Embarking on Its Most Extensive Review of Media Ownership: The FCC's Endeavor to Create a Happy Medium

James E. Michel

Follow this and additional works at: http://lawecommons.luc.edu/lclr

Part of the Consumer Protection Law Commons

Recommended Citation

Available at: http://lawecommons.luc.edu/lclr/vol15/iss3/3

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
I. Introduction

Note to self—tune in to watch “Joe Millionaire” on Mondays, “The Real World” on Tuesdays, “The Bachelorette” on Wednesdays, and “Survivor” on Thursdays. Note to the television viewing public—American television has gone completely reality-based. In recent years, the major broadcast networks, along with giant cable stations, have aggressively competed with each other to offer the most appealing reality-based program. But, as programming becomes increasingly homogenized, the television broadcast industry seems to be losing sight of its obligation to provide news and information that is relevant and important.

Although difficult to recognize because of the dramatic increase in television viewing options, remarkable changes in the quality, quantity, and content of public interest programming have taken place in the television broadcast industry. These days, many believe that the industry spends less time reporting news and information that caters to the needs and interests of the average television viewer. Furthermore, consumers question the validity of

---

* J.D. candidate, May 2004, Loyola University Chicago School of Law; B.A., Communication with concentration in Journalism, 1998, Purdue University.

1 See Consumer Federation of America, Public Support for Media Diversity and Democracy in the Digital Age: A Review of Recent Survey Evidence 2 (Oct. 31, 2002) [hereinafter Public Support for Media Diversity] (citing a 2000 survey finding that over 60% of consumers surveyed believed that people like them were not accurately presented on television), available at http://www.consumerfed.org/MediaSurvey10.31.02.pdf.
national and local news broadcasts.\textsuperscript{2} Public opinion also reveals a demand for more educational and community-oriented programming.\textsuperscript{3} Many Americans believe that the industry should consider the cultural and ethnic composition of communities in selecting its television programming.\textsuperscript{4} The public is also concerned that the major networks are not offering programming that addresses public affairs or local news and events.\textsuperscript{5} Note to the media giants—today’s reality-based shows cannot provide the public interest element that consumers have been seeking.

The media industry is rapidly advancing towards a framework dictated by corporate giants who regulate closed, proprietary networks and pay little attention to the public interest.\textsuperscript{6} The Telecommunications Act of 1996 (the “1996 Act”),\textsuperscript{7} responsible for this trend, calls for a more deregulated and consolidated media landscape—supposedly to protect the public interest.\textsuperscript{8} Since 1996, however, consumers have witnessed a steady wave of media mergers that threaten to weaken democratic principles and public interest obligations.\textsuperscript{9} Opponents of deregulation fear that it would place too much power in the hands of a few major conglomerates.\textsuperscript{10} It could, for example, become commonplace for one corporation, such as Fox or Viacom, to own the dominant newspapers, broadcast and cable television stations, radio stations, and Internet access providers for an

\textsuperscript{2} Public Support for Media Diversity, supra note 1, at 2 (citing a 1999 survey finding that 47\% of consumers surveyed did not trust television news).

\textsuperscript{3} Id. at 2–3 (citing a 2000 survey finding that 70\% of consumers surveyed were in favor of requiring networks to provide more educational programming).

\textsuperscript{4} Id. at 2 (citing a 2002 survey finding that a majority of consumers surveyed deemed it important that television programs reflect the cultural and ethnic makeup of their communities).

\textsuperscript{5} Id. (citing a 2002 survey finding that a majority of consumers surveyed deemed it important to have public affairs programs that discuss local issues).

\textsuperscript{6} Id. at 1.


\textsuperscript{8} See Public Support for Media Diversity, supra note 1, at 1.

\textsuperscript{9} See id.

entire metropolitan area.\textsuperscript{11}

These media giants, who recognize the importance of maximizing profits, have sought to thrive under the policies of the Federal Communications Commission ("FCC" or "Commission"). As required by the 1996 Act, the FCC has promulgated rules designed to relax restrictions on the consolidation of media ownership.\textsuperscript{12} On the other hand, the Commission has traditionally relied on its ownership policy as a means of promoting diversity, competition, and localism.\textsuperscript{13} Diversity, in particular, has been one of the FCC’s long-standing principles in developing its ownership rules.\textsuperscript{14} This policy goal furthers the First Amendment principle, endorsed by the Supreme Court, that the "widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."\textsuperscript{15} Similarly, the Commission has long embraced the concept that greater ownership diversity in the marketplace avoids the potential for a single entity to have an unreasonable effect on public opinion.\textsuperscript{16} Consumers have relied on these policies to receive information on public affairs and local issues. Therefore, opponents of deregulation argue that relaxing the FCC’s media ownership rules will frustrate the policy goal of diversity.\textsuperscript{17}

One of the most significant rules that the FCC enforces is the "national television ownership rule," which prohibits a network from owning television stations that collectively reach more than 35% of American homes.\textsuperscript{18} The FCC also enforces the "local television

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., National Television Multiple Ownership Rule, 47 C.F.R. § 73.3555(e)(1) (2002).
\item Id. at 18,516.
\item Id. (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
\item Id. (citing 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, 45 F.C.C. 1476, 1477 (1964)).
\item 2002 Notice, supra note 13, 17 F.C.C.R. at 18,543.
\end{enumerate}
\end{footnotesize}
ownership rule," which allows for common ownership of two television stations in the same local market as long as one of the stations is not among the four highest ranked stations in the market and at least eight independently owned operational television stations remain in that market after any merger.19 This local television ownership rule is based in part on the “diversification of service” rationale, which posits that a greater number of separately owned broadcast stations promote diversity.20 By advancing an industry structure that regulates itself, however, the 1996 Act has altered the FCC’s diversity objectives with regard to both of these rules. Consequently, the FCC finds itself torn between adhering to the Act, which strives for deregulation, and enforcing its rules, which have been proven to promote diversity.

The D.C. Circuit Court of Appeals recently reviewed both the national and local ownership rules.21 In Fox Television Stations, Inc. v. FCC, the court remanded the national television ownership rule to the FCC for further consideration, holding that it acted arbitrarily and capriciously by retaining the rule.22 Similarly, the court in Sinclair Broadcasting Group, Inc. v. FCC remanded the local television ownership rule for further consideration.23 Both decisions can be seen as victories for the networks because they suggest that the FCC cannot justify the preservation of these rules. As this article will argue, however, the D.C. Circuit also recognized the importance of the FCC’s restrictions on media ownership in preventing media consolidation. Thus, the court directed the FCC to carefully assess the effect that relaxation of the rules would have on the consumer’s opportunity to keep informed on public affairs and local issues.

Corporate domination of the media industry may be inching closer to becoming a reality, considering the recent flurry of FCC proceedings held to determine whether current media ownership rules are still viable tools in the industry.24 In 2002, the FCC announced

20. Id.
21. See Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) (reviewing the local television ownership rule); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002) (reviewing the national television ownership rule), modified on reh’g, 293 F.3d 537 (D.C. Cir. 2002).
22. Fox, 280 F.3d at 1033.
23. Sinclair, 284 F.3d at 152.
proposals to further relax or eliminate the rules. Consumers have outwardly opposed the Commission’s recent measures, warning that the proposed changes could reduce the number of media outlets, and thus, hamper the public’s knowledge of public affairs and local issues. Although messages from Congress are mixed, one representative stated that the FCC’s decision to relax or eliminate its media ownership rules would have a “tremendous impact on our goal of promoting diversity . . . on our public airwaves.”

Part II of this article will track the development of FCC media ownership policy. In particular, it will discuss the 1996 Act and the D.C. Circuit’s decisions in Fox and Sinclair. Part III will address the FCC’s newest proposals for the television industry, set forth in its 2002 Notice. Part IV will argue that the Commission should acknowledge public opinion and the wealth of empirical evidence that supports the need to preserve its media ownership policies. Finally, Part V of this article will discuss the most important justifications for retaining the national and local television ownership rules and argue that the FCC should preserve these rules because they continue to promote its policy goals for the media industry.


26 See Jim Landers, FCC agrees to study media ownership rules; Debate is over whether easing limits would lead to fewer news outlets, DALLAS MORNING NEWS, Sept. 13, 2002, at 2D, available at 2002 WL 100570599.


28 Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1027 (D.C. Cir. 2002).

II. FCC Media Ownership Policy: From the Duopoly Rule to the National and Local Television Ownership Rules

For over seven decades, the FCC has regulated the number and type of media outlets that any entity can own. In 1938, the Commission denied a broadcasting company that already controlled a broadcast station the opportunity to own another in the same market. In doing so, the FCC created the "duopoly rule," which prohibits such a company from receiving multiple licenses for the same type of facilities in the same broadcast area. Since the establishment of the duopoly rule, however, the FCC has implemented a vast set of regulations to deal with an industry that has seen growth in numbers and several technological advancements.

A. Media Ownership Policy Prior to the 1996 Act

The national television ownership rule began to develop in the 1940s, when the FCC first imposed numerical caps on the number of television broadcast stations that a single entity could own. Under these regulations, the Commission limited nationwide ownership to three stations. In 1953, the FCC expanded the limit to five stations, reasoning that the higher limit would still promote diversification. The rule also continued to serve the policy goals of the Communications Act of 1934 (the "1934 Act"), which was designed to restrict the monopolization of broadcast facilities and preserve a free and competitive broadcasting industry. Then, in 1954, relying

32 See id.
34 Id. (citing 6 Fed. Reg. 2284–85 (1941)).
35 Id. (citing 9 Fed. Reg. 5442 (1941)).
36 Id. at 11,067 (citing Amendment of Multiple Ownership Rules, 9 Fed. Reg. 1563 (1953)).
on the same principles, the FCC raised the national ownership limit of television stations from five to seven.\textsuperscript{37}

The television industry operated under the seven-station rule for thirty years before the FCC considered a major transformation of its media ownership rules. In 1984, the Commission made a u-turn on its policy.\textsuperscript{38} After considering the technological changes in mass media, the FCC implemented a six-year transition period during which the ownership limit would be raised to twelve television broadcast stations.\textsuperscript{39} The Commission did not view this change as detrimental to either the promotion of viewpoint diversity or the prevention of media concentration.\textsuperscript{40} Rather, the FCC explained that the seven-station limit was no longer needed because of the growing number of media outlets.\textsuperscript{41} The FCC also stated that the national television ownership rule had no effect on the ability of small, independent media outlets to thrive in the industry or the opportunity for consumers to receive diverse points of view in their local market.\textsuperscript{42} Finally, the Commission explained that group ownership positively affected the quality and quantity of public affairs programming.\textsuperscript{43} Because the concept of gobbling up small entities to gain market share had not been thought of yet, the FCC's reasoning for increasing the ownership limit was sound. Unlike today, during the 1980s, major networks shared market power and competed fairly with small, independent stations.

Nevertheless, Congress rejected the FCC's 1984 modifications of the national ownership rule and directed the Commission to reconsider its findings.\textsuperscript{44} After reaffirming its

\textsuperscript{37} Id. (citing Amendment of Multiple Ownership Rules, 43 F.C.C. 2797 (1954)).

\textsuperscript{38} See In re Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 17 (1984) [hereinafter 1984 Order].

\textsuperscript{39} See id. at 18, 55.

\textsuperscript{40} 1998 Biennial Review, supra note 33, 15 F.C.C.R., at 11,067 (citing 1984 Order, supra note 38, at 24–46).

\textsuperscript{41} See 1984 Order, supra note 38, at 18, 28.

\textsuperscript{42} See id. at 37.

\textsuperscript{43} See id. at 20.

\textsuperscript{44} See Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1034 (D.C. Cir. 2002) (citing Second Supplemental Appropriations Act, Pub. L. No. 98–396, § 304,
position, the FCC raised the numerical ownership limit to twelve stations, but also established an audience reach cap of 25%. The cap prevented a single entity from owning television stations that collectively reached more than 25% of American households. The Commission reasoned that the cap would prevent the acquisition of multiple stations in smaller markets, thus preventing "disruptive restructuring." The FCC also noted that a national audience cap would "temper dramatic changes in the ownership structure by the largest group owners in the largest markets." These justifications are even more important today.

Unlike the national television ownership rule, the local television ownership rule is a recent phenomenon spawned largely from the 1996 Act. In 1964, the FCC instituted a rule generally prohibiting an entity from owning two television stations in the same local market. The rule was based in part on the FCC’s "diversification of service" rationale, which theorizes that a greater number of separately owned broadcast stations promote diversity. The local television ownership rule did not undergo any changes until the enactment of the 1996 Act.

Congress intended the 1996 Act to be interpreted as "favoring diversity of media voices, vigorous economic competition, technological advancement, and the promotion of the public interest, convenience, and necessity." Unfortunately, however, the Act has put the FCC's policy objectives of promoting diversity and preventing media concentration in serious jeopardy by directing the Commission to loosen its restraints on media ownership and

98 Stat. 1369, 1423 (1984)).

45 See In re Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 74, 98 (1985).

46 See id.

47 See id.

48 See id. at 89, 91.


50 See id. (citing Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rule Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964)).

51 See id. (citing Genessee Radio Corp., 5 F.C.C. 183 (1939)).

52 Id.

deregulate the industry. The Act has allowed major media conglomerates to capture smaller broadcast stations nationwide and ultimately control most of the market share.\(^5^4\) Competition in the media industry may be vigorous, but only between the biggest and loudest voices.

**B. The 1996 Act and its Directives**

The 1996 Act was the first substantial reform in telecommunications policy since the 1934 Act.\(^5^5\) The 1996 Act set in motion Congress’s plans for a more deregulated and consolidated media industry.\(^5^6\) One of its stated primary goals is to promote competition so customers can benefit from lower prices, higher quality services, and new technologies.\(^5^7\) But, the media industry appears to have reacted adversely to these goals, as corporate giants continue to buy out smaller media outlets, generating competition only between other major entities.

The 1996 Act requires the FCC to reexamine its media ownership rules every two years and to repeal or modify any regulation that is no longer in the public interest.\(^5^8\) Section 202(h) of the Act expressly sets forth the FCC’s duty to determine "whether any such rules are necessary in the public interest as a result of competition.”\(^5^9\)

As required by the 1996 Act,\(^6^0\) the Commission modified the national television ownership rule.\(^6^1\) Section 202(c)(1) directs the FCC to eliminate the numerical ownership limit on the number of television broadcast stations a single entity can own and increase the

---


\(^5^5\) Id. at 260.


\(^5^8\) See Telecommunications Act of 1996 § 202(h).

\(^5^9\) Id.

\(^6^0\) See id. § 202(c)(1)(B).

\(^6^1\) National Television Multiple Ownership Rule, 47 C.F.R. § 73.3555(e)(1) (2002).
audience reach cap on such ownership. Pursuant to the Act, the FCC abolished the 12-station rule and increased the audience reach cap for national television ownership from 25% to 35% of American households.

Although Congress revamped the national television ownership rule, it delegated the authority to change the local television ownership rule to the FCC. Congress directed the Commission to consider its restrictions on the number of television stations that an entity could own within a local television market. In 1999, the FCC adopted its current rules regarding local television ownership, which allow for ownership of two television stations by the same entity in the same local market if one of the stations is not among the four highest ranked stations in the market and at least eight operational, independently owned television broadcast stations remain in the market after a merger. The Commission refers to this rule as the "the top four ranked/eight voices test." The FCC set the number of independently owned television stations at eight to maximize the available viewpoints given in a local market. The Commission concluded that, without sufficient limits on ownership in local markets, diversity would vanish while media concentration would slowly prevail. Conversely, the FCC also reasoned that the increase in the availability of local media outlets and the efficiency and public service benefits of joint ownership prompted this change in policy.

Until the 1996 Act, the national and local television ownership rules evolved incrementally. Over the years, the courts typically approved developments in FCC policy if they were

63 See 47 C.F.R. § 73.3555(e)(1).
65 See Telecommunications Act of 1996 § 202(c)(2).
66 Local Television Multiple Ownership Rule, 47 C.F.R. § 73.3555(b) (2002).
67 2002 Notice, supra note 13, 17 F.C.C.R. at 18,527.
69 See id.
70 2002 Notice, supra note 13, 17 F.C.C.R. at 18,528.
71 Id. at 18,505.
constructed rationally, served their stated purpose, and followed administrative procedure. The 1996 Act altered that relationship, as was demonstrated when the D.C. Circuit held that § 202(h) of the Act carries a presumption in favor of repealing or modifying the Commission's media ownership rules.

C. The D.C. Circuit as the FCC's Arbiter: The Fox and Sinclair Decisions

Pursuant to the 1996 Act, the FCC reexamined its media ownership rules in its 1998 Biennial Review. After assessing the significance of the national television ownership rule, the FCC decided against repealing or modifying the rule. This decision prompted the major networks to seek judicial review. This section will discuss the D.C. Circuit's reaction in two cases: Fox Television Stations, Inc. v. FCC and Sinclair Broadcasting Group, Inc. v. FCC.

1. Fox Television Stations, Inc. v. FCC and the National Television Ownership Rule

In Fox, the FCC cited several reasons for retaining the national television ownership rule. First, it argued that it should observe the effect of Congress's changes to the local television ownership rule before changing the national television ownership rule. Similarly, the FCC reasoned that it should first observe the effects of Congress's decision to increase the national ownership cap. Perhaps most important, the FCC suggested that retaining the national television ownership rule would allow smaller affiliates to continue to bargain with other networks so that they could better serve their local communities. The Commission also argued that, without constraints, monopolies might surface in advertising and
Finally, the FCC concluded that repealing the national television ownership rule would reduce competition and diversity.  

The networks, on the other hand, argued that the FCC failed to show that they have enough control in the market to hinder competition. Therefore, they concluded, the Commission’s position was “fundamentally irrational.” They also contended that the FCC did not meaningfully consider whether the rule was in the public interest, as directed by § 202(h). Finally, the networks claimed that the FCC failed to adequately explain why it departed from its previous position in 1984 that favored the elimination of the rule.

Before reaching the merits, the court noted that the FCC’s decision to retain the ownership cap had a substantial effect on Viacom’s acquisition of CBS. As a consequence of the merger, Viacom’s audience reach hit 41 percent, well above the 35% limit. Only a stay issued by the D.C. Circuit allowed the company to avoid divesting itself of enough ownership to come within the 35% cap. The court also mentioned that the cap had prevented Fox from proceeding with its purchase of Chris-Craft Industries, a purchase that would have given Fox a national audience reach of over 40%.

With these business concerns in mind, the D.C. Circuit first considered the networks’ argument that the FCC’s decision to retain the national television ownership rule was irrational. The court held that the Commission failed to present any convincing evidence that the networks have enough power to hinder competition in any relevant market. Furthermore, the court found that the FCC’s passing reference to national diversity did not explain why the

79 Fox, 280 F.3d at 1036.

80 Id.

81 Id. at 1041.

82 Id. at 1040.

83 Id.

84 Id. at 1040.

85 See Fox, 280 F.3d at 1036.

86 See id.

87 Id.

88 See id.

89 See id. at 1041–42.
national television ownership rule is necessary to protect this particular policy goal.\textsuperscript{90} The court therefore concluded that the FCC had failed to explain why the rule was necessary in the public interest, as it was required to do by § 202(h) of the 1996 Act.\textsuperscript{91}

The court found that the Commission failed to offer any analysis of the state of competition in the industry to support its decision to retain the national ownership cap.\textsuperscript{92} In particular, the court criticized the FCC’s brief report on the broadcasting market, which contained an assessment of the state of competition that the court found “woefully inadequate.”\textsuperscript{93} The court specifically noted that the FCC merely presented facts regarding the makeup of the media industry without linking those facts to its decision to retain the rule.\textsuperscript{94} Therefore, the court concluded, the Commission simply failed to follow the 1996 Act’s directions.\textsuperscript{95}

Finally, the D.C. Circuit paid special attention to the networks’ argument that the FCC failed to consider its 1984 findings regarding the national television ownership rule.\textsuperscript{96} The court pointed out that, in 1984, the Commission concluded that competition undermined any need for the rule.\textsuperscript{97} The court held that the FCC failed to present any substantial evidence to justify changing its position in 1998.\textsuperscript{98}

As a result of these findings, the court concluded that the FCC’s decision to retain the national television ownership rule was arbitrary and capricious.\textsuperscript{99} Instead of vacating the rule, however, the court remanded it to the FCC for further consideration.\textsuperscript{100}

\textsuperscript{90} See Fox, 280 F.3d at 1042.
\textsuperscript{91} See id. at 1043.
\textsuperscript{92} See id. at 1044.
\textsuperscript{93} See id.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{96} See Fox, 280 F.3d at 1044–45.
\textsuperscript{97} See id. at 1044.
\textsuperscript{98} See id. at 1045.
\textsuperscript{99} See id. at 1033.
\textsuperscript{100} See id. at 1049.
2. Sinclair Broadcasting Group, Inc. v. FCC and the Local Television Ownership Rule

In Sinclair, the D.C. Circuit started where it left off in Fox, stating that the 1996 Act carries with it a presumption favoring the repeal or modification of the FCC’s media ownership rules. In light of that presumption, the court held that the FCC’s justifications for establishing the top four-ranked/eight voices test were flawed. The court concluded that the FCC failed to demonstrate that its decision to retain the local television ownership rule was not arbitrary and capricious.

Essentially, Sinclair Broadcasting challenged the rule on three grounds. Most important, however, it argued that the FCC’s decision to limit the number of television stations that a broadcasting company can own in a local market was arbitrary and capricious.

Regarding the FCC’s top four-ranked/eight voices test, Sinclair primarily attacked the eight voices part of the standard, arguing that the Commission’s decision to consider only television stations as voices in a local market lacked any rational foundation or connection to promoting diversity. Sinclair alleged that the FCC “plucked the number eight out of thin air” and arbitrarily decided to limit the types of voices to broadcast television and not various forms of non-broadcast media, such as the Internet or cable systems. Also, Sinclair reasoned that common ownership without regulatory limits could lead to better and more varied programming. Therefore, the network contended, the FCC should no longer be concerned with the dissolution of diverse programming sources or viewpoints in the local market.

