

Commission can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. In addition, under our dual network rule, the Commission continues to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect localism. In combination, the Commission's new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities.

### I. Legal Framework

6. The Commission conducts this biennial ownership review within the framework established by section 202(h) of the 1996 Act, which provides: "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." 1996 Act, section 202(h).

7. Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television and Sinclair*, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule. Second, Section 202(h) requires the Commission to determine whether its rules remain "necessary in the public interest."

8. The Commission concludes that in its current form only the dual network rule remains necessary in the public interest as a result of competition. The Commission also concludes that the other ownership rules should be modified as described in the R&O.

9. The ownership rules adopted in the R&O must be consistent not only with the legal standard in section 202(h), but also with the First Amendment rights of affected media companies and consumers. The Commission concludes, based on the decisions in the *Fox Television* and *Sinclair* cases, that the rational basis standard is the correct First Amendment standard to apply to the broadcast ownership rules.

10. The Commission rejects, as did the court, the application of the

intermediate scrutiny (*O'Brien*) standard applicable to cable operators or the strict scrutiny standard applicable to the print media and to content-based regulations. Under *O'Brien*, government regulation of speech will be upheld only if: (1) It furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. In general, ownership limits on cable operators have been subject to the *O'Brien* test. The Supreme Court has determined that "promoting the widespread dissemination of information from a multiplicity of sources" is a government interest that is not only important, but is of the "highest order" and is unrelated to the suppression of free speech. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662–63 (1984); *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997). On the other hand, the Commission may not burden cable operators' speech with "illimitable restrictions in the name of diversity."

11. Strict scrutiny First Amendment analysis would require the Commission to demonstrate that its rules are the "least restrictive means available of achieving a compelling state interest."

12. Under the rational basis standard, the Commission's broadcast regulations satisfy the First Amendment if they are "a reasonable means of promoting the public interest in diversified mass communications." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) (*NCCB*). As the court has noted, there is no unabridgeable First Amendment right to hold a broadcast license; would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including demonstrating compliance with any applicable ownership limitations.

13. In applying the rational basis test, the *Fox* and *Sinclair* courts relied on longstanding Supreme Court precedent which also supports our decision. *NCCB*, 436 U.S. at 802. In *NCCB*, the Supreme Court applied the rational basis test to the Commission's newspaper/broadcast cross-ownership rules, finding that they "are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because

spectrum scarcity requires "Government allocation and regulation of broadcast frequencies" and because these regulations are not content related. The rational basis standard therefore governs the Commission's broadcast ownership regulations, whether they govern those that own only broadcast outlets or those that might seek to combine ownership of a broadcast outlet with a newspaper.

14. First Amendment interests are implicated by any regulation of media outlets, including broadcast media. The Commission endeavors to be sensitive to those interests and to minimize the impact of our rules on the right of speakers to disseminate a message. As discussed below, our decision today to eliminate the newspaper/broadcast cross-ownership rule and the radio-television cross-ownership rule, and to modify our other local ownership rules and our national audience reach cap, turns in part on our determination that these rules in their current form are not a reasonable means to accomplish the public interest purposes to which they are directed. The Commission turns next to identifying the policy goals that will inform this determination.

### II. Policy Goals

15. The Commission, in the NPRM, identified diversity, competition and localism as longstanding goals that would continue to be core agency objectives that would guide its actions in regulating media ownership. To fulfill our biennial review obligation, the Commission will first define our goals and the ways it will measure them. The Commission can then assess whether our current broadcast ownership rules are necessary to achieve these goals.

#### A. Diversity

16. There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity.

17. *Viewpoint Diversity*. Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy. Consequently, "it has been a basic tenant of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." This policy is given effect, in part, through regulation of broadcast ownership. Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation