Calendar No. 270

108TH CONGRESS *1st Session*	SENATE	REPORT 108–141

PRESERVATION OF LOCALISM, PROGRAM DIVERSITY, AND COMPETITION IN TELEVISION BROADCAST SERVICES ACT OF 2003

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1046

together with

ADDITIONAL VIEWS

SEPTEMBER 3, 2003.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

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REPORT
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PRESERVATION OF LOCALISM, PROGRAM DIVERSITY, AND COMPETITION IN TELEVISION BROADCAST SERVICES ACT OF 2003

SEPTEMBER 3, 2003.—Ordered to be printed

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

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1046]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1046) to amend the Communications Act of 1934 to preserve localism, to foster and promote the diversity of television programming, to foster and promote competition, and to prevent excessive concentration of ownership of the nation's television broadcast stations, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to prevent any one entity from owning, operating, controlling, or having a cognizable interest in broadcast television stations that have an aggregate national audience reach exceeding 35 percent. The legislation also would require entities that own, operate, control, or have a cognizable interest in broadcast television stations that have an aggregate national audience reach exceeding 35 percent to divest such stations within one year after the date of enactment of this legislation. Further, this legislation would change the standard used by the Federal Communications Commission (FCC or Commission) to review its media ownership rules; require broadcast radio station group owners that

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exceed local ownership limits to divest such stations within one year after the date of enactment of this legislation; reinstate the FCC's broadcast-newspaper and radio-television cross ownership bans; require the Commission to hold five public hearings in different areas in the United States before it renders any decision in conjunction with its mandated review of media ownership rules; and provide a small market exemption from the Commission's broadcast-newspaper cross ownership ban.

BACKGROUND AND NEEDS

For over seventy years, the FCC's regulation of broadcast service has sought to ensure that the allocation of broadcast licenses serves the public interest and promotes the core values of competition, diversity, and localism that are essential to the fabric of American democracy. Indeed, as was noted by the Supreme Court over 50 years ago, our 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).

In the earliest days of broadcast regulation, the FCC reviewed common ownership issues on a case by case basis and denied proposed combinations that would result in one owner holding multiple licenses in a local market as inconsistent with the "public interest, convenience, and necessity." Over time, the FCC has also sought to protect the public interest through the adoption of bright line rules that limit license ownership and guard against the accumulation of market power in national and local media markets. Such limits have included restrictions on the total numbers of radio stations and television stations that a single entity could own in local and national markets. However, with the passage of the Telecommunications Act of 1996 ("1996 Act"), Congress significantly loosened media ownership limits, and established a requirement that the FCC review these limits every two years. The Act itself repealed the prohibition on telephone-cable cross ownership; overrode the remaining regulatory limits upon cable-broadcast cross ownership; eliminated the national radio ownership cap; relaxed restrictions on local radio ownership; and eased the "dual network" rule. The 1996 Act also mandated that the FCC review its media ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition."

On June 2, 2003, the FCC completed its 2002 biennial review of its media ownership rules as required by section 202(h) of the 1996 Act. In its recent decision, the FCC increased the national ownership limits affecting the number of broadcast television stations that one entity may own, operate, control or in which an entity may hold a cognizable interest to 45 percent. It also relaxed its cross ownership rules, which limit the ability of one entity to own a daily newspaper and multiple radio and television stations in the same market.

There has been significant consolidation in the media marketplace over the last decade. In the broadcast television industry, the number of television station owners has dropped 40 percent since 1995. In radio, the number of commercial radio station owners has declined by 34 percent since 1996, and the top station group has increased its size from a total of 39 stations with annual revenues of $495 million, to over 1200 stations with annual revenues of almost $3.2 billion. Similarly, media consolidation has resulted in substantial changes to the broadcast television programming market. One recent study by Tom Wolzien of Bernstein Research, notes that five media conglomerates control "about a 75 percent share of prime-time viewing" and are on pace to soon control roughly "the same percentage of TV households in prime time as the three networks did 40 years ago." Accordingly, while technology has provided a number of new media outlets, these outlets are largely controlled by the same large media conglomerates. This increasing influence over programming and distribution outlets has generated an outpouring of concern among many groups and private citizens who believe that robust structural safeguards are needed to protect the public interest and to promote competition, diversity, and localism in broadcasting.

Moreover, increased media consolidation has also fueled public concern about efforts to relax the commission's cross-ownership restriction. Changes that would allow a single entity to own or control a variety of media properties in local markets (e.g. a newspaper, television and radio stations, cable systems, Internet web sites) raise significant concerns about the preservation of diverse and antagonistic sources of news and information in local markets.

I. THE NATIONAL TELEVISION OWNERSHIP CAP

For several decades, the FCC's national television ownership limits focused on restricting the number of television stations an entity could own. Then, in 1985, the FCC adopted an additional ownership limit based on audience reach. This rule allowed entities to acquire interests in television stations as long as the combined reach of those stations did not exceed 25 percent of the national audience determined by market rankings. *See Memorandum Opinion and Order, Gen. Docket No. 83–1009, FCC 84–638 (adopted Dec. 19, 1984).*

Under section 202 of the 1996 Act, Congress directed the FCC to eliminate the restriction on the total number of television stations that an entity could own (which at the time prohibited common ownership of more than 12 television stations), and increased the national audience cap from 25 percent to 35 percent. See Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996). In its 1998 Biennial Review, the FCC decided to retain the 35 percent cap so it could: (1) observe the effects of recent changes in the rules required by the 1996 Act; (2) observe the effects of the national ownership cap having been raised to 35 percent; and (3) preserve the power of local affiliates to bargain with their networks in order to promote diversity of programming. *1998 Biennial Regulatory Review, Biennial Review Report, 15 FCC Rcd 11058 (adopted May 26, 2000).*

After the 1998 Biennial Review was released, three of the national networks, FOX, NBC, and CBS, challenged the FCC's decision to retain the 35 percent cap. The D.C. Circuit, while rejecting the networks' constitutional challenges, held that the FCC's decision to retain the 35 percent cap was arbitrary and capricious, finding the FCC had provided "no valid reason to think the [national TV ownership rule] is necessary to safeguard competition" or "to advance diversity." Furthermore, the court determined the FCC had failed to comply with the review required by 202(h) by providing "no analysis on the state of competition in the television industry to justify its decision". *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), *rehearing denied Aug. 13, 2002.*

While the networks asked the court to vacate the 35 percent cap, the D.C. Circuit expressly declined this invitation. Instead the court chose to remand the rule to the Commission for further consideration. As the court explained,

> "Although the Commission's decision to retain the rule was, as written, arbitrary and capricious and contrary to 202(h), we cannot say with confidence that the Rule is likely irredeemable . . . . We note that although the Commission in its 1998 Report failed to develop any affirmative justification for the rule based on competitive concerns, it did, albeit, somewhat cryptically, advert to possible competitive problems in the national markets for advertising and program production . . . . In sum, we cannot say it is unlikely that the Commission will be able to justify a future decision to retain the Rule. Fox, 293 F.3d at 1048–49."

As a result of the Court's directive, the Commission invited comment on whether to retain, eliminate, or modify the 35 percent national ownership rule as part of its 2002 Biennial Review of the Commission's media ownership rules.

FCC Decision. In its June 2, 2003 decision, the Commission found that although evidence in the record before it supported the retention of a national ownership cap, it did not support a cap of 35 percent. Therefore the FCC raised the cap on the number of broadcast television stations one party may own from stations constituting 35 percent of the national audience share to station constituting 45 percent of the national audience share. The national audience share is calculated by adding the number of TV households in each market in which a company owns a station divided by the total number of United States television households.

The Commission found that a national television cap serves the policy goal of localism by preserving a balance of power between the networks and their affiliates serving local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities. The Commission also found that a modest relaxation of the cap would help networks compete more effectively with cable and DBS operators and would promote free, over-the-air television by deterring migration of expensive programming to cable networks.

Independent stations affiliated with the networks argue that retention of the 35 percent cap is essential to the preservation of localism and diversity over the airwaves. Affiliates argue that raising the cap above 35 percent could potentially silence the voices of local independently-owned and operated outlets and cause a flurry of media mergers and further consolidation of national networks. They also argue that the national ownership cap ensures that programming decisions remain in the hands of local broadcasters, not in the hands of national networks.

II. RULES PROHIBITING CROSS OWNERSHIP

Local Radio/TV Cross Ownership. In 1970, the FCC adopted rules limiting the common ownership of local radio and television broadcast stations ("Local Radio/TV Cross Ownership Rule") in a single market. In 1989, the FCC adopted a presumptive waiver policy to permit certain radio/TV combinations. The Commission then relaxed the rule in 1999 to balance the FCC's diversity and competition concerns with its desire to permit broadcasters and the public to realize the economic efficiencies enjoyed by common ownership of radio and television stations. Prior to the FCC's recent action, its rules allowed the common ownership of:

2 television stations and up to 6 radio stations in any market where at least 20 independent "voices" would remain post-combination or 1 television station and up to 7 radio station (where such entity could own 2 television stations and 6 radio stations);

2 television stations and up to 4 radio stations in any market where at least 10 independent "voices" would remain post-combination;

1 television station and 1 radio station no matter the number of independent "voices" that would remain post-combination. See 47 C.F.R. § 73.3555(c).