In response, the FCC argued that Sinclair's characterization of the local television ownership rule as an unnecessary restraint on

---

102 See id.
103 See id.
104 Id.
105 Id.
106 Id. at 158–59.
107 Sinclair, 284 F.3d at 158–59.
108 Id.
109 Id. at 159.
ownership was misguided because programming had become highly diversified.\footnote{Id. at 161.} The Commission argued that the rule was primarily designed to preserve viewpoint diversity, not necessarily advance diverse programming.\footnote{Id.} Therefore, the FCC contended, Sinclair’s argument that it failed to present substantial evidence that the rule would lead to better and more varied programming was irrelevant.\footnote{Id.}

Furthermore, the FCC stated that non-broadcast media, such as the Internet or cable, should not be considered part of the eight voices standard because most are still developing and they typically do not serve as an outlet for news and informational programming.\footnote{Sinclair, 284 F.3d at 160.} To support this contention, the FCC argued that broadcast television has always acted as the preeminent source of news and entertainment and that it has a broad, sweeping impact on the television consumer.\footnote{Id. at 163.}

The D.C. Circuit held that, because the FCC has the authority to determine the number and definition of voices, the court must take into account its expertise in projecting market results.\footnote{See id. at 162.} Yet, the court did not find enough support in the record to agree with the FCC’s justifications for considering only broadcast television stations as required voices in the local market.\footnote{See id. at 162–63 ("The rulemaking record does not fill the evidentiary gap.").} Therefore, the court held, the Commission failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception was not arbitrary and capricious.\footnote{See id. at 165.} As it did in \textit{Fox} with the national ownership rule, the court remanded the local ownership rule to the FCC for further consideration.\footnote{See id.}
III. The FCC’s 2002 Biennial Review

Using Fox Television Stations, Inc. v. FCC and Sinclair Broadcasting Group, Inc. v. FCC as its guides, the FCC recently set out to review its media ownership rules once more. The FCC considered the importance of its national and local television ownership rules, marking the initial stages of its 2002 Biennial Review. The Notice initiated the FCC’s most extensive review of its media ownership rules—its third overall since the 1996 Act. The FCC set forth four objectives in its review: (1) to more accurately define its policy goals of diversity, competition, and localism, (2) to determine the best way to promote these goals in the media industry consistent with the 1996 Act, (3) to establish the best measure for these goals, and (4) to establish a balancing test to prioritize the goals if tension exists between them. This section will address the FCC’s most recent views regarding its national and local television ownership rules.

A. The Future of the National Television Ownership Rule

Taking into account the D.C. Circuit’s conclusions in Fox and the directives of the 1996 Act, the FCC is seriously considering whether to repeal the national television ownership rule. In its 2002 Notice, the Commission questioned whether the rule is necessary to preserve competition. Further, the FCC asked whether the rule continues to serve its original purpose of promoting diversity, competition, and localism.

After reviewing the conclusions it made in 1984, the FCC, as the court did in Fox, suggested that the national television ownership rule might not promote diversity in the television market. The Commission stated that consumers typically do not travel to other metropolitan areas to obtain different viewpoints on national or local issues. Rather, the FCC explained that consumers primarily rely on

119 2002 Notice, supra note 13, 17 F.C.C.R. at 18,504.
120 See id. at 18,508.
121 See id. at 18,515.
122 Id. at 18,544.
123 See id.
124 See id. at 18,546.
125 See 2002 Notice, supra note 13, 17 F.C.C.R. at 18,546.
broadcast television and forms of non-broadcast media available in their own communities.\textsuperscript{126} The FCC questioned the effect, if any, that media outlets in different television markets would have on each other's ability to generate news and informational programming to consumers in their respective markets.\textsuperscript{127} Therefore, the Commission suggested, the national television ownership rule might not be relevant to its goal of promoting diversity at the local level.\textsuperscript{128}

Regarding competition, however, the FCC studied the effects that changes to the rule might have on program production and the advertising market.\textsuperscript{129} The Commission specifically considered the effects an increase in the national ownership cap might have on the monopolization of the media industry.\textsuperscript{130} The FCC stated that the effect of an increase in the cap would depend primarily on the makeup of market participants in the industry.\textsuperscript{131} If, for example, program producers had buyers other than television broadcast stations for their products, then the FCC would be less concerned with media concentration.\textsuperscript{132} But, if the networks were capable of controlling the cost structure and client-base of program producers after an increase in the cap, competition and diversity might be severely hindered.\textsuperscript{133}

Finally, the FCC recognized the importance of the national television ownership rule for localism.\textsuperscript{134} The Commission stated that the rule creates a group of separately owned stations that can decide whether to preempt programming and substitute shows that would specifically cater to the needs and interests of consumers in their respective markets.\textsuperscript{135} Considering the Fox court's conclusions that localism might decide the fate of the rule, the FCC asked whether preserving a class of smaller broadcast stations would improve or weaken the quantity and quality of local news and public affairs

\textsuperscript{126} See id.
\textsuperscript{127} See id.
\textsuperscript{128} See id.
\textsuperscript{129} See id. at 18,547-49.
\textsuperscript{130} See id. at 18,547.
\textsuperscript{131} See 2002 Notice, supra note 13, 17 F.C.C.R. at 18,547.
\textsuperscript{132} See id. at 18,548.
\textsuperscript{133} See id.
\textsuperscript{134} See id. at 18,550.
\textsuperscript{135} See id.
programming. Most important, the Commission suggested that the national television ownership rule could allow the large class of separately owned stations to collectively influence programming decisions so that the major networks would be forced to air shows that address public affairs and local issues. Consequently, the FCC determined that retaining the rule based on this reasoning could prevent the exercise of undue economic power by the major networks over smaller broadcast entities.

B. The Future of the Local Television Ownership Rule

In its 2002 Notice, the FCC focused primarily on the validity of the eight voices test, which the D.C. Circuit in Sinclair ruled was arbitrary and capricious. The FCC questioned whether the test should include only television stations. The Commission suggested that perhaps radio stations, daily newspapers, cable systems, and the Internet should be considered voices under the test. More important, however, the FCC stated that the answer to this question would depend on the extent to which these forms of non-broadcast media provide news and information to consumers. Regarding diversity, the FCC stated that television stations have abandoned editorials and bias in their news reporting because they fear that consumers will simply change the channel for more favorable newscasts. The Commission suggested that stations might have a strong economic incentive to provide balanced and unbiased news reports. Therefore, the FCC asked whether promoting a diversity of viewpoints is still an important factor in retaining the rule. Furthermore, the Commission considered the effect that weakening the rule might have on consumers' ability to obtain more diverse programming in the entertainment, news, and

137 See id. at 18,551.
138 Id. at 18,528.
139 See id.
140 See id.
141 See id.
142 See 2002 Notice, supra note 13, 17 F.C.C.R. at 18,529.
143 See id.
144 See id.
Finally, the FCC was especially concerned with the effect that the major networks might have on the ability of station owners and local news departments to exercise editorial judgment if the rule were eliminated.\textsuperscript{146}

In its 2002 Notice, the FCC considered the potential effects of eliminating the local television ownership rule on the advertising market and media outlets that provide sources of entertainment for consumers.\textsuperscript{147} In particular, the Commission studied the possibility that alternatives to television, such as movie theaters and the Internet, could serve as entertainment substitutes for the public.\textsuperscript{148} It concluded that if viable alternatives exist, the local television ownership rule might not be necessary.\textsuperscript{149} Yet, the Commission identified an urgent need to prevent major networks from exercising significant market power over the purchase of programming that provides a source of entertainment.\textsuperscript{150} In a diverse, localized market, suppliers will be forced to sell their programming at remarkably low prices just to cater to small media outlets.\textsuperscript{151} Consequently, the FCC recognized that a sufficient number of competitors must exist so that these suppliers can price their products at competitive levels, thus helping to balance market power between media outlets.\textsuperscript{152}

Finally, the FCC recognized in its 2002 Notice that local television newscasts and local public affairs programming are invaluable.\textsuperscript{153} The Commission’s primary concern was the potential for the rule to protect local television stations and preserve a diversity of viewpoints at the local level.\textsuperscript{154} The FCC reasoned that a relaxation of the rule might result in more local news because the bigger networks would be able to keep local stations afloat.\textsuperscript{155}

\textsuperscript{145} See id. at 18,530.
\textsuperscript{146} See id.
\textsuperscript{147} Id. at 18,531–35.
\textsuperscript{148} See 2002 Notice, supra note 13, 17 F.C.C.R. at 18,533.
\textsuperscript{149} See id.
\textsuperscript{150} See id. at 18,534.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
\textsuperscript{153} Id. at 18,535.
\textsuperscript{154} See 2002 Notice, supra note 13, 17 F.C.C.R. at 18,535.
\textsuperscript{155} See id.
Unfortunately, the FCC failed to acknowledge that this result would only occur if the major networks decided to air local, public affairs programming rather than select shows that sell. The next section argues that, based on the D.C. Circuit’s conclusions in *Fox* and *Sinclair* and the FCC’s recent considerations in its 2002 Notice, the Commission should acknowledge public opinion and the wealth of empirical evidence that supports the need to preserve both rules.

**IV. The FCC Should Not Overlook the Importance of Retaining the National and Local Television Ownership Rules**

The D.C. Circuit and the FCC have both identified the far-reaching benefits of retaining the national and local television ownership rules. Arguably, the mere insufficiency of the record in both *Fox* and *Sinclair* prevented the court from ruling in favor of the FCC. Even without a polished record, the D.C. Circuit recognized that the FCC presented potentially justifiable reasons for deciding to retain the rules.156 Meanwhile, the Commission seems to be torn between the 1996 Act, which strives for deregulation, and its own policy goals. However, the FCC now has the studies and surveys that contain the necessary empirical evidence to establish a complete and convincing record.

In *Fox*, the court agreed with the FCC that protecting diversity through the national television ownership rule is “permissible policy.”157 Although the court found that the Commission failed to provide an adequate basis for furthering that goal, it did not see a need to vacate the rule.158 In fact, the court pointed out that the rule provides for more owners in the industry than there otherwise would be.159 Therefore, the court noted, diversified television ownership could lead to more diverse viewpoints.160 The court’s decision was based on the FCC’s “silence” in justifying the retention of the rule.161 The court could not

156 *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1049 (D.C. Cir. 2002); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002).

157 *Fox*, 280 F.3d at 1043.

158 *See id.* at 1043, 1048–49.

159 *See id.* at 1047.

160 *See id.*

161 *Id.* at 1048.
confidently conclude that the rule would likely be irredeemable merely because the Commission could not provide any empirical evidence to support its position.\textsuperscript{162}

The only evidence that the court characterized as even remotely important to advancing the FCC’s decision to retain the national television ownership rule was a “single, barely relevant” study, which tended to refute the networks’ position that affiliates have gained negotiating power.\textsuperscript{163} The court stated that this study did not suggest in any way that broadcasters have too much market power.\textsuperscript{164} The D.C. Circuit also characterized the additional evidence that the FCC offered in support of its decision as undeveloped and unsupported.\textsuperscript{165} Nevertheless, the court did observe the indication that some problems with competition exist in the national markets for advertising and program production.\textsuperscript{166} Accordingly, the court directed the FCC to develop these points on remand.\textsuperscript{167} These conclusions indicate that the D.C. Circuit saw potentially legitimate reasons for preserving the rule but needed further proof.

