

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

Promoting Diversification of Ownership In The Broadcasting Services	)	MB Docket No. 07-294
	)	
	)	
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 MB Docket No. 02-277 MM Docket No. 01-235 MM Docket No. 01-317 MM Docket No. 00-244 MB Docket No. 04-228
	)	
	)	

**COMMENTS OF  
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.  
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION  
MEDIA ALLIANCE  
COMMON CAUSE  
BENTON FOUNDATION**

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July 30, 2008

## SUMMARY

*UCC et al.* respectfully submit these comments in response to the FCC's recently adopted Report and Order and Further Notice of Proposed Rulemaking on broadcast ownership diversity.

Facilitating broadcast ownership by underrepresented groups provides significant public benefits by increasing the diversity of programming, breaking down racial and gender stereotypes, providing better service to underserved segments of the population, and remedying past discrimination against women and minorities. Given these important goals, we are disappointed that the Commission did not go further in developing targeted rules to enhance opportunities for broadcast ownership by minorities and women – or to ensure that it can accurately track and analyze women's and minority ownership levels. It is particularly discouraging in light of the *Prometheus* Court's rebuke of the Commission's failure to adequately address minority and women's ownership in the ownership proceeding. The FCC has done so little to target ownership by minorities and women, that it cannot be deemed to have complied with the *Prometheus* mandate

*UCC et al.* have already commented extensively on many of the issues the FCC has put out for further comment. Unfortunately, in seeking further comment, the FCC failed to address many of the arguments we presented in our earlier filings. Consequently, these comments build upon many of our previous arguments.

In particular, we ask that the Commission formulate a race and gender-based eligible entity definition to encourage ownership among underrepresented groups. *UCC et al.* have already submitted analyses and studies supporting the constitutionality of such a definition; however, the FCC itself has yet to produce any assessment of the evidence that has already been submitted in this proceeding, and it is unclear to us what additional information the FCC seeks.

The Commission could significantly enhance the quality of public input if it would evaluate the considerable information already presented in this proceeding and give some guidance to commenters so that they can provide the FCC with the best record possible.

We also ask the FCC to adopt its proposed modifications to its Form 323 ownership reports without delay. The Commission has been well briefed on the inadequacies of its current processes, and by now must be acutely aware of these problems. It should adopt the proposed modifications to Form 323 promptly to ensure that it can assess the success or failure of the rules it has adopted in the *Diversity Order*.

Finally, we are pleased that the FCC has committed to conducting additional studies on minority and women' ownership. Analysis of the state of minority and women's ownership must be done with some regularity. The Commission should use its Triennial Section 257 Reports (or some other regular reporting mechanism) as a vehicle for consistent and systematic assessment of barriers to entry for women and minorities. Unfortunately, the FCC's most recent Section 257 Reports comprise little more than laundry lists of FCC initiatives with little or no analysis of whether those initiatives have been effective. Instead, the FCC should regularly examine the effectiveness of its policies, and assess whether additional measures are needed. It should also take a searching look at past FCC practices and policies and assess the level of FCC participation (inadvertent or otherwise) in discrimination against women and minorities in the broadcast industry.

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**BENTON FOUNDATION**

The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women Foundation (“NOW”), Media Alliance, Common Cause, and the Benton Foundation (collectively, *UCC et al.*), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the Report and Order and Third Further Notice of Proposed Rule Making (“Diversity Order”) in the above referenced proceeding, which was adopted on December 18, 2007, and released on March 5, 2008.<sup>1</sup>

In the *Diversity Order* the Commission reinstated the Failing Station Solicitation Rule (FSSR) and adopted a number of new rules, including a ban on discrimination in broadcast transactions, non-discrimination clauses for advertising sales contracts, and permitting the sale of

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<sup>1</sup> *Promoting Diversification of Ownership In The Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd. 5922 (2007) (“Diversity Order”).

expiring construction permits to eligible entities.<sup>2</sup> However, it declined to adopt a race or gender-based definition for “eligible entities.”<sup>3</sup> It also failed to adopt revisions to its minority and women’s ownership data collection processes, despite the comments of multiple parties, including *UCC et al.*, suggesting that its current procedures are flawed.<sup>4</sup> Instead the FCC has asked for further comment on these issues, as well as for a number of additional proposals to increase ownership among new entrants, including minorities and women.

As an initial matter, while we are pleased that the Commission adopted important new rules preventing discrimination in the broadcast industry, we are disappointed that the Commission did not go further in developing more targeted rules to enhance opportunities for broadcast ownership by minorities and women – or indeed, even to ensure that it can accurately track and analyze women’s and minority ownership levels. We are particularly disappointed at the Commission’s inaction given the Third Circuit’s admonishment of the FCC’s failure to address the issue of minority and women’s ownership, and its instruction that the Commission do a better job on remand.<sup>5</sup>

Though we welcome the opportunity to provide further input on these issues, *UCC et al.* have already commented extensively on many of the questions presented in the *Diversity Order*, most importantly, the constitutionality of a race and gender-based eligible entity definition, reforms to Form 323 ownership reports, and ongoing longitudinal studies on women’s and minority ownership. Unfortunately, in seeking further comment, the FCC failed to address many

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<sup>2</sup> *Id.* at ¶¶15, 40, 49.

<sup>3</sup> *Id.* at ¶9.

<sup>4</sup> *Id.* at ¶95.

<sup>5</sup> *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 n. 82 (3d Cir. 2004).

of the arguments we presented in our earlier filings. As a result, it is unclear to us what additional information the FCC seeks.

Consequently, these comments build upon many of our previous arguments. In particular, we ask the Commission to formulate a race and gender-based eligible entity definition to encourage ownership among underrepresented groups, adopt reforms to its Form 323 without delay, and conduct additional studies on minority and women's ownership. We have also attached the comments we have previously filed in this proceeding for ease of reference.<sup>6</sup> Given the volume of information already submitted in this docket, we anticipate that the Commission will have an adequate record to promptly adopt new rules, or at the very least, provide the public with a minimum of analysis of why the FCC believes it cannot adopt new rules and what additional data it needs.

#### **I. The FCC's Response To The *Prometheus* Court's Mandate Has Been Inadequate**

Developing policies to encourage ownership among minorities and women and assessing the impact of ownership rules on underrepresented and disadvantaged groups is not optional for the Commission – it is imperative. As *UCC et al.* have pointed out in earlier filings, the Commission is bound by Sections 257 and 309(j) of the Communications Act to review and eliminate barriers to entry for underrepresented groups, including women, minorities, and small businesses, and to develop policies to encourage their acquisition of broadcast licenses.<sup>7</sup> And if this statutory mandate were not enough, in *Prometheus Radio Project v. FCC*, the Third Circuit Court of Appeals admonished the Commission for failing to adequately address minority and

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<sup>6</sup> See Appendices A-D, attached to these comments.

<sup>7</sup> Appendix B at 4.

women's ownership in the ownership proceeding.<sup>8</sup> Specifically, the Third Circuit instructed the FCC to: reconsider its repeal of the Failing Station Solicitation Rule;<sup>9</sup> reevaluate whether an SDB-based definition would promote the Commission's diversity objectives;<sup>10</sup> “conduct rigorous analysis of [its] rules on minorities and women;”<sup>11</sup> and conduct the ownership rulemaking in conjunction with consideration of proposals to address ownership by underrepresented groups.<sup>12</sup>

Unfortunately, with the exception of reinstating the FSSR, the Commission has not adequately attended to the Third Circuit's concerns. First, the FCC has not only refused to adopt a race or gender-based SDB definition, it has failed to present any record assessment to determine whether an SDB definition would be effective or constitutional. Second, the FCC cannot monitor the effect of its ownership rules on underrepresented groups, because its process for collecting and analyzing data on minority and women's ownership is wholly inadequate.

Additionally, although the adoption of *Diversity* and *2007 Ownership Orders* on the same day gives the impression that diversity issues had been addressed in the ownership proceeding, the FCC has done so little to target ownership by minorities and women, that it cannot be deemed to have complied with Third Circuit's mandate.<sup>13</sup> It has given the veneer of compliance, but with little substance to back it up. Indeed, given the considerable evidence that increased

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<sup>8</sup> *Prometheus*, 373 F.3d at 435 n 82.

<sup>9</sup> *Id.* at 421.

<sup>10</sup> *Id.* at 428 n. 70.

<sup>11</sup> *Id.* at 421 (internal citations omitted) (quoting the dissenting opinion of Commissioner Michael Copps).

<sup>12</sup> *Id.* at 421 n. 59.

<sup>13</sup> See *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd. 2010 (2007) (“2007 Ownership Order”). Though the *Diversity Order*, was adopted the same day as the Commission issued its general ownership order pursuant to the consolidated 2006 Quadrennial Review and 2002 Biennial Review remand, the *2007 Ownership Order* was published in the Federal Register in February, before the text of the *Diversity Order* was even available and long before its publication in the Federal Register.

consolidation has hurt minority and women’s representation among broadcast owners, the Commission’s decision to issue the *2007 Ownership Order* and relax the newspaper-broadcast cross ownership rule before establishing policies to monitor and foster ownership among these underrepresented groups cannot be considered reasonable or logical.<sup>14</sup>

## **II. There Is Ample Evidence Supporting The Adoption Of A Race and Gender-Based Eligible Entity Definition**

In the *Diversity Order*, the Commission seeks comment on the adoption of a race-conscious definition of socially and economically disadvantaged businesses (SDBs). It states that “[r]ace-based classifications subject to strict scrutiny may be upheld ‘only if they are narrowly tailored measures that further compelling government interests.’”<sup>15</sup> Unfortunately, the Commission provides little further assessment of the case law or of the evidence already submitted in the record.<sup>16</sup> The Commission could significantly enhance the quality of public input if it would evaluate the considerable information already presented in this proceeding and give some guidance to commenters so that they can provide the FCC with the best record possible.

To that end, *UCC et al.* are pleased that the Commission has convened an “Eligible Entities” Subcommittee as part of its Advisory Committee on Diversity for Communications in

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<sup>14</sup> See, e.g., Appendix B at 5-7; Appendix D at 14-16.

<sup>15</sup> *Diversity Order* at ¶83. We note that the *Diversity Order* also failed to discuss or acknowledge that gender-based preferences are subject, not to strict scrutiny, but to intermediate scrutiny. Under this standard, a proponent must show that the preference enhances an important governmental interest and the means must be substantially related to achieving that goal. *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565 (1990)).

<sup>16</sup> Instead the Commission merely asserts that “parties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to encourage ownership diversity and new entry must explain specifically using empirical data and legal analysis, how such classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling.” *Diversity Order* at ¶83.

the Digital Age (“Diversity Committee”) to create a constitutionally sustainable eligible entity definition.<sup>17</sup> However, we are disappointed that the FCC did not assemble this subcommittee sooner so that commenters could have the benefit of its analysis for this filing. Nevertheless, we anticipate that the subcommittee will be issuing its report in the near future and look forward to reviewing its conclusions.

In any event, *UCC et al.* have already addressed the constitutionality of a race and gender-based eligible entity definition extensively in comments filed nearly two years ago, when the Commission issued its first notice of proposed rulemaking pursuant to the Third Circuit’s remand of the FCC’s ownership rules.<sup>18</sup> However, the Commission has never discussed, or indeed, even acknowledged the data and analysis we presented. *UCC et al.*’s comments addressed the two rationales – diversity and remedying past discrimination – which have been upheld by the courts as sufficiently compelling to justify the use of race-based preferences.<sup>19</sup> *UCC et al.* cited and discussed numerous studies demonstrating that increased levels of women and minority ownership would lead to increased program diversity,<sup>20</sup> break-down racial and gender stereotypes prevalent in media,<sup>21</sup> and increase civic participation among underserved minority groups.<sup>22</sup>

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<sup>17</sup> See Transcript of the June 10, 2008 Meeting of the FCC Advisory Committee on Diversity for Communications in the Digital Age, at 36, available at <http://www.fcc.gov/DiversityFAC/meeting061008.html>.

<sup>18</sup> Appendix A at 1-40.

<sup>19</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1988) (finding that “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (recognizing a compelling government interest in educational diversity).

<sup>20</sup> Appendix A at 16-18.

<sup>21</sup> *Id.* at 18.

<sup>22</sup> *Id.* at 21.

The comments also addressed how the FCC has, at a minimum, been a passive participant to discriminatory practices limiting broadcast ownership by minorities and women, and cited studies and analysis demonstrating that remedying discrimination in broadcast licensing constitutes a compelling governmental interest.<sup>23</sup> Additionally, *UCC et al.* discussed and supported the adoption of the race-based socially disadvantaged business currently adopted by the SBA and implemented by a number of federal agencies, including the Environmental Protection Agency and the Department of Transportation.<sup>24</sup>

*UCC et al.* are happy to provide any additional analysis or data that might prove useful, however, without any evaluation of the record by the Commission, we are at a loss to know what else the FCC thinks it requires. Does the Commission think there is sufficient evidence to support race and gender-based preference? Does the FCC deny that it has been a passive participant in discrimination against women and minorities in obtaining broadcast licenses? Does the Commission think that the SDB programs used by other government agencies would be inappropriate or ineffective if applied in the broadcast context? Again, we look forward to the Eligible Entities Subcommittee's forthcoming report, and hope that it provides the record analysis that to this point has been lacking.