—"Voices" included local broadcast television stations, cable systems, radio stations, and daily newspapers of a certain circulation.

Newspaper/Broadcast Cross Ownership. In 1975, the FCC adopted a rule prohibiting the common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication ("Newspaper/Broadcast Cross Ownership Rule"). *See* 47 C.F.R. § 73.3555(d). When the Commission adopted the rule, it grandfathered newspaper/broadcast combinations in many markets (so long as the ownership of the combination remained the same), but required divestiture of properties in highly concentrated markets. Currently, more than 70 "grandfathered" newspaper/broadcast combinations exist.

FCC Decision. In its June 2, 2003, decision, the FCC concluded that neither the Local Radio/TV Cross Ownership Rule nor the Newspaper/Broadcast Cross Ownership Rule could be justified for larger markets, finding that citizens rely on an abundance of sources for news. Additionally, the FCC found these rules did not promote competition because radio, TV, and newspapers generally compete in different economic markets. The FCC found that greater participation by newspaper publishers in the television and radio business would improve the quality and quantity of news available to the public.

As a result, the FCC replaced the cross ownership rules with a new set of cross-media limits. In establishing these new restrictions, the FCC developed a Diversity Index to measure the presence of key media outlets in markets of various sizes. According to the Commission, the index suggested that there were three types of markets in terms of "viewpoint diversity" concentration, each warranting different regulatory treatment. The Commission replaced the newspaper/broadcast and the local radio/TV cross ownership rules with the following cross-media limits for the three market types:

In markets with three or fewer TV stations, no cross ownership is permitted among TV, radio, and newspapers. A company may obtain a waiver of that ban if it can show that the television station does not serve the area served by the cross-owned property (i.e. the radio station or the newspaper).

In markets with between four and eight TV stations, combinations are limited to one of the following:

—(A) A daily newspaper; one TV station; and up to half of the radio station limit for that market (i.e. if the radio limit in the market is six, the company can only own three);

—(B) A daily newspaper; and up to the radio station limit for that market (i.e. no TV stations); or

—(C) Two TV stations (if permissible under local TV ownership rule); up to the radio station limit for that market (i.e. no daily newspapers).

In markets with nine or more TV stations, the FCC eliminated the newspaper/broadcast cross ownership ban and the local radio/TV cross ownership ban.

Significant concerns have been raised before the Committee that the FCC's new rules allowing greater media cross ownership will permit excessive consolidation in local markets, which could threaten the diversity of viewpoints offered to a local community, stifle democracy, and reduce competition among media outlets to put forth the best news product. Some critics believe the prohibition on cross ownership is also necessary to protect advertisers that substitute between newspapers, broadcast television, and broadcast radio. Without robust competition for advertising dollars, many small businesses will be forced to pay higher advertising rates, which may result in consumers paying more for products in a market with commonly owned newspapers and broadcast stations as such costs are passed on to them.

Cross-ownership threatens localism as well, according to the concerned parties. When one entity is allowed to own more than one media outlet in a community, critics fear large corporations will buy several media outlets there and "pipe in" news and programming feeds from a central distribution facility, rather than airing locally-originated news and programming. Such consolidation may also decrease the number of opinions and viewpoints that are provided to a community by its media outlets if a consolidated media company, for example, only has one editorial board instead of an editorial board for each media property.

III. THE LOCAL RADIO OWNERSHIP CAP

The origins of local radio ownership limits can be traced back to 1938. At that time, the FCC denied an application for a new AM station based on the fact that the parties who controlled the applicant also controlled another AM station in the same community. The FCC believed that two stations in the same community owned by the same party would not compete with each other, and thereby the "public convenience, interest and necessity" would not be served. *Genesee Radio Corp., 5 FCC 183 (1938)*.

In the 1950s, the FCC placed this policy decision in its rules stating, "AM licensees are prohibited from owning another AM station that would provide 'primary service' to a 'substantial portion' of the 'primary service area' of a commonly owned AM station, except where the public interest would be served by multiple ownership". *See* Amendment of sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Report and Order*, 18 FCC 288 at 295–296 (1953). FM licensees were similarly restricted. From 1940 to 1964, the FCC enforced this rule on a case-by-case basis.

In 1964, the FCC developed a new local ownership rule using a signal contour-based definition that only looked at the overlap of the radio stations' signals, rather than using a "primary service area" definition. The new rule prohibited common ownership of same service stations when any overlap of signal contours occurred. The rule was designed to "promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest". *See* Amendment of sections 73.35, 73.240 and 73.636 of the Commission's Rules, First *Report and Order*, 22 F. C. C. 2d 339, 344 (1970).

In 1992, the FCC found that the increasing number of media outlets (TV, radio, cable, etc.) justified a relaxation of its local radio ownership rule. Therefore, the FCC changed its rules to allow a single party to own multiple stations in the same local market. Specifically, for markets with more than 15 radio stations, a single licensee was permitted to own up to two AM Stations and two FM stations, provided that the combined audience share of the stations did not exceed 25 percent. For stations in markets with fewer than 15 radio stations, a single licensee was permitted to own up to three stations, (of which no more than two could be AM or FM stations), provided that the owned stations represented less than 50 percent of the total number of radio stations in the market.

Shortly thereafter, the most profound change in local radio ownership limits occurred with the enactment of the Telecommunications Act of 1996, which eliminated the national ownership limit (then prohibiting a single entity from owning more than 40 radio stations nationwide) and directed the FCC to further revise its local ownership rule by allowing the following combinations:

—In local radio markets with 45 or more radio stations, a company may own 8 stations, only 5 of which may be in one class, AM or FM;

—In local radio markets with 30–44 radio stations, a company may own 7 stations, only 4 of which may be in one class, AM or FM;

—In local radio markets with 15–29 radio stations, a company may own 6 stations, only 4 of which may be in one class, AM or FM; and

—In local radio markets with 14 or fewer radio stations, a company may own 5 stations, only 3 of which may be in one class, AM or FM, except that a party may not own, operate, or control more than 50 percent of the stations in such market. See 47 U.S.C. 202(b).

FCC Decision. In its June 2, 2003, decision, the Commission found that local limits on radio ownership remained necessary to further the public interest. However, it changed its methodology for implementing the local radio ownership rule.

As noted above, the FCC previously used a signal contour methodology to define a "local radio market" for purposes of determining whether a station owner was in compliance with the local ownership limits. This methodology led to some anomalous results that appeared to frustrate the local ownership limits in the 1996 Act. The most commonly cited example is Minot, North Dakota, where one entity owns six of the seven commercial stations that directly serve the Minot area. In its recent decision, the Commission eliminated the use of the signal contour methodology and replaced it with a geographic market methodology. Under this new methodology, all radio stations licensed to communities in an Arbitron Metro market are counted as being in that "local radio market" regardless of their signal reach. Under the new market definition, certain station groups will exceed the limits on local radio ownership. The FCC decided to "grandfather" these existing clusters under its news rules, rather than requiring the owners to come into compliance with the limits under the new market definition.

LEGISLATIVE HISTORY

Senators Stevens, Hollings, Burns, Lott, Dorgan, and Wyden introduced S. 1046 on May 13, 2003. The Committee held hearings regarding media ownership on January 30, May 6, May 13, May 22, and June 4, 2003. All five FCC Commissioners attended the hearing on June 4, 2003, during which the participants discussed the FCC's new rules.

On June 19, 2003, the Senate Commerce, Science, and Transportation Committee held an executive session at which S. 1046 was considered. The bill was approved by voice vote and was ordered reported with amendments including: an amendment by Senator McCain to clarify Congressional intent with respect to the media ownership rules review standard to be used by the FCC; an amendment by Senator McCain to vitiate the FCC's grandfathering of radio broadcast station ownership under the new local radio ownership rules; an amendment offered by Senators Dorgan, Hollings, Hutchinson, Snowe, Wyden, and Cantwell to restore the cross ownership media rules to their pre-June 2, 2003, status, as well as a second degree amendment by Senator Stevens providing small markets with an exemption to the newspaper/broadcast cross ownership rule under certain circumstances; and an amendment by Senator Boxer to require the FCC to hold five geographically diverse public hearings before concluding its media ownership rules review.

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:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 25, 2003.

Hon. JOHN MCCAIN,
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. 1046, the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for federal costs): Theresa Gullo (for the state and local impact); and Jean Talarico (for the impact on the private sector).

Sincerely,

ROBERT A. SUNSHINE
(For Douglas Holtz-Eakin, Director.)

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1046—Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003

Summary: S. 1046 would change current law and existing regulations concerning ownership of television, radio, and newspapers. The bill also would clarify the frequency and nature of the Federal Communication Commission's (FCC's) reviews of those regulations. CBO estimates that implementing S. 1046 would cost the FCC less than $500,000 over the 2004–2008 period.

S. 1046 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.

S. 1046 would impose private-sector mandates on the owners of radio stations, television stations, and newspapers. The most costly mandate would be imposed on the owners of radio stations. Based on information from several industry experts, CBO expects that the cost of all the private-sector mandates in the bill would exceed the annual threshold for such mandates established by UMRA ($117 million in 2003, adjusted annually for inflation).