In \textit{Sinclair}, the FCC presented one study to support its finding that broadcast television is still the primary source of news and information for most consumers, and therefore, should be the only medium in a local market included in the eight voices standard.\textsuperscript{168} The D.C. Circuit concluded, however, that the study did not support the FCC’s position because it never compared broadcast television with cable television as sources of news.\textsuperscript{169} Instead, the study merely inferred that 93% of Americans watch a program on a broadcast network or local station and that nearly 70% of consumers get most of their news from television.\textsuperscript{170}

Nevertheless, the D.C. Circuit must have found some utility in preserving the local television ownership rule in the interim and remanding it to the FCC. The \textit{Sinclair} court never held that the rule

\begin{footnotesize}
\begin{enumerate}
\item See Fox, 280 F.3d at 1048.
\item Id. at 1041–42.
\item See id. at 1041.
\item See id. at 1042.
\item See id. at 1048–49.
\item See id. at 1049.
\item Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 163 (D.C. Cir. 2002).
\item See id.
\item Id.
\end{enumerate}
\end{footnotesize}
should be eliminated or weakened. It simply directed the Commission
to provide a reasoned explanation for its findings.\textsuperscript{171} The court took
issue only with the FCC's justifications for setting the numerical limit
at eight and confining the type of media outlets to be counted in the
eight voices standard to television stations—not with the validity or
general purpose of the rule itself. Taking into consideration the
substantial deference given to the FCC's line drawing, the D.C.
Circuit stated that it could conceivably adjust not only the type of
media outlets that would apply but also the numerical limit.\textsuperscript{172} More
important, however, the court never decided that the FCC should
necessarily eliminate the numerical limit from its media ownership
policy.\textsuperscript{173} These findings make sense because the court also
concluded that the FCC adequately explained how the rule furthers
diversity in the local market.\textsuperscript{174} Thus, the court did not direct the FCC
to do away with its rules but simply present more proof to support
their preservation.

If more adequate evidence had been available to the FCC
during the drafting of its 2002 Notice, perhaps it would not have
drawn up preliminary proposals that call for the elimination or
weakening of the national and local television ownership rules. For
example, the Commission might have been persuaded to retain the
eight voices standard and the local television ownership rule if
studies showed that a substantial portion of consumers obtain most, if
not all, of their news from broadcast television. Also, studies
revealing the important role that network affiliates and other media
outlets play in the market could have compelled the FCC to demand
that the major networks explain why the national ownership cap
should be increased or why the national television ownership rule
should be abolished.

The FCC now recognizes the importance of a solid, factual
base for its media ownership rules.\textsuperscript{175} Therefore, in response to the
D.C. Circuit's findings in \textit{Fox} and \textit{Sinclair}, the FCC established a
Media Ownership Working Group, which recently released a number

\begin{enumerate}
\item\textsuperscript{171} See id. at 162.
\item\textsuperscript{172} See id.
\item\textsuperscript{173} See id.
\item\textsuperscript{174} See \textit{Sinclair}, 284 F.3d at 160.
\item\textsuperscript{175} See Press Release, FCC, FCC Releases Twelve Studies on Current Media
\end{enumerate}
of studies that examine a myriad of issues, including diversity, competition, and localism.\(^{176}\) These studies were designed to investigate how consumers use the media, how advertisers view media outlets, and how media ownership affects the FCC’s policy goals.\(^{177}\)

Some of these studies might help preserve the national and local television ownership rules. For example, one study indicates that the financial incentives connected with programming ownership significantly influence the program selection of a network.\(^{178}\) That finding suggests that maximizing profits, rather than meeting the needs of consumers, is the most important concern for major networks regarding their program selection. Another study shows that an increase in competition for programming resources has raised production costs.\(^{179}\) That finding suggests that the national ownership cap may be preventing the consolidation of bargaining power among the major networks.\(^{180}\) Other research reveals that increased levels of concentration in the television broadcast industry would result in a greater proportion of non-programming material, such as commercials and public service announcements, from outlets with a higher market share.\(^{181}\) The FCC should be inclined to preserve its television ownership rules based on this study because a weakening of its rules would leave little room for more educational, public affairs, or news-oriented programming to surface on television.

Perhaps most important is an independent study, released by the Project for Excellence in Journalism, which shows that smaller broadcast stations generally produce significantly higher quality newscasts and pay more attention to local issues than do stations

\(^{176}\) Id.

\(^{177}\) Id.


\(^{180}\) Id.

controlled by the major networks. As one of the most extensive reviews regarding the relationship between the size of media ownership and the quality of local news, the study examined several hundred hours of newscasts from 172 randomly selected television stations over a five-year span. The study concluded that a more consolidated media industry would lead to a further decline in the quality of television programming. These findings show that, as major networks continue to grow, their need to maximize profits to compete with other media giants supersedes their obligation to offer programming that addresses public affairs and local issues.

Finally, public opinion and consumer surveys have been at the FCC’s disposal for the past several years. For example, research has shown that the television viewing public is troubled by the growing concentration of the media industry. A majority of consumers who responded to the surveys also believe that broadcasters will simply maximize profits if not obligated to air public interest programming. Consumers are already receiving less news and information from fewer sources. In addition, public opinion indicates that the major networks should be required to provide more programming that addresses public affairs and local issues as well as programming that reflects the cultural and ethnic makeup of communities. At the very least, this evidence shows that consumers are paying attention to what television has to offer.

---


183 See id.

184 See id.


186 Id.

187 Id.


189 PUBLIC SUPPORT FOR MEDIA DIVERSITY, supra note 1, at 2–3.
V. Preserving the Status Quo

Proponents of the FCC’s proposals to weaken or eliminate its media ownership rules contend that allowing for the consolidation of the industry could foster more programming that meets the needs of consumers. For example, they suggest that, without ownership restraints, major networks with superior resources could purchase smaller stations and provide them with the tools necessary to better address public affairs and local issues. Others argue that, because group ownership could lead to better and more varied programming, the loss of diversity in the marketplace should no longer be considered a threat. In particular, FCC Chairman, Michael Powell, who has made deregulation a personal agenda, stated that the national audience cap has failed to generate programming that caters to minorities in communities. Finally, many believe that emerging media outlets, such as cable and the Internet, have provided more diversity and competition in the industry.

A. Addressing the Present State of the Market

Although there may come a time when the FCC’s media ownership rules fail to serve the public interest, the national and local television ownership rules are still necessary for the promotion of the FCC’s policy goals. The day that we have twenty-five broadcast networks, an unlimited supply of cable outlets, and enough radio stations to flood the airwaves is the day that the FCC can relax not only its media ownership rules but also its efforts to provide a prosperous, competitive industry that provides consumers with reliable news and information. Until that day comes, however, the FCC’s rules continue to serve important functions.

190 Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002).
191 Id. at 1046–47.
193 See PUBLIC SUPPORT FOR MEDIA DIVERSITY, supra note 1, at 4 n.2.
Perhaps the most important justification for retaining the national television ownership rule and its audience reach cap is to decrease the bargaining power of networks, and therefore further localism by helping smaller broadcast outlets program their stations based on the interests of the communities they serve. In turn, this framework promotes competition by prohibiting networks from exploiting their market share by exercising too much economic power in the program production market. The potential for more network affiliates and media outlets to thrive in the industry also means an increase in the diversity of viewpoints on a national level. These same considerations prompted the FCC to retain the national television ownership rule in its 1998 Biennial Review when it concluded that consolidation of television broadcast stations in the hands of the major networks would not serve the public interest.\footnote{See 1998 Biennial Review, \textit{supra} note 33, 15 F.C.C.R. at 11,075.}

The local television ownership rule allows consumers to obtain more diverse programming. Most important, the rule allows programming that the television viewing public has openly requested. The rule also strikes a balance between network ownership and viewpoint diversity. The local television ownership rule places the role of determining news selection and exercising editorial judgment in the hands of both the major networks and the small, independent station owners or local news departments.

Furthermore, television stations should be the only media outlets considered in the FCC's eight voices test. Consumers will always rely on television for information about public affairs and local issues, no matter how popular the Internet or cable may become. If the FCC determines that non-broadcast media could offer news and information to consumers, the Commission might consider the local television ownership rule to be unnecessary. In reaching this conclusion, however, the FCC could fail to recognize that most forms of non-broadcast media, aside from newspapers, might not be able to provide programming that adequately addresses public affairs or local issues. For now, the rule's restraints on ownership, such as the eight voices test, blocks major broadcasters from exerting undue market power over smaller entities at the local level.

\textbf{B. Where Congress and the Supreme Court Stand}

Although the national and local television ownership rules may be in jeopardy, there is some good news for consumers.
Contrary to what the media might have everyone believe, Congress may not be ready to eliminate the FCC's media ownership policy. As the FCC pointed out in Fox, both the House and the Senate rejected a proposal to raise the national ownership cap to 50% in 1996. In fact, one congressman remarked that Congress's decision to set the cap at 35% "should settle the issue for many years to come." The 1996 Act may have been designed to create a more deregulated media landscape, but these congressional views indicate that the industry may be advancing towards this framework much sooner than the Congress intended. Perhaps Congress expected the industry to work towards deregulation only at a time when it could ensure that diversity and competition would still exist.

Finally, the rules might also receive deferential review from the Supreme Court. The Court has traditionally embraced the FCC's legitimate interest in promoting diversity, competition, and localism through ownership restraints. Furthermore, the Court has previously acknowledged that "diversity and its effects are elusive concepts, not easily defined." In FCC v. National Citizens Committee for Broadcasting, the Court held that, although the rulemaking record had not been conclusively established, the FCC still made rational findings that diversification of ownership would enhance the possibility of achieving greater viewpoint diversity. The Court would likely be satisfied with a rational foundation for preserving the television ownership rules, even if the record is somewhat incomplete. But, if the FCC succeeds in developing a complete record, the Court would surely accept the FCC's position to preserve these rules.

VI. Conclusion

The FCC's most recent review of its media ownership policy is said to be the most comprehensive review of media ownership


200 Nat'l Citizens Comm. for Broad., 436 U.S. at 796–97 (quoting Nat'l Citizens Comm. for Broad. v. FCC, 555 F.2d 938, 961 (D.C. Cir. 1977)).

201 See id.
regulation that it has ever undertaken.\textsuperscript{202} The FCC has conducted field hearings in particular regions throughout the country to give consumers and others who have a financial or ownership interest in the industry an opportunity to voice their opinions.\textsuperscript{203} These hearings indicate the FCC’s desire to address the concerns of smaller, broadcast stations and the public. Commissioner Michael Copps, who understands the importance of the FCC’s media ownership policy, stated that “[a]t stake in this proceeding are our core values of localism, diversity, competition, and maintaining the multiplicity of voices and choices that undergird our marketplace of ideas and that sustain American democracy”.\textsuperscript{204}

The FCC took its first step this past fall, issuing its 2002 Notice as part of its biennial review of its media ownership rules. Although the Notice may show the FCC’s intent to eliminate or further relax its rules, consumers should be confident in knowing that the Commission has everything it needs to find that retaining the national and local television ownership rules would be its best policy. Not only can the FCC review a wealth of sound industry research but also nearly 15,000 responses from individual consumers requesting that it preserve the rules.\textsuperscript{205} Consumers may be viewing much more reality-based programming, but that has not prevented them from recognizing the importance of receiving public interest programming from diverse viewpoints. While media giants rush to bring the public the next big reality-based show, it is comforting to consumers to know that the FCC is also continuing its efforts to maintain its policy goals as the foundation of its media ownership rules.


\textsuperscript{204} Id.