decided to maintain the NBCO rule. Again, the 1975 rule remained.

Today, we fix the shoddy effort of the previous Commission. We also establish a thorough record and analysis justifying why the NBCO rule is no longer necessary. I have no doubt that this item will wind up back on the desk of the Third Circuit. However, the court will be hard pressed to find that the FCC failed to justify its reasoning. More than a decade ago the court found that the FCC “reasonably concluded” that the NBCO rule was not necessary to promote competition or localism⁵ and today’s item fully addresses why it is also not needed to ensure viewpoint diversity. According to Pew, “Americans turn to a wide range of platforms to get local news and information.”⁶ The Third Circuit recognized this multiplicity of voices, including cable and Internet, in 2004. It simply disagreed with the Commission on the degree to which these services competed with local newspapers. But, something else happened in 2004: a social media platform known as Facebook launched, followed by Twitter in 2006. These social media platforms, along with Google, became go-to sites that many consumers visit to first learn about breaking national or local news. More than a decade later, it is hard to overstate the impact of social media platforms and online outlets on viewpoint diversity.

Also since 2002, the Commission has explored ways to modify the Local Television Ownership Rule, otherwise known as the duopoly rule.⁷ In 2004, the Third Circuit largely upheld the Commission’s decision to relax the “eight voices test” but remanded the new numerical limits the FCC imposed.⁸ Once again, this had the effect of freezing the old rules in place.

I have long called for a reexamination of the duopoly rule. In many markets, duopolies or triopolies could strengthen the overall state of broadcasters and allow stations to concentrate more resources on bringing more and higher quality local content to their viewers. At the very least, requirements like the “eight voices test” makes even less sense now than it did in 2002 when the Commission first sought to eliminate it. I am pleased that this Commission agrees. As to the top-four restriction, I would prefer that we were adopting bright-line rules rather than relying on a staff-driven case-by-case assessment. I also question how likely, and quickly, these decisions will be reached. I trust that as we re-examine this issue as part of the 2018 Quadrennial Review we will give serious weight to a full elimination of the duopoly rule.

I also hope in the 2018 quadrennial that we can more honestly define the media market as it exists today. While the item acknowledges that the video marketplace has substantially evolved, based on the current record the Commission declines to expand its market definition beyond local broadcast television stations. I believe there is ample evidence that cable operators, over-the-top providers, Internet sites, and social media platforms compete with local broadcasters. Fortunately, the item at least recognizes that its market definition could change in a future proceeding with a different record. While it may be a missed opportunity today, I will be watching closely for this in our next review of our rules.

⁵ *Prometheus I*, 373 F.3d at 400–01.

⁶ Pew Research Center and Knight Foundation, *How People Learn About Their Local Community 1* (Sept. 26, 2011) (*How People Learn About Their Local Community*), <http://www.pewinternet.org/2011/09/26/how-people-learn-about-their-local-community> (cited in NAB FNPRM Comments at 25 & n.83 (cited in NAB Petition at ii & n.4) and Morris FNPRM Reply at 5).

⁷ *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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) (2002 Biennial Review Order).

⁸ *Prometheus I*, 373 F.3d at 412–21.

We also eliminate the attribution rule for television joint sales agreements, which never should have been adopted in the first place. Further, we agree to set up an incubator program in this item, while exploring how to best structure it.

Turning to radio, I appreciate the Chairman's willingness to work with me and Commissioner Carr to address the issue of embedded markets. Originally, this item denied the relevant reconsideration petition. Admittedly, this is a narrow issue as only two markets have multiple embedded markets—DC and New York. I believe the Commission should have granted the petition in full and altered the Commission's methodology for determining compliance with the Local Radio Ownership Rule in markets containing embedded markets. As both Nielsen and BIA make clear, the listing of embedded markets in the parent market "is a reflection of geography, not an analysis of competition."⁹ However, it appears the Commission wants to gather more information in the record before going this far. For these reasons, I understand that the Commission will consider this further in its 2018 Quadrennial Review.

Until then, Connoisseur presents convincing evidence that even under the most extreme circumstance in which one party were to own the maximum number of stations in each embedded market *and* each of these stations reached their highest ratings of the last 13 months, the owner would only rank third in the New York market with an 11.2 percent market share.¹⁰ In Washington, DC, under the most extreme example, a station would rank sixth.¹¹ For these reasons, I support providing a presumptive waiver that the Commission will evaluate proposed transactions of radio stations located in the current markets with multiple embedded markets by looking to the transaction's compliance with the ownership limits in the embedded markets. Not only does the record support this, but this will bring more certainty to the marketplace until we can more fully examine this rule. These are important changes from the draft item.

Beyond the issue of embedded markets, I am disappointed that this item did very little to unburden the radio industry. While I was pleased to see the elimination of the Radio/Television Cross-ownership rule, I wish the Commission would have gone further in addressing our Local Radio Ownership Rules. For starters, it's time to review the Commission's AM/FM subcaps. However, I recognize that the Commission was confined to the petitions for reconsideration before us and that there will be an opportunity to re-examine our rules once again during the 2018 Quadrennial Review.

Finally, I am disappointed that the Commission declines to reverse course from the previous Commission's ill-advised decision to impose disclosure requirements for shared services agreements (SSAs) for commercial television stations. Despite assurances from this Commission, make no mistake: disclosure requirements are generally used as precursors for regulations. Maybe not today. Maybe not tomorrow. But regulations will likely come. It is also counterintuitive that in one item we consider today we question whether the costs of Form 325 data collections exceed the benefits of the information but in this item we retain illogical disclosure requirements. This is the wrong approach. We should treat this part of the proceeding in the same way that we have treated items within our media modernization initiative: with deep skepticism. I look forward to its elimination in the very near future.

In 2004, Judge Scirica got it right. He dissented from the court stay, suggesting it would be better to allow the quadrennial review process to run its course in order to allow both the Commission and Congress the ability to measure the media marketplace.¹² He cautiously warned, "[v]acating and

⁹ Connoisseur Oct. 30, 2017 *Ex Parte* Letter ("If embedded market stations really competed in the parent market, there would be no need to have embedded markets.").

¹⁰ Connoisseur Nov. 9, 2017 *Ex Parte* Letter.

¹¹ Connoisseur Oct. 30, 2017 *Ex Parte* Letter.

¹² *Prometheus I*, 373 F.3d at 435–36.

remanding the proposed rules to the Commission will preserve the existing rules in place for months or even years, and the resulting delay will likely leave the public worse off than if these rules were allowed to take effect.”¹³ If only. These rules have been frozen in place for over a decade. Remands result in inertia. Inertia in our media ownership rules upend Congressional intent and prohibit a functioning media marketplace, to the detriment of the American consumer. If only the rest of the Third Circuit understood this as well.

In *Prometheus III* the court reminded us, “[r]arely does a trilogy benefit from a sequel.”¹⁴ I do not disagree. Alas, it is coming. I can only hope that this time there is a twist at the end: the court finally allows the Commission to do its job and update our rules to accurately reflect today’s media landscape. If not, I trust we have the wherewithal to challenge any decision to a higher court.

¹³ *Id.* At 438.

¹⁴ *Prometheus III*, 824 F.3d at 60.