Estimated cost to the Federal Government: S. 1046 would void regulations issued by the FCC on June 2, 2003, pertaining to the ownership of television stations, radio stations, and newspapers. The bill would reinstate the regulations concerning ownership of multiple media outlets that were in effect before that date. S. 1046 also would direct the FCC not to grant or transfer a television license if that act would result in an entity owning or controlling television stations that reach an aggregate national audience of more than 35 percent. CBO estimates that those changes would not have a significant effect on federal spending.

In addition, sections 5 and 6 of the bill would clarify existing law regarding how the FCC reviews its regulations on broadcast ownership. Under the bill, the FCC would have to review its regulations every two years and hold at least five public hearings in different areas of the United States in conjunction with each review. Based on information provided by the FCC, CBO estimates that those provisions would cost less than $500,000 each year over the 2004–2008 period, subject to the availability of appropriated funds.

Estimated impact on state, local, and tribal governments: S. 1046 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimated impact on the private sector: S. 1046 would impose private-sector mandates as defined in UMRA on the owners of radio stations, television stations, and newspapers. The most costly mandate would be imposed on the owners of radio stations. Based on information from several industry experts, CBO expects that the cost of all mandates in the bill would exceed the annual threshold for private-sector mandates established by UMRA ($117 million in 2003, adjusted annually for inflation).

Ownership of Radio Stations

The FCC adopted a Report and Order on media ownership on June 2, 2003. That decision would maintain the current limitation on radio ownership. At the same time, however, the FCC's decision would change the methodology for defining local radio markets to a market-based approach using Arbitron Metro rating boundaries. That change would reduce the number of stations a company may own in a local market. Consequently, many owners of radio stations would exceed the ownership limit if the FCC's new rules become effective. To avoid requiring those owners to sell their stations, the FCC's June 2 decision included a "grandfather" provision that would exclude those owners from the new ownership limit. Section 4 of this bill would revoke that "grandfather" provision. As a result, those owners of radio stations not in compliance with the local market caps under the new market definitions would be required to sell some properties within one year after enactment of this bill.

The cost of this mandate on owners of radio stations would be incurred in the form of diminished value for the stations they would be required to sell. Based on information from industry sources, CBO estimates that the cost would exceed the annual threshold for private-sector mandates. Bear, Stearns & Company estimates that owners of radio stations would be required to sell over 200 stations to comply with the removal of the "grandfather" provision. The consensus of industry experts is that the owners of those stations would be able to sell them only at prices considerably below recently recorded market prices. Two reasons are cited. First, the bill's mandate would create a buyer's market in which many stations would be on the market at the same time. The bargaining power of potential buyers would grow as the deadline approached for the owner of stations to meet the ownership limitations. Second, in some instances, current owners enjoy economic advantages in operating and marketing the clusters of stations that they own; potential new owners of some of those stations would be unlikely to capture such benefits and thus would not account for them in their offers.

Ownership of Commercial Television Broadcast Stations

Currently, a broadcast network can own and operate local broadcast stations that reach up to 35 percent of households nationwide. The FCC increased the ownership cap to 45 percent in its June 2 decision, and that new cap is likely to become effective within a few months. Section 3 of S. 1046 would restore the current national television ownership cap of 35 percent. The bill also would require any party that holds licenses for commercial television broadcast stations that exceed the 35 percent limit to sell some of their stations to comply with this limit within one year from the date of enactment.

According to the FCC, two companies would exceed the cap: Viacom Inc. (the owner of CBS) and News Corps. (the owner of Fox). Based on information from government and industry sources, CBO estimate that Viacom, Inc. and News Corps. would likely be able to sell their stations at a fair market value. Therefore, the cost of this mandate would be only the transaction cost involved in the sale.

Cross-Ownership of Media Outlets

Prior to June 2, 2003, the FCC prohibited companies from owning a television station and newspaper in a single market and limited the combined number of radio and television stations that companies could own in a single market. The FCC's June 2 decision relaxed those restrictions. As a result, under current law, companies will be able to request approval from the FCC to own additional cross-media properties. Section 7 of S. 1046 would reinstate the more restrictive broadcast-newspaper and radio-television cross-ownership rules that were in effect on June 1, 2003, retroactively to June 2, 2003. The costs to the private-sector of reinstating the cross-ownership rules would be the loss in profits that would otherwise be earned by those who would purchase additional media properties under the relaxed restrictions. CBO has no basis for estimating that loss.

Further, if media owners purchase properties during the period that the FCC's relaxed restrictions are in effect that are not in compliance with the requirements of S. 1046, those owners would be required to sell such properties. Given the strong possibility that the more restrictive cross-media rules will be reinstated, it is very unlikely that any parties would apply for or receive licenses under the relaxed rules prior to enactment of this legislation.

Estimate prepared by: Federal Costs: Melissa E. Zimmerman; impact on state, local, and tribal governments: Theresa Gullo; impact on the private sector: Jean Talarico.

Estimate approved by: Robert A. Sunshine, 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

S. 1046 would restore the FCC's 35 percent national broadcast television ownership cap and its cross ownership rules, and would make other changes to the Communications Act of 1934. The number of persons covered by this legislation should be consistent with current levels of individuals affected.

ECONOMIC IMPACT

S. 1046 would restrict consolidation of media companies in the United States. Although the legislation may have an adverse economic impact on those companies, it is expected to help ensure an environment conducive to economic opportunity for diverse, local programming and advertising.

PRIVACY

S. 1046 is not expected to have an adverse effect on the personal privacy of any individuals that will be impacted by this legislation.

PAPERWORK

S. 1046 is expected to have a minimal impact on current paperwork levels.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section would provide that the legislation may be cited as the "Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003".

Sec. 2. Congressional findings and purposes

This section states that the principle of localism has been the "pole star" for regulation of the broadcast industry by the FCC for nearly 70 years, and that any increase in the national television multiple ownership cap may harm this principle. In addition, this section states that retaining the national television multiple ownership cap at 35 percent would prevent further national concentration that may occur, the pernicious effects of which may be difficult to eradicate once begun, and would ensure the independence of non-network owned stations from becoming passive conduits for network transmissions.

Sec. 3. National television multiple ownership limitations

This section would eliminate Section 202(c)(1)(B) of the 1996 Act, which directs the Commission to modify its rules for multiple ownership to increase the national television multiple ownership cap to 35 percent. In its place, the bill would codify the 35 percent cap by adding a new Section 340 to the Communications Act of 1934. Section 340 would prevent any license for a commercial broadcast television station to be granted, transferred or assigned to a party if it would result in a party owning, operating, controlling or having a cognizable interest in television stations having an aggregate national audience reach exceeding 35 percent.

The bill would define "audience reach" using the same terms that the Commission set forth in 47 C.F.R. § 73.3555, except this definition would allow the Commission to substitute any successor definition it may adopt to delineate television markets for the purpose of imposing the 35 percent cap. The bill would define "cognizable interest" using the same terms as the Commission has set forth in 47 C.F.R. § 73.3555.

This section would also require divestiture of broadcast stations by any party whose holdings exceed the 35 percent cap. Section

340(b) would require this divestiture to take place within one year after the date of the enactment of this bill. Currently, two networks are over the 35 percent cap and would be required to divest—Viacom/CBS at just over 39 percent and FOX/News Corp. at 37.8 percent.

Lastly, Section 340(c) would prevent the FCC from using its forbearance authority in Section 10 of the Communications Act of 1934 to prevent this new Section 340 from taking effect.

Sec. 4. No grandfathering

This section would prevent the FCC from grandfathering owners of existing radio station clusters that exceed the local radio ownership cap under the FCC's new market definition. As a result, those owners with station clusters in excess of the local limits would be required to come into compliance within one year after the date of enactment of the Act.

Sec. 5. Clarification of Congressional intent with respect to ownership rules review

This section would modify Section 202(h) to specifically allow the FCC to repeal, strengthen, limit, or retain its media ownership rules during its next 202(h) review if it determines such changes to be in the public interest. Courts have interpreted Section 202(h) to carry "with it a presumption in favor of repealing or modifying ownership rules" as part of "a process of deregulation" set in place by the Telecommunication Act 1996 Act. *Fox Television Stations Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002). When the FCC Commissioners appeared before the Committee on June 4, 2003, several Commissioners agreed that section 202(h) allows the FCC to strengthen or repeal its broadcast ownership rules, but requested clarification from Congress. This section would provide such clarification.

Sec. 6. Public hearing requirement

This section would require the Commission to hold five public hearings in different areas of the United States before it renders any decision in conjunction with its media ownership review pursuant to 202(h) of the Communications Act of 1934.

Sec. 7. Restoration of cross ownership rules

This section would reinstate the Commission's Newspaper/Broadcast and Local Radio/TV Cross Ownership Rules that were in place on June 1, 2003.

This section would also provide an exemption to the Newspaper/Broadcast Cross Ownership Rule under certain conditions for small markets with a Designated Market Area (DMA) of 150 or higher. If a broadcast station and a newspaper in such a community wish to come under common ownership, the potential common owner could petition the public utility commission in the community's State or States for a recommendation approving the transaction. If a respective public utility commission finds that such a transaction would enhance the community's local news and information, promote the financial stability of the newspaper or broadcast station or generally promote the public interest, then the public utility commission may refer the transaction to the FCC which may grant a waiver of compliance with the cross ownership rules. The FCC may grant the waiver approving the transaction within 60 days after the FCC receives it unless the Commission finds there is compelling evidence that the transaction would be contrary to the public interest. If approved, the newspaper and the broadcast station covered by the waiver must maintain separate editorial boards. Additionally, if the broadcast station or the newspaper issues an editorial viewpoint via broadcast or print, respectively, the other commonly owned media outlet should broadcast or print their respective viewpoint if one has been established.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 1239:

