

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

MB Docket No. 06-121

2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

MB Docket No. 02-277

Cross-Ownership of Broadcast Stations and Newspapers

MM Docket No. 01-235

Rules and Policies Concerning Multiple Ownership of Radio Stations in Local Markets

MM Docket No. 01-317

Definition of Radio Markets

MM Docket No. 00-244

**COMMENTS OF MORRIS COMMUNICATIONS COMPANY, LLC
CONCERNING CHAIRMAN MARTIN’S PROPOSED REVISION TO
THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE**

Morris Communications Company, LLC (“Morris”)¹ hereby responds to Chairman Kevin J. Martin’s November 13, 2007 proposal (the “Martin Proposal”)² to revise the Commission’s antiquated newspaper/broadcast cross-ownership ban (the “NBCO Rule”).³ Under the Martin Proposal, the general prohibition would be retained, but a positive presumption would be added

¹ Morris is one of the country’s strongest mid-size, privately held media companies, with diversified holdings including, among other assets, newspaper publishing and radio broadcasting. Through affiliates, Morris currently operates 33 United States radio stations and 13 daily newspapers, including co-located (but separately staffed and operated) radio/newspaper combinations in Topeka, Kansas and Amarillo, Texas.

² See *Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule*, News Release (rel. Nov. 13, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf (the “*Martin Notice*”).

³ 47 C.F.R. 73.3555(d).

under which a daily newspaper in one of the top 20 markets would be permitted to own, at most, one television station *or* one radio station. The Commission presumptively would disfavor *all other* newspaper-broadcast cross ownership.⁴ While the Martin Proposal represents a small step in the right direction, the modest relief it provides to owners of same-market newspaper and broadcast properties is plainly insufficient in light of the record before the Commission, statutory and judicial mandates that the Commission eliminate or relax the NBCO Rule, and considerations of fundamental fairness.

The Factual Record Before the Commission Requires Elimination of the NBCO Rule

Under any objective analysis, the record before the Commission clearly demonstrates that the NBCO Rule is contrary to the interests of newspaper publishers, broadcasters, and the local communities they serve. Morris' prior comments concerning the NBCO Rule⁵ (along with the majority of relevant substantive comments filed with the Commission) show that complete elimination of restrictions on newspaper/broadcast cross-ownership would greatly serve the public interest. In this regard, Morris has shown that its co-owned (but separately operated) newspaper and broadcast properties in the Amarillo, Texas and Topeka, Kansas markets provide exemplary public service and that such service could be enhanced further if the same-market properties were permitted to share costs and resources.⁶ Based on the overwhelming factual

⁴ See generally *Martin Notice*.

⁵ See, e.g., *Reply Comments of Morris Communications Company, LLC*, MB Docket No. 06-121, *et al.* (filed January 16, 2007); *Comments of Morris Communications Company, LLC*, MB Docket No. 06-121, *et al.* (filed October 23, 2006) ("*2006 Comments*"); *Comments of Morris Communications Corporation*, MB Docket No. 02-277, *et al.* (filed Jan. 2, 2003) ("*2003 Comments*"); *Reply Comments of Morris Communications Corporation*, MM Docket Nos. 01-235 and 96-197 (filed Feb. 15, 2002); *Comments of Morris Communications Corporation*, MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) ("*2001 Comments*"); *Reply Comments of Morris Communications Corporation and Stauffer Communications, Inc.* in MM Docket No. 96-197 (filed Mar. 21, 1997).

⁶ See, e.g., *2006 Comments* at 13-21; *2003 Comments* at 5-6; *2001 Comments* at 7-12.

record, the Commission already has concluded that the NBCO Rule is contrary to the public interest.⁷ The Third Circuit affirmed this determination, expressly finding that “reasoned analysis supports the Commission’s determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest.”⁸

Notwithstanding the mammoth record already in existence, the Commission sought even more public comment concerning the NBCO Rule in connection with the *2006 Quadrennial Regulatory Review* proceeding, which the agency commenced more than a year and a half ago.⁹ The Commission requested comments or reply comments on several different occasions,¹⁰ accumulating thousands of pages of content from industry representatives, consumer interest groups, and individual consumers.¹¹ To supplement this record, the agency commissioned and released ten empirical studies – all subject to independent peer review – from academics and other economic experts.¹² In addition, during the past several months, the agency held six field

⁷ *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13747 (2003) (“*Biennial Review Order*”) (“nation-wide prohibition on common ownership of daily newspapers and broadcast outlets in the same market . . . is [not] necessary in the public interest”). See also *id.* at 13767.

⁸ *Prometheus Radio Project v. FCC* 373 F.3d 372, 398 (3d Cir. 2004) (“*Prometheus*”).

⁹ See *2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006).

¹⁰ See *id.* (requesting Comments and Reply Comments on media ownership rules); *2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 14215 (2007) (requesting Comments and Reply Comments on minority ownership issues); *FCC Seeks Comment on Research Studies on Media Ownership*, Public Notice, 22 FCC Rcd 14313 (2007) (“*Media Ownership Studies Public Notice*”) (requesting Comments and Reply Comments on July 2007 empirical studies); *Martin Notice* (requesting comments on proposed revision of newspaper/broadcast cross-ownership rule).

¹¹ See FCC Electronic Comment Filing System, MB Docket 06-121, available at http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts (last visited Dec. 11, 2007) (listing more than 167,000 filings in docket).

¹² *Media Ownership Studies Public Notice*; FCC Media Bureau, Peer Review Webpage, available at http://www.fcc.gov/mb/peer_review/peerreview.html (last visited Dec. 9, 2007).

hearings concerning media ownership and two hearings on broadcast localism, receiving feedback from hundreds if not thousands of citizens and expert witnesses.

The additional evidence now before the FCC only strengthens the case for elimination of the NBCO Rule. Broadcasters and newspaper publishers remain subject to extreme economic pressures as media choices increase and audiences sizes decrease. In media markets of all sizes, these economic pressures, coupled with escalating costs, have led to a decrease in local news content and have put many broadcast and print news outlets at risk.¹³ Newspaper/broadcast cross-ownership therefore would serve the public interest by allowing struggling same-market broadcasters and newspapers to share resources and costs. Accordingly, Morris respectfully submits that the Commission should go beyond the Martin Proposal, which presumptively limits such combinations in all but the largest markets, and give broadcasters and newspaper publishers much-needed economic breathing room by eliminating the NBCO Rule entirely.¹⁴

Moreover, while Morris supports repeal of all cross-ownership limitations, it is important to note that the record contains *no* persuasive justification for retaining *any* limitations on newspaper/*radio* cross-ownership. Indeed, the few commenters who argue that the FCC should retain continued restrictions on newspaper/broadcast cross-ownership generally focus on the continuing popularity of newspapers and television news coverage as the supposed basis for FCC

¹³ See e.g., Sarah Ellison, *Newspapers Try New Math on Circulation: As Numbers Fall, Dailies Trumpet Their Online Draw*, Wall St. J., Nov. 6, 2007, at B10; Comments of the Newspaper Association of America, MB Docket Nos. 06-121, *et al.*, at 41-45, 65-79 (filed Oct. 23, 2006) ("*NAA Comments*"); *2006 Comments* at 12-13; The Goldman Sachs Group, Inc., *Rethinking the Newspaper Stocks* 4 (July 2, 2007).

¹⁴ Continued restriction of newspaper/broadcast cross-ownership – whether under the current NBCO Rule or the Martin Proposal – also could require parties to break up newspaper/broadcast combinations already in existence. This, in turn, would unquestionably result in less local news content, in disservice of the public interest. Accordingly, in the event the cross-ownership ban is not repealed in its entirety, Morris urges the Commission to preserve intact existing combinations currently operating pursuant to temporary or conditional waivers or due to later acquisition of co-located newspapers.

concern.¹⁵ In the absence of relevant record evidence, the Commission cannot conclude that continued restriction of newspaper/*radio* cross-ownership is necessary to serve the public interest.

The Commission Is Required by Law to Eliminate or Substantially Relax the NBCO Rule

As part of the periodic review mandate with respect to the Commission's media ownership rules contained in the Telecommunications Act of 1996 (the "1996 Act"), Congress directed the agency to "repeal or modify any regulation that it determines to be no longer in the public interest."¹⁶ The Commission already determined that the NBCO Rule falls into this category,¹⁷ and the Third Circuit concurred.¹⁸ Accordingly, the FCC is under statutory and court-imposed legal directives to eliminate or at least substantially relax the NBCO Rule. The Martin Proposal, which provides no assurance of relief with respect to newspaper/*radio* cross-ownership except in the largest markets, and even there limits cross-owners to a single broadcast station, will not fully satisfy these demands. In order to comply with the 1996 Act and binding judicial precedent, the Commission should move quickly to eliminate or substantially relax the NBCO Rule.

¹⁵ Similarly, under the Martin Proposal, in order for a newspaper/combination in a top 20 market to "presumptively" satisfy the public interest, it cannot involve a TV station that is ranked among the top four in the DMA. There would be no parallel restriction with respect to *radio* stations, however. *See generally Martin Notice.*

¹⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) ("1996 Act").

¹⁷ *Biennial Review Order* at 13747, 13767.

¹⁸ *Prometheus*, 373 F.3d 372 at 398.

Continued Restriction of Newspaper/Broadcast Cross-Ownership Unfairly Disadvantages Common Owners of Newspaper and Broadcast Properties

The Martin Proposal, although an improvement over the outright ban on newspaper/broadcast cross-ownership, would leave prospective co-owners of newspaper and broadcast properties at a significant competitive disadvantage vis-à-vis their broadcast-only competitors. Accordingly, the Commission should move beyond the Martin Proposal to provide additional regulatory relief and level the playing field for newspaper publishers seeking to retain or acquire and operate co-located broadcast properties.

The NBCO rule was adopted more than 30 years ago.¹⁹ Even at that time, the Commission realized that newspaper-affiliated broadcast stations provided superior local service, but justified enactment of the NBCO Rule on a mere *hoped for* gain in diversity.²⁰ Notwithstanding these questionable beginnings, however, the NBCO rule remains in force today in its original, draconian form – unlike all of the Commission’s other media ownership restrictions, which have been relaxed in the interim to accord with economic and marketplace realities.²¹

In particular, pursuant to the FCC’s current ownership rules, one entity may own up to two full-power TV stations and as many as six or seven radio stations in the same market. Even

¹⁹ *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F.C.C. 2d 1046 (1975).

²⁰ *Id.* at 1078-81.

²¹ *See, e.g., Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) (relaxing local television ownership and television radio cross-ownership restrictions); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992) (relaxing restrictions on local radio ownership); 1996 Act, §202(b) (mandating further relaxation of local radio ownership rule); 1996 Act, §202(f) (repealing statutory cable/broadcast cross-ownership ban). Under the Martin Proposal, all rules except for the NBCO Rule would remain unchanged. *Martin Notice* at 2.

in the smallest markets, a single owner may operate one TV station and one radio station.²² Similarly, under the FCC's local radio ownership rules, one company can own as many as eight radio stations in a single market, and up to five stations in the smallest markets.²³ In stark contrast, the still existent NBCO Rule prohibits *all* newspaper/broadcast cross-ownership,²⁴ and the Martin Proposal presumptively would disallow such cross-ownership in all but the twenty largest markets.²⁵

This continued restrictive and disparate treatment places newspaper/broadcast cross-owners at an unfair and unjustified competitive disadvantage with respect to their broadcast-only competitors, which are able to realize the obvious operational and economic benefits that flow from common ownership. This disparity makes no sense from a public interest standpoint, given that daily newspapers have vastly more extensive newsgathering resources than other local media outlets, have strong journalistic and business incentives to use these resources to strengthen other commonly-owned outlets, and, therefore, are far more likely than other types of media entities to significantly improve the local news and informational offerings of co-owned broadcast stations.²⁶ In order to resolve these troubling inconsistencies and ensure that its media ownership regime provides substantial public interest benefits, the FCC must, at a minimum, put newspaper publishers on a regulatory par with other broadcasters by significantly relaxing or eliminating the NBCO Rule.

²² 47 C.F.R. 73.3555(b), (c).

²³ *Id.* § 73.3555(a)(1). Ownership in the smallest markets is subject to the rarely applicable limitation that a single entity may not control more than half of the broadcast stations in a market. *Id.* § 73.3555(a)(1)(iv).

²⁴ *Id.* § 73.3555(d).

²⁵ See generally *Martin Notice*.

²⁶ See, e.g., *NAA Comments* at 65-79.

Moreover, the case-by-case approach and “presumptions” built into the Martin Proposal create unnecessary obstacles and regulatory uncertainty in the vast majority of media markets. These procedures would leave newspaper/broadcast cross-owners at a significant disadvantage vis-à-vis their broadcast-only competitors and would prejudice newspaper/broadcast cross-owners in small to mid-size markets as compared to their large market competitors. In every case, the use of a case-by-case approach would significantly complicate transaction planning, disadvantage newspaper owners in competitive bidding situations, and entail significant regulatory burdens and costs, notwithstanding the potential public interest benefits of the proposed combination.

To begin with, in order to qualify for a positive presumption under the Martin Proposal, a newspaper/broadcast applicant apparently must meet all of the stringent criteria set forth in the suggested rule.²⁷ Any party wishing to create or transfer a newspaper/broadcast combination in a top 20 market will encounter significant delay and incur substantial legal costs in making the required showing and defending the proposed cross-ownership – even though that cross-ownership poses no reasonable public interest concerns. And, under the Martin Proposal, even if the party qualifies for a positive presumption, third parties may contest the application, and the Commission may still disallow the proposed common ownership based on a consideration of complex and somewhat subjective “public interest” concerns.²⁸ Parties likely will encounter significant additional costs and delays while working to overcome this second set of hurdles.²⁹

²⁷ See generally *Martin Notice*.

²⁸ See generally *id.*

²⁹ None of the Commission’s other media ownership rules burden parties with a similar general requirement of case-by-case consideration. See generally 47 C.F.R. § 73.3555.

In addition, the negative presumption reflected in the waiver standard for combinations outside the top 20 DMAs unfairly burdens entities with newspaper/broadcast combinations in small and mid-sized market combinations. Specifically, under the Martin Proposal, common ownership of newspaper and broadcast properties outside of the top 20 markets is presumed *not* to be in the public interest.³⁰ Accordingly, when a newspaper/broadcast cross-owner in a small or mid-size market seeks a waiver of the rule outlined in the Martin Proposal based on the enumerated factors, it will be disadvantaged right out of the gate.³¹ Morris submits that if a party does not meet the strict criteria to qualify under a black letter standard or a positive presumption, the Commission should view the public interest showing neutrally – as it does requests for waivers of other media ownership restrictions – and should not presume before any analysis that the proposed cross-ownership disserves the public interest.³²

Conclusion

The Commission has been examining the NBCO Rule for more than a decade. In the course of that examination, both the Commission and the Third Circuit have conclusively determined that the rule is contrary to the public interest. Specifically, the record evidence unequivocally shows that the newspaper-broadcast cross-ownership ban is unnecessary in light of today's crowded and highly competitive media marketplace, that the restriction disserves the

³⁰ See generally *Martin Notice*.

³¹ Moreover, the enumerated factors do not include several items that would seem clearly relevant to a public interest determination, including, for example, the economic health of any broadcast station involved in the proposed combination and, in the case of existing newspaper/broadcast combinations, the length of time the combination has been in place, and the record of performance under common ownership.

³² The negative presumption also runs counter to legal precedent requiring the agency to have flexible, appropriate waiver procedures. See, e.g., *U.S. v. Storer Broad. Co.*, 351 U.S. 192, 204-05 (1956); *National Broad. Co. v. U.S.*, 319 U.S. 190, 207, 225 (1943); *P & R Temmer v. FCC*, 743 F.2d 918, 929-30 (D.C. Cir. 1984); *Southwest Pa. Cable TV, Inc. v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Community Service, Inc. v. U.S.*, 418 F.2d 709, 711-12 (6th Cir. 1969).

public interest by prohibiting newspaper/broadcast combinations that would provide superior news and information programming, and that the rule unfairly puts newspaper publishers at a competitive disadvantage vis-à-vis their broadcast-only competitors at a time when both the newspaper and broadcast industries are suffering significant economic downturns.

These considerations, along with mandates from Congress and the Third Circuit, require the Commission to provide significant regulatory relief to newspaper/broadcast cross-owners. Although the Martin Proposal is a step in the right direction, the Commission should go farther and provide more substantial regulatory relief to owners of newspapers and broadcast stations by eliminating entirely, or at least relaxing significantly, the NBCO Rule. Any relaxation short of repeal would be best accomplished through black letter standards, with a fair opportunity for case-by-case consideration or waiver in situations falling outside the scope of the black letter test. Further, the Commission should consider objectively all public interest considerations advanced by applicants and avoid unnecessary disruption of existing combinations that have served the public interest in their local communities during the extended period of time – now over a decade – during which the NBCO Rule has been in flux.

Respectfully submitted,

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