Senator Sununu (for himself and Senator Breaux) offered an amendment to provide conditional grandfathering of licenses granted in excess of the national audience reach limitation that would be imposed by new section 340 of the Communications Act of 1936. By rollcall vote of 7 yeas and 16 nays as follows, the amendment was defeated:

YEAS—7	NAYS—16
Mr. Brownback	Mr. Stevens [1]
Mr. Smith [1]	Mr. Burns
Mr. Fitzgerald [1]	Mr. Lott
Mr. Ensign	Mrs. Hutchison [1]
Mr. Allen [1]	Ms. Snowe
Mr. Sununu	Mr. Hollings
Mr. Breaux	Mr. Inouye [1]
	Mr. Rockefeller [1]
	Mr. Kerry [1]
	Mr. Dorgan
	Mr. Wyden
	Mrs. Boxer
	Mr. Nelson
	Ms. Cantwell
	Mr. Lautenberg [1]
	Mr. McCain

[1] By proxy

Mr. Stevens offered a second degree amendment to the amendment offered by Mr. Dorgan to provide for a small market exemption from the cross ownership rules. By rollcall vote of 14 yeas and 9 nays as follows, the amendment was adopted:

YEAS—14	NAYS—9
Mr. Stevens	Mr. Lott
Mr. Burns	Ms. Snowe
Mrs. Hutchison	Mr. Rockefeller
Mr. Brownback	Mr. Kerry [1]
Mr. Smith	Mr. Dorgan
Mr. Fitzgerald [1]	Mr. Wyden
Mr. Ensign [1]	Mr. Nelson
Mr. Allen	Ms. Cantwell
Mr. Sununu	Mr. McCain
Mr. Hollings	
Mr. Inouye [1]	
Mr. Breaux	
Mrs. Boxer	
Mr. Lautenberg	

[1] By proxy

Mr. McCain offered an amendment to vitiate the Commission's grandfathering of radio broadcasting station ownership under its new broadcast media ownership rules. By rollcall vote of 12 yeas and 11 nays as follows, the amendment was adopted:

YEAS—12	NAYS—11
Mr. Stevens [1]	Mr. Burns
Ms. Snowe	Mr. Lott
Mr. Hollings	Mrs. Hutchison [1]
Mr. Inouye [1]	Mr. Brownback
Mr. Kerry [1]	Mr. Smith [1]
Mr. Dorgan	Mr. Fitzgerald [1]
Mr. Wyden	Mr. Ensign
Mrs. Boxer	Mr. Allen [1]
Mr. Nelson	Mr. Sununu
Ms. Cantwell	Mr. Rockefeller [1]
Mr. Lautenberg	Mr. Breaux
Mr. McCain	

[1] By proxy

ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATORS DORGAN, HUTCHISON, HOLLINGS, SNOWE, INOUYE, LOTT, BOXER, AND LAUTENBERG

During the Executive Session on June 19, 2003, several issues were raised during the consideration of S. 1046. As drafted, S. 1046 would maintain the current national television ownership limit at 35 percent. However, the Committee also adopted by voice vote a Dorgan/Snowe/Hutchison/Hollings amendment to restore the newspaper-broadcast cross ownership ban in most major markets. We are providing these additional remarks to explain why the Committee took this action.

One of the things the FCC did in its June 2nd Report and Order on media ownership was to largely eliminate the ban on new newspaper-broadcast cross ownership combinations. We disagree with that decision because we fear the negative impact that additional newspaper-broadcast combinations will have on localism, diversity, and competition in those markets. Inevitably the merging of broadcasters and newspapers reduces the number of voices in individual markets and threatens to place too much control over local news and information in the hands of too few companies.

The Committee received testimony and statistical evidence underscoring the dangers inherent in the FCC's order lifting the cross ownership ban. If the FCC order lifting the ban were allowed to remain, broadcast-newspaper mergers could occur in nearly 200 markets, meaning that 98 percent of the American public could effectively lose many of the most relied upon independent voices in their community.

This would allow almost two-thirds of the markets in the country to have only four local news sources (from television stations and newspapers). And, it would make it possible for individual markets to be dominated by a single newspaper/TV conglomerate which could control well over half the news audience and two-thirds of the reporters in a given local market.[1] Clearly, this would be devastating for local competition and diversity in local news.

Numerous witnesses before the Committee demonstrated that new technologies, such as the Internet and cable television, have—so far—failed to replace local broadcast and newspapers as the major sources of news and information for citizens. The FCC's own studies show that 80 percent of consumers still rely upon television and newspapers for their local and national news, and when asked, (in comparison to broadcast television and newspapers) consumers do not cite the Internet or cable television as a significant source

[1] Analysis of June 2nd FCC Order, "Mass Deregulation of Media Threatens to Undermine Democracy," Consumer Federation of America and Consumers Union, June 2, 2003.

of local news.[2] As a result, the growth of the Internet and other new technologies has not created a significant enough change in consumer behavior to warrant relaxation of the cross ownership ban.

The Federal courts have previously acknowledged that this cross ownership ban reflects an appropriate legislative and regulatory tool to promote competition and diversity of ownership,[3] yet the FCC's proposed relaxation of this rule is likely to undermine these democratic principles. Furthermore, as Frank Blethen, Publisher of the *Seattle Times* testified to this Committee, "There is no business justification that I'm aware of—other than monopolization—for lifting any of the current rules or for allowing any entity to engage in cross-media ownership."[4]

Recognizing the significant role broadcast stations and newspapers still play in local communities, we know of no better tool to ensure that the public airwaves are used to promote the important principles of localism, diversity, and competition. Therefore, the committee agreed that it is imperative to reinstate the FCC's previous ban on newspaper-broadcast cross ownership in the same communities.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

TITLE III—PROVISIONS RELATING TO RADIO

PART I. GENERAL PROVISIONS

SEC. 340. NATIONAL TELEVISION MULTIPLE OWNERSHIP LIMITATIONS.

(a) NATIONAL AUDIENCE REACH LIMITATION.—The Commission shall not permit any license for a commercial television broadcast station to be granted, transferred, or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, or members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in television stations which have an aggregate national audience reach exceeding 35 percent.

(b) NO GRANDFATHERING.—The Commission shall require any party (including all parties under common control) that holds licenses for commercial television broadcast stations in excess of the limitation contained in subsection (a) to divest itself of such licenses

[2] Nielsen Media Research, Consumer Survey On Media Usage (FCC Media Ownership Working Group Study No. 8, September 2002).
[3] FCC v. National Citizens Comm. for Broadcasting, 436 US 775, 802 (1978)
[4] Frank Blethen, Testimony before the Senate Commerce Committee, "Media Ownership (Broadcast)," May 13, 2003.

as may be necessary to come into compliance with such limitation within one year after the date of enactment of this section.

(c) SECTION NOT SUBJECT TO FORBEARANCE.—Section 10 of this Act shall not apply to the requirements of this section.

(d) DEFINITIONS.—

(1) NATIONAL AUDIENCE REACH.—The term 'national audience reach' means—

(A) the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located, or as determined under a successor measure adopted by the Commission to delineate television markets for purposes of this section; divided by

(B) the total national television households as measured by such DMA data (or such successor measure) at the time of a grant, transfer, or assignment of a license.

No market shall be counted more than once in making this calculation.

(2) COGNIZABLE INTEREST.—Except as may otherwise be provided by regulation by the Commission, the term 'cognizable interest' means any partnership or direct ownership interest and any voting stock interest amounting to 5 percent or more of the outstanding voting stock of a licensee.

TELECOMMUNICATIONS ACT OF 1996

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.—The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.—

(1) APPLICABLE CAPS.—The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or en-

tity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.—

(1) NATIONAL OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of ⟦its regulations (47 C.F.R. 73.3555)—

(A) by eliminating⟧ *its regulations (47 CFR 73.3555) by eliminating* the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide⟦; and⟧ .

⟦(B) by increasing the national audience reach limitation for television stations to 35 percent.⟧

(2) LOCAL OWNERSHIP LIMITATIONS.—The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.—With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.—The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of—

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.—

(1) ELIMINATION OF RESTRICTIONS.—The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.—The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.—Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

[(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.]

(h) FURTHER COMMISSION REVIEW.—

(1) IN GENERAL.—The Commission shall review its rules adopted pursuant to this section, and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether—

(A) any rule requires strengthening or broadening;

(B) any rule requires limiting or narrowing;

(C) any rule should be repealed; or

(D) any rule should be retained.

(2) CHANGE, REPEAL, OR RETAIN.—The Commission shall change, repeal, or retain such rules pursuant to its review under paragraph (1) as it determines to be in the public interest.

Before making any determination under this subsection concerning an ownership rule or regulation, the Commission shall hold no less than 5 public hearings in different areas of the United States with respect to that rule or regulation.

(i) ELIMINATION OF STATUTORY RESTRICTION.—Section 613(a) (47 U.S.C. 533(a)) is amended—

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking "and" at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting "; and"; and

(6) by adding at the end the following new paragraph:

"(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l)".

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