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<sup>23</sup> *Id.* at 23-25. Indeed, in issuing the *Diversity Order* the Commission acknowledges, yet does not appear to recognize, evidence of its own passive participation in discrimination. For example, in adopting non-discrimination provisions for broadcast advertising sale contracts, the FCC states that “[f]or over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten ‘no urban/no Spanish’ dictates.” *Diversity Order* at ¶49. Moreover, it is disturbing that, having been aware of such practices for over two decades, the Commission did not take action sooner.

<sup>24</sup> Appendix A at 33-34.

### **III. The Commission Must Improve Its Collection And Analysis Of Data On Women's And Minority Ownership**

The FCC has been long aware of the disadvantages faced by minorities and women in the broadcast industry, and both studies and comments submitted in this proceeding only confirm that ownership among these groups is unacceptably low – about five and six percent for women in TV and radio, respectively, and about three and eight percent for minorities in TV and Radio, respectively.<sup>25</sup> Regardless of whether it believes it has or does not have sufficient evidence to support a race and gender-based eligible entity definition, the Commission must do a better job of monitoring and studying ownership among underrepresented groups. Tracking ownership trends among such groups is not only essential to building a record to support race and gender-based programs, it is also the only way for the Commission to evaluate the impact of its ownership rules on women and minorities, and fulfill its statutory mandate under Section 257 of the Communications Act.<sup>26</sup>

As *UCC et al.* have observed in past filings, the FCC's recent track record in this area has left much to be desired. The FCC's lack of action could, at best, be described as apathetic – at worst, a neglect of statutory duty. Multiple commenters in this proceeding, as well as researchers commissioned by the FCC have complained of the paucity of data and analysis concerning minorities and women. Thus, we urge the FCC to promptly adopt revisions to its Form 323 and to conduct meaningful, regular analysis of minority and women's ownership levels.

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<sup>25</sup> *Diversity Order*, Statement of Commission Jonathan Adelstein, at 1 (citing statistics submitted by Free Press).

<sup>26</sup> 47 U.S.C. §257(a)(b) (instructing the Commission to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision of and ownership of telecommunications and information services” and to do so in a manner “favoring diversity of media voices.”).

**A. The Commission Should Adopt Its Proposed Modifications To Form 323 Without Delay**

In the *Diversity Order* the FCC asks whether it should adopt modifications to its Form 323 so that it can more accurately track ownership by minorities and women.<sup>27</sup> *UCC et al.*, as well as other parties, have already filed multiple comments recommending such modifications.<sup>28</sup> The fact that the FCC has not yet adopted such reforms, and is only now putting this issue out for initial comments, demonstrates neglect of one of the most basic mandates of Section 257 and the *Prometheus* Court – that the FCC evaluate the impact of its rules and policies on ownership by underrepresented groups.<sup>29</sup>

Two years ago, when the FCC issued its first NPRM in response to the Third Circuit’s remand of the ownership rules, commenters, including *UCC et al.*, advised the FCC of problems with its collection of data on minority and women’s ownership. In particular we noted that exemptions for sole proprietorships and partnerships of natural persons give an incomplete picture of the state of minority and women’s ownership, and because group owners need only file once for all their stations, it is difficult for FCC staff to determine whether every station has filed.<sup>30</sup> The FCC did nothing to repair the problems. Instead, the organization Free Press did what the FCC had failed to do – it counted the numbers of women and minority owners in television and radio, and found the levels to be disconcertingly and unacceptably low.<sup>31</sup> Indeed,

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<sup>27</sup> *Diversity Order* at ¶¶95-96.

<sup>28</sup> *See, e.g.*, Appendix A at 39-40; Appendix B at 11; Appendix C at 8; Appendix D at 6.

<sup>29</sup> 47 U.S.C. §257(a), and *Prometheus*, 373 F.3d at 428 n. 70.

<sup>30</sup> Appendix A at 39-40.

<sup>31</sup> S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (June 2007) (“Off the Dial”), and S. Derek Turner and Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States* (Sept. 2006) (“Out of the Picture”).

Free Press described the FCC as having “abdicated its responsibility to monitor and foster increased minority and female broadcast ownership.”<sup>32</sup>

Despite these criticisms, the FCC did nothing to fix the ownership reporting problems. Nearly a year later, it issued a Second Further Notice of Proposed Rulemaking (2d NPRM) on ownership diversity.<sup>33</sup> The *2d NPRM* made no mention of the data problems. Multiple parties, including *UCC et al.*, again filed comments entreating the FCC to reform its data collection and modify Form 323.<sup>34</sup> Shortly thereafter, the FCC released a series of studies, some of which attempted to examine and explain the low levels of ownership among minorities and women.<sup>35</sup> Across the board these researchers found that the FCC’s data was wholly inadequate, and as a result, were forced to rely on ill-suited outside data to measure the levels of minority and women’s ownership.<sup>36</sup> Comments submitted on these studies again pointed out the shoddy state of the FCC data.<sup>37</sup> In spite of this, the Commission adopted the *Diversity Order* without any modification to its data collection and analysis, and merely seeks further comment on the issue.

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<sup>32</sup> *Id.* at Exec Summary.

<sup>33</sup> *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, 72 Fed. Reg. 44457-01 (rel Aug. 8, 2007) (“2d NPRM”).

<sup>34</sup> *See, e.g.*, Appendix B at 11.

<sup>35</sup> Available at [http://www.fcc.gov/mb/peer\\_review/peerreview.html](http://www.fcc.gov/mb/peer_review/peerreview.html).

<sup>36</sup> According to one study, “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.” Ari Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (June 2007). Even the FCC’s own Office of General Counsel’s Chief Economist found that “every database supplied by the Video Division of the Media Bureau is noisy or incomplete” and that in fact “all FCC databases on station ownership contain noise.” C. Anthony Bush, “*Minority and Women Broadcast Ownership Data*” at Study 2, Appendix A, at 18 (July 24, 2007).

<sup>37</sup> *See, e.g.*, Appendix D at 6.

The accurate collection of data on minorities and women is integral to the success of any rules designed to foster ownership by underrepresented groups. The Commission has been well briefed on the inadequacies of its current processes, and by now must be acutely aware of these problems. It should adopt the proposed modifications to Form 323 without delay and ensure that it can actually assess the success or failure of the rules it has adopted in the *Diversity Order*.

**B. The Commission Should Conduct Regular Studies On Ownership By Underrepresented Groups**

In the *Diversity Order* the Commission pledges to conduct ongoing longitudinal studies on women's and minority ownership, after it improves its information collection processes.<sup>38</sup> *UCC et al.* are pleased that the Commission has committed to such an important undertaking. As we pointed out in our previous comments, better data collection and analysis is essential to the FCC's objective of increasing female and minority representation in media ownership.<sup>39</sup> The FCC cannot expect to build good policy without sufficient data or analysis.

Analysis of the state of minority and women's ownership must be done with some regularity. Regrettably, the FCC conducted the most recent substantive studies on barriers to entry for women and minorities over eight years ago.<sup>40</sup> Such a delay is unacceptable. In order to

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<sup>38</sup> *Diversity Order* at ¶53.

<sup>39</sup> Appendix B at 13.

<sup>40</sup> The studies can be found at [http://www.fcc.gov/opportunity/meb\\_study/](http://www.fcc.gov/opportunity/meb_study/) and [http://www.fcc.gov/Bureaus/Mass\\_Media/Informal/ad-study/](http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/). We do not agree with some commenters that that these studies are "stale." Recently, the District Court for the Western District of Texas, has weighed in on the timeliness of data used to support remedial affirmative action. *Rothe v. U.S. Dept. of Defense*, 499 F.Supp. 2d 775, 839 n. 86 (W.D. Texas 2007). The court refused to adopt a bright-line rule for determining data staleness. Moreover, the court rejected a USCCR Report proposal that all statistical data older than five years be considered stale. *Id.* at 839. Instead, the court found that "[a]lthough a governmental entity resisting strict scrutiny challenge cannot rely on old statistical data when newer statistical data is available, it should be able to rely on the most recently available data so long as that data is reasonably up-to-date." *Id.* Because many of the 2000 Section 257 Studies deal with the issue of past

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monitor policies and build a record to support race and gender-based programs, such analyses must be consistent and systematic.

The Commission's Triennial Section 257 Reports may provide a good vehicle for such assessments. Section 257 requires the Commission to report to Congress every three years on its regulatory efforts to eliminate market entry barriers for entrepreneurs and other small businesses "in the provision and ownership of telecommunications services and information services," and to recommend any such obstacles that should be eliminated.<sup>41</sup> Unfortunately, the FCC's most recent Triennial Reports (released in 2004 and 2007) have consisted of little more than a laundry list of FCC initiatives with no analysis of what, if any, impact those initiatives have had.<sup>42</sup> Instead of squandering future Section 257 Reports, the FCC should use them (or some other regular reporting mechanism) to evaluate trends in ownership among underrepresented groups and assess the impact and need for new rules and policies. In particular, the FCC should build upon the 2000 Section 257 Studies and examine whether its newly adopted non-discrimination provisions have been effective, or whether additional measures or enforcement are needed. It should also take a searching look at past FCC practices and policies and assess the level of FCC participation (inadvertent or otherwise) in discrimination against women and minorities in the broadcast industry.

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(footnote continued)

discrimination, which has a compounding future effect on the success of minority and women broadcasters, such data is still timely to demonstrate past practices which have hindered the ownership prospects of underrepresented groups. Nevertheless, in the interest of good policymaking it is incumbent on the FCC to ensure that its data and analysis is as up to date as possible.

<sup>41</sup> 47 U.S.C. §257(a).

<sup>42</sup> See *Section 257 Triennial Report to Congress*, 22 FCC Rcd. 21132 (2007), and *Section 257 Triennial Report to Congress*, 19 FCC Rcd. 3034 (2004).

## Conclusion

For the foregoing reasons, *UCC et al.* urge the Commission to act promptly to adopt policies to promote opportunities for minorities and women to fully participate in serving the public as broadcast licensees. *UCC et al.* are pleased that the Commission has recently taken some important steps to address current discrimination in the broadcast industry. However, its failure to adopt any remedies to meaningfully target women and minorities is discouraging. Participation by women and minorities in the broadcast industry provides significant diversity benefits to the public, but their presence and success have been stunted by long-term discrimination. To meaningfully address these problems, the FCC should adopt a race and gender-based eligible entity definition (or at least provide an analysis of the legal and evidentiary record to-date), and ensure that its collection and analysis of data on minority and women's ownership is thorough, accurate, and current.

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# **APPENDIX A**

Comments of UCC et al., filed MB Dkt. 06-121 (Oct. 23, 2006)

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	)	MM Docket No. 01-235
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-317
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 00-244
	)	
Definition of Radio Markets	)	

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October 23, 2006

## **SUMMARY**

The Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, and Benton Foundation, urge the Commission to tighten or maintain existing broadcast ownership limits so as to increase opportunities for minorities and women to own broadcast stations and to best promote the public interest goals of diversity, localism, competition, and efficient use of the spectrum.

The Commission should make increasing opportunities for minorities and women to own broadcast stations a central focus of this proceeding. Analyses of the Commission's Form 323 ownership data show that the percentage of broadcast stations owned by minorities and women is in the low single digits, has been stagnant or decreasing, and is far below that of other industries. Moreover, numerous studies find that minorities and women continue to be under-represented or stereotyped in both news and entertainment programming.

Increasing minority and female broadcast station ownership would serve the public interest in many ways. First, it would benefit the public by increasing the diversity of programming. Second, it would help to break down racial and gender stereotypes. Third, increasing the number of minority or women-owned stations would result in better service for underserved segments of the population. Finally, it would help remedy the past discrimination against both women and minorities in which the Commission has been at least a passive participant.

Tightening the existing ownership limits and eliminating "grandfathering" are among the most important steps the Commission could take to foster new entry by minorities and women. At a bare minimum, the FCC must ensure that discrimination based on race or gender does not

occur in the sale of broadcast stations by adopting MMTC's Proposal for an equal opportunity transaction rule.

The Commission should also act promptly to develop a working definition of "socially and economically disadvantaged" businesses that would include small businesses controlled by minorities or women. The transfer of grandfathered clusters should be limited to socially disadvantaged businesses rather than small businesses generally, and other ways of assisting socially and economically disadvantaged small businesses should be considered.

The Commission must ensure that local television stations, newspapers, and radio stations are held by multiple, diverse owners. These media are the primary sources of news and information for the vast majority of the American public. Alternative information sources such as cable, Internet, and satellite provide little if any local news, although they may serve as additional platforms for the news gathered and produced by broadcast stations and newspapers. Additionally, a significant number of Americans do not have access to or cannot afford these alternative media sources.

Specifically, Commenters urge the Commission to modify its broadcast ownership rules as follows:

***Local TV:*** The Commission should return to a single-license restriction on local television ownership. Digital television enables licensees to broadcast multiple program streams using a single license, thus obviating the need to acquire a second or third license to provide additional programming to the public. Moreover, the predicted programming benefits from common ownership, on which the Commission relied in relaxing local television ownership rules in 1999, have failed to materialize. A single-license restriction would promote diversity of

viewpoints, improve local service, increase competition, and give licensees the incentive to use the spectrum more efficiently.

***Newspaper-Broadcast Cross-Ownership:*** The Commission should retain the current prohibition on common ownership of a daily newspaper and a broadcast station serving the same area. Recent developments that allow both broadcasters and newspaper publishers to disseminate content on other platforms have undercut arguments for relaxing the cross-ownership restriction. Moreover, studies and anecdotal evidence show little or no public benefit from cross-ownership. Retaining the current rule with a modification to close up the loophole created by the extension of license terms to eight years would best serve the goals of diversity, localism and competition. However, if the Commission concludes that some relaxation is necessary, it would best be accomplished by modifying the waiver policy to allow waivers where certain objective criteria are met indicating that the waiver would benefit the public and to disallow waivers in categories of cases where the diversity of local news sources available to public would be reduced.

***Radio-TV Cross-Ownership:*** The Commission should reinstate a ban on radio-television cross-ownership. Reinstating the prohibition would promote diversity, competition and localism. According to the Media Bureau's recently released study, television stations that are cross-owned air less local news. Moreover, the Commission cannot retain the Cross Media Limit found arbitrary by the Third Circuit in *Prometheus*, nor can it simply return to the 1999 rule, because it suffers from the same defects as the Cross Media Limit.

***Local Radio:*** The Third Circuit found most radio markets to be "excessively concentrated." That excessive concentration continues today. The Commission should lower the maximum number of stations that may be commonly owned in a market. Lowering the limit and

requiring divestiture within a reasonable time will increase opportunities for minorities and women to acquire radio stations, foster the diversity of views available to the public, improve local service, and encourage efficient use of the spectrum. Commenters also urge the Commission to retain the AM/FM subcaps.

***Data Collection, Monitoring and Enforcement:*** Whether the Commission retains or modifies the rules, it should proceed in a deliberate and cautious manner so that the effects of any changes can be assessed and corrective action taken if needed. To accurately document and study the effects of any changes to the media ownership rules, the Commission must improve its data collection and analysis. The Commission should also strictly enforce the ownership limits and policies.

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review –	)	MB Docket No. 06-121
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
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	)	MM Docket No. 01-235
	)	
Cross-Ownership of Broadcast Stations and	)	
Newspapers	)	MM Docket No. 01-317
	)	
Rules and Policies Concerning Multiple	)	
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	MM Docket No. 00-244
	)	
Definition of Radio Markets	)	

**COMMENTS**

The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women (“NOW”), Media Alliance, Common Cause, and the Benton Foundation, by their attorneys, the Institute for Public Representation (“IPR”), respectfully submit comments in response to the Further Notice of Proposed Rule Making (“*FNPRM*”) in the above referenced proceeding, which was released on July 24, 2006. Collectively, these organizations represent a broad spectrum of the listening and viewing public. Each has actively participated in FCC proceedings, including the earlier phases of this ownership review.

## I. THE COMMISSION SHOULD ADOPT RULES TO PROMOTE OPPORTUNITIES FOR MINORITIES AND WOMEN TO OWN BROADCAST STATIONS

Pursuant to the court's order in *Prometheus*,<sup>43</sup> the *FNPRM* seeks comment on the proposals for advancing minority ownership made by the Minority Media and Telecommunications Council (MMTC) in its comments in the 2002 Biennial Review proceeding and asks for alternative proposals for fostering its minority ownership and diversity goals. It also seeks comment on the effects that ownership rule proposals will have on the ownership of broadcast outlets by minorities, women and small businesses.<sup>44</sup> However, the Commission provides no proposals of its own, nor does it indicate its views about the desirability, effectiveness, or legality of MMTC's proposals. In fact, the *FNPRM* fails to even identify the relevant MMTC proposals. Commenters therefore will address the proposals listed in MMTC's Motion filed August 23, 2006.<sup>45</sup> For ease of reference, these Comments will use the same numbers used by MMTC, with the addition of a short form label.<sup>46</sup>

Commenters urge that increasing opportunities for minorities and women should be a central focus of this proceeding. Despite the increased number of broadcast stations on the air, the percentage owned by minorities and women is extremely small and has increased only slightly in the case of minorities and has fallen in the case of women. At the same time,

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<sup>43</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 n 82 (3rd. Cir 2004).

<sup>44</sup> *FNPRM* at ¶6.

<sup>45</sup> *Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of A Revised Further Notice*, App. B, Section I. MMTC presented the first fourteen of its proposals in its comments filed in MM Dkt. No. 02-277. The motion provides citations to the record for each proposal. Many of these proposals were also presented in other, related proceedings as well as in Docket 02-277.

<sup>46</sup> The fourteen proposals are: 1) Equal Transactional Opportunity; 2) Transfer of Grandfathered Clusters; 3) SDB Transfer as Factor in Waiver; 4) Expiring CPs; 5) Incubators; 6) Share-times; 7) Financing Unbuilt Stations; 8) Nonattributable EDPs; 9) Mathematical Touchstones; 10) Zero Tolerance; 11) JOAs; 12) New FMs; 13) Staged Implementation; 14) Tradable Diversity Credits.

minorities and women continue to be under-represented and stereotyped in broadcast news and other programming. Increasing minority and female ownership would serve the public interest by improving service to underserved segments of the community and by helping to educate the public at large about minority concerns, thereby breaking down stereotypes. It also would remedy past discrimination in which the Commission has been, at the least, a passive participant.

Commenters propose a number of race and gender neutral steps that the Commission should promptly adopt. However, because history suggests that race and gender neutral policies alone will not be sufficient to increase ownership opportunities for minorities and women, Commenters also urge the Commission to promptly initiate proceedings to develop constitutionally sound programs that would give preferences to socially and economically disadvantaged businesses, including small businesses controlled by minorities and women. Because of the interrelationship between media ownership rules and policies designed to promote ownership opportunities for minorities and women, the Commission should have policies to ensure that minorities and women have opportunities to own broadcast stations in place **before** it takes any action that would further relax existing ownership limits.

**A. Increasing Opportunities for People of Color and Women to Own Broadcast Stations Should be a Central Focus of this Proceeding**

Increasing opportunities for minorities and women to own broadcast stations should be a central focus of the remand and quadrennial review. Not only did the Third Circuit direct the FCC to consider this issue, but the lack of minority and female ownership has been a long standing problem that has worsened in recent years. The lack of minority and female owned stations contributes to the under representation and/or stereotyping of minorities and women on

the air. Increasing minority and female ownership of broadcast stations would serve the public interest in multiple ways.

**1. Minority and Female Ownership Has Been Stagnant or Decreasing Despite Increases in Minority Population and the Number of Broadcast Stations**

In comments filed by UCC and others more than ten years ago in *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, MM Dkt. No. 94-149, a proceeding that has never been concluded by the FCC, UCC pointed out that only a small percentage of broadcast stations were owned by minorities and women.<sup>47</sup> The most current statistics then available were the 1994 data collected by NTIA. NTIA's analysis showed that minorities owned only 323 of 11,128 (2.9%) broadcast facilities.<sup>48</sup> Moreover, minorities owned the same low percentage of television stations (31 of 1,155 or 2.9%) as radio stations (292 out of 9,973 or 2.9%).<sup>49</sup>

Comparable statistics were not available for women-owned stations. However, a study conducted by the Congressional Research Service in 1988 found that women held 51% or more ownership interest in 7.1% of the broadcast stations surveyed,<sup>50</sup> and an earlier study

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<sup>47</sup> *Comments of Black Citizens for a Fair Media, et al.*, MM Dkt. No. 94-149 at 6-7 (May 17, 1995).

<sup>48</sup> *Id.* at 6 (citing the Minority Telecommunications Development Program, National Telecommunications and Information Administration, *Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States* (1994)); see Chart, *A Comparative Analysis of Minority Owned Commercial Broadcast Stations Licensed in the United States in 1992, 1993, and 1994*.

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* at 7 (citing Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* 12 (1988)).

commissioned by the FCC in 1982 found that women were majority owners of 8.5% of the AM stations, 9% of the FM stations, and 2.8% of the television stations across the country.<sup>51</sup>

Since 1994, the number of broadcast stations has increased.<sup>52</sup> So, too, has the percentage of minorities in the population.<sup>53</sup> Yet, the percentage of stations owned by minorities has increased only marginally and the percentage of stations controlled by women has dropped. Data collected by the FCC on Ownership Form 323s and posted on its website shows that of the 12,844 stations filing in 2004-05, minorities controlled 460, or 3.58%, and women controlled 438, or 3.41%.<sup>54</sup> Of 11,609 stations filing in 2003, minorities controlled 389, or 3.35% and women controlled 412, or 3.55%. In 2001, of 8,751 stations filing, minorities controlled 303, or 3.46% and women controlled 380, or 4.34%. Thus, since 1994, the percentage of minority-controlled stations has increased slightly (from 2.9% to 3.58%), while the percentage of women-owned stations seems to have fallen from 7.1% in 1988 to 4.34% in 2001 and 3.41% in 2004/05.

Two studies have recently tackled the subject of minority and female broadcast ownership. One by Dr. Carolyn M. Byerly (attached to these Comments in Appendix A) analyzes the TV and radio data collected by the FCC and notes a number of significant problems

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<sup>51</sup> *Id.* at 7, n.8 (citing ERLA Group Inc., *Female Ownership of Broadcast Stations* 45 (1982)).

<sup>52</sup> In 1994, there were 13,230 full power broadcast stations on the air. FCC, 61st Annual Report, Fiscal Year 1995 33 (1995). By 2006, there were 15,500. Federal Communications Commission, Broadcast Station Totals as of March 31, 2006 (May 26, 2006), *available at* <http://www.fcc.gov/mb/audio/totals.bt060331.html>. The total number of stations on the air including Class A television stations, translators, boosters, and low power stations is now 27,556. *Id.*

<sup>53</sup> According to the U.S. Census Bureau, in 1995 minorities comprised 27.0% of the total population. By 2004 the minority population had increased to 31.3%. <http://quickfacts.census.gov/qfd/states/00000.html/>

<sup>54</sup> *Available at* <http://www.fcc.gov/ownership/data.html>.

that need to be addressed.<sup>55</sup> These data problems prompted another researcher, S. Derek Turner of Free Press, to go beyond the FCC's summary data and to analyze the Form 323s and other data filed by television stations to get a complete picture of television station ownership.<sup>56</sup> Taken to together, these studies reveal the bleak condition of minority and female broadcast ownership.

For example, Byerly found that of the reported minority-owned stations in 2005, 52% were AM stations, 36% were FM stations and 6% were television stations. Of the stations owned by women, 43% were AM stations, 46% were FM stations, and 9% were TV stations.<sup>57</sup> These numbers show that both minorities and women held a disproportionately greater share of the less valuable AM radio stations and a disproportionately smaller share of FM and television stations. At the end of 2004, of 15,273 full power broadcast stations, approximately 31% were AM, 57% were FM, and 11% were television.<sup>58</sup>

Byerly found the fact that minorities and women own proportionately fewer television stations than radio stations was not surprising, but troubling:

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<sup>55</sup> Carolyn Byerly, *Questioning Media Access: Analysis of FCC Women and Minority Ownership Data* (Sept. 2006), see Appendix A. ("Questioning Media Access"). These problems include incomplete reporting, duplicate reports, questions about the percentage of voting control, and inclusion of low power and translator station which the FCC rules do not require to report. *Id.* at 3-4.

<sup>56</sup> S. Derek Turner and Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States* (Sept. 2006) ("Out of the Picture"). Unfortunately, because of the larger number of radio stations, public interest groups lacked the resources to follow the same method for radio stations.

<sup>57</sup> Byerly, *Questioning Media Access* at 5. The percentages do not total 100% because a small percentage of stations were translator or low power stations, even though the FCC does not require such stations to file this data.

<sup>58</sup> Broadcast Stations Totals for December 2004. Available at <http://www.fcc.gov/mb/cdbs.html>. Translator and low power stations were not included because they are not required to file ownership reports.

Radio, which is less expensive than television to finance and operate, makes it more accessible to those historically marginalized economically – females, racial minorities, low-income persons. While such accessibility is a positive thing on the one hand, it also signals a serious problem on the other. Television, the most watched medium and the one where millions living in the U.S. prefer to get their news and information, is presently dominated by powerful, elite and nearly all White male owners. . . .<sup>59</sup>

Not only are minorities and women more likely to own radio stations than television stations, but the stations they do own are more likely to be located in rural areas. Byerly found that:

Nearly all broadcast stations with majority women and minority ownership in the FCC reports for 2005 are located in rural areas and small towns. More than half (52%) of the women-owned stations, and well over a third (38%) of minority-owned stations are in rural communities with less than 10,000 inhabitants. Similarly, about a third of women-owned (35%) and exactly a third (33%) of minority-owned stations are in small towns. By contrast, many fewer women-owned (11%) and minority-owned (17%) stations are located in urban settings.<sup>60</sup>

In addition, twelve states do not have a single station controlled by minorities and four do not have a station controlled by women.<sup>61</sup> Because minority and female owned stations are not available in many communities and the communities that they do serve often have small populations, many Americans do not have access to them.<sup>62</sup>

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<sup>59</sup> Byerly, *Questioning Media Access* at 9.

<sup>60</sup> *Id.* at 5; *see also id.* at Tables 3 and 4.

<sup>61</sup> *Id.* at 5; Tables 1 and 2.

<sup>62</sup> *Id.* at 5-6 and Table 5. Byerly further found that three-quarters of the women-controlled stations were actually owned by both men and women and that 83% of the owners of women-controlled stations were White, not of Hispanic descent. *Id.* at 5. Of minority-controlled stations, 54% had both male and female owners. Hispanics (45%) accounted for nearly half of all minority broadcast owners, with Blacks (30%) about a third, Asians (7%), American Indians (4%), and Native Hawaiians (3%) comprising most of the remainder. A few (11%) of minority-owned stations had owners with varied ethnicities. *Id.* at 6; *see also* Tables 6 and 7.

The Free Press study, which only looks at television station ownership, also finds that only a miniscule number of stations are controlled by minorities and women.<sup>63</sup> Because of problems with the FCC data, the authors of this study used the actual Form 323s instead of the FCC summary data for their analysis.<sup>64</sup> They found that of 1,349 full-power commercial television stations in the United States, 67 or 4.97% were owned by women, and 44, or 3.26 % were owned by minorities.<sup>65</sup> Black or African-Americans owned 1.33% of all stations, Hispanics or Latinos owned 1.11%, American Indians or Alaska Natives owned 0.37%, Asian Americans owned 0.44% and Native Hawaiian or Pacific Islanders owned none.<sup>66</sup> Whether compared to the percentage of women and minorities in the population or to their percentage of ownership in other businesses, these figures are exceedingly small. For example, women owned 28 % of all non-farm businesses in 2002, but currently own less than 5% of commercial broadcast television stations. While minorities owned 18% of non-farm business in 2002, today they own approximately only 3% of commercial broadcast television stations.<sup>67</sup>

The study also finds a 30% decrease in the number of Black owned television stations since 1998, even though the total number of stations increased over the same time period.<sup>68</sup> It

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<sup>63</sup> Turner and Cooper, *Out of the Picture*.

<sup>64</sup> *Id.* at 7-9. Turner and Cooper discuss problems such as ineffective reporting standards and the poor quality of summary reports. Specifically, this has led to data with some stations having ownership interests that add up to greater than 100 %, forms lacking the station facility information (AM, FM or TV), and the attribution of ownership in other stations not being reported, just to name a few.

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> *Id.* at 2-3.

<sup>68</sup> *Id.* at 3.

finds that 17 minority owned stations were sold to non-minority buyer after 1998, and that 9 of these sales would not have been permitted under the old national cap or duopoly rule.<sup>69</sup>

The study also finds that women and minorities tend to disproportionately own the less valuable UHF stations, which tend to have smaller audiences than VHF stations.<sup>70</sup> Minorities are also less likely to own television stations affiliated with one of the big four networks.<sup>71</sup>

Perhaps even more troubling, this study finds that minority-owned stations reach only 21% of US television households and only 30% of minority households.<sup>72</sup> Hispanic or Latino-owned stations reach just 21.8% of Latino television households, and Black-owned television states reach just 8.7% of African-American television households.<sup>73</sup> There are no Hispanic owned or African-American owned television stations in the New York City market, where over 10% of the nation's Hispanic population and over 12% of the African American population reside.<sup>74</sup>

In sum, minorities and women are vastly under-represented in broadcast station ownership. The few stations that they do own tend to be the less desirable or have a more limited audience reach. Finally, much of the U.S. population, including most minorities, resides in communities that have no minority or women owned stations.

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<sup>69</sup> *Id.* at 9.

<sup>70</sup> *Id.* at 11.

<sup>71</sup> *Id.* at 4. Minorities own just 1.5% of these stations.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

## 2. Minorities and Women Continue to be Under-represented or Stereotyped in Broadcast Programming

Given the small numbers of broadcast stations owned by minorities and women, it is not surprising that minorities and women tend to be under-represented on the air as well. For example, the National Urban League Policy Institute analyzed five Sunday morning political talk shows aired between January 1, 2004 and June 30, 2005.<sup>75</sup> It focused on these programs because

Sunday morning talk shows frame the perception and coverage of issues that have a substantial impact on the American public. Yet these programs consistently lack any African American participation in the discussion of these issues – from the war in Iraq to the economy to electoral politics to Social Security to judicial nominations – leaving the impression that interest in and analysis of these topics is “for Whites only.”<sup>76</sup>

The study found, among other things, that more than 60% of the programs had no Black guests, that fewer than 8% of the guests were Black, and that three individuals -- Condoleezza Rice, Colin Powell, and Juan Williams -- accounted for 69% of the appearances by Black guests.<sup>77</sup>

A report prepared for the National Association of Hispanic Journalists (NAHJ) found that Latinos are under-represented on network news and even when they are seen, the coverage is often negative and one-sided.<sup>78</sup> This report examined news stories that were aired on the ABC, CBS and NBC network evening newscasts. Among other things, it found that of the estimated 12,600 stories that aired on these channels in 2005, only 105 (0.83%) were exclusively about

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<sup>75</sup> Stephanie J. Jones, *Sunday Morning Apartheid* (Aug. 2005).

<sup>76</sup> *Id.* at 1-2.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> Daniela Montalvo and Joseph Torres, *Network Brownout Report 2006: The Portrayal of Latinos & Latino Issues on Network Television News*, 19 (2006) (“Brownout 2006”).

Latinos.<sup>79</sup> Only five of these stories featured Latino reporters.<sup>80</sup> Moreover, Latinos appeared as sources in only about 1.7% of non-Latino-related stories.<sup>81</sup>

A study of network news by Entman and Rojecki found that the range of topics attributed to Black interviewees was quite limited. The study examined videotapes of four randomly chosen weeks of evening news from the ABC, CBS, and NBC networks in 1997.<sup>82</sup> The study found that White people were given 1,289 total “sound bites” in the sample, while Black people had a mere 95.<sup>83</sup> In the sample, only one Black person said anything in an economics story, compared with 86 sound bites for Whites.<sup>84</sup> Only one said anything in story on foreign affairs, compared with 99 White sound bites.<sup>85</sup> White voices were heard 79 times on electoral politics, whereas not one Black person said anything on the subject.<sup>86</sup> The disparities were almost as great in any other area that either “invoked the common experiences or interests of Americans as a whole (disasters, foreign affairs, politics, death/rituals),” or that “involved technical expertise (science, economics).”<sup>87</sup> Black voices were much more common in stories dealing with entertainment, sports, or discrimination – topics already stereotypically associated with African Americans.<sup>88</sup>

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<sup>79</sup> Montalvo, *Brownout 2006* at 4.

<sup>80</sup> *Id.* at 4; 9-10.

<sup>81</sup> *Id.* at 4.

<sup>82</sup> Robert M. Entman & Andrew Rojecki, *The Black Image in the White Mind: Media and Race in America* 62 (University of Chicago Press 2000). These samples were collected for a report commissioned by the President’s Initiative on Race. *Id.* at 246 n.9.

<sup>83</sup> *Id.* at 64.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

When minorities do appear in news programs, they are often portrayed in ways that reinforce negative stereotypes.<sup>89</sup> Professors Bachen et al. have conducted an exhaustive review of studies of television news coverage of race from the time of the Kerner Commission Report in 1968 to the present.<sup>90</sup> They find consistent evidence that “minorities are under-represented in the media or, when present, are portrayed in limited or stereotypical roles.”<sup>91</sup> For example, many studies have found that local television newscasts more often feature Blacks and Latinos as perpetrators of crime compared to Whites. Moreover, Whites are overrepresented as victims of homicide and other violent crime, while Blacks and Latinos were under-represented when compared to crime statistics for the area.<sup>92</sup>

Similarly, Dr. Byerly’s survey of three Washington, D.C ethnic minority neighborhoods found that viewers were concerned about racial bias in local news coverage.<sup>93</sup> For example,

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<sup>89</sup> See Leonard M. Baynes, *WHITE OUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 227-67 in Philip M. Napoli, *Media Diversity and Localism: Meaning and Metrics* (Lawrence Erlbaum Associates 2007). (“WHITE OUT”).

<sup>90</sup> The Kerner Commission investigation into the causes of the 1967 riots found that one of the contributing factors was the media’s ongoing failure to depict the conditions and difficulties faced by African Americans living in ghettos. See Christine M. Bachen, Allen S. Hammond, IV, and Catherine J.K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, 432 in Philip M. Napoli, *Media Diversity and Localism: Meaning and Metrics* (Lawrence Erlbaum Associates 2007) (“Serving the Public Interest”).

<sup>91</sup> Bachen et. al, *Serving the Public Interest* at 274.

<sup>92</sup> *Id.* at 275-76; see also Leonard Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV 235, 258 (2004), (“Making the Case”) (citing Daniel Romer, et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?* 25 COMM. RES. 286 (1998)( study of television news found that African Americans and Latinos were twice as likely to be shown in local crime stories and than in other stories and were more often shown as perpetrators than victims)).

<sup>93</sup> Carolyn M. Byerly, et.al., *Media Ownership Matters: Localism, the Ethnic Minority News Audience and Community Participation* at 6-9 (“Media Ownership Matters”).

A Black female in Lamond Riggs neighborhood said, “When a White person commits a crime, his face is not shown, but it when the person is Black, his face is always shown.” A college-educated resident in Lamond Riggs neighborhood said he believed that the news media “have a lot of negative views of Black males.” One long-time Columbia Heights resident complained that reporters “cover the murders of Black children differently from White children,” meaning the latter get both more coverage and more sympathetic coverage. . . . Another participant described what he saw to be disparity in coverage of two recent murders, which occurred within days of each other in different parts of the city, one was the shooting death of disabled African American activist Chris Crowder (who used a wheel chair), in northwest Washington, DC, and the other, the stabbing death of White British Jewish activist, Alain Senitt, who died in Georgetown. The participant accused television news of repeatedly mentioning that the murder of the White man was “so tragic, and reporters emphasized his work in the community,” but he perceived there was comparatively little news on the Black man or his activism.<sup>94</sup>

Other studies have found that the media disproportionately portray African Americans as poor or as involved with illegal drugs.<sup>95</sup>

Women, too, remain under-represented as sources for journalists, according to a 2005 study by the Project for Excellence in Journalism (PEJ).<sup>96</sup> This study examined four nightly newscasts and three network morning shows, as well as newspapers and web sites. It found that only 31.1% of the broadcast stories examined contained a female source.<sup>97</sup> Another study by Fairness and Accuracy in Reporting (FAIR) looked at the participation of women on four Sunday morning talk shows over a six month period (September 2004 to February 2005). It found that women made up 49% of the participants on NBC’s Chris Matthews Show, 22% on ABC’s This Week, 25% on Fox News Sunday and 39% on Meet the Press. Only two non-White women,

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<sup>94</sup> *Id.* at 17-18.

<sup>95</sup> Baynes, *Making the Case* at 259 (summarizing studies).

<sup>96</sup> PEJ, *The Gender Gap: Women are Still Missing as Sources for Journalists* (May 23, 2005) available at <http://www.journalism.org/node/141>.

<sup>97</sup> *Id.*

Gwen Ifill and Donna Brazile, appeared in the six months studied and each appeared only once.<sup>98</sup>

While the studies cited above examine the portrayal and participation of minorities and women in broadcast news programming, other studies have found that minorities and women are also under-represented or stereotyped in entertainment programming. Professor Baynes has examined the portrayal of minorities in primetime television.<sup>99</sup> He finds that networks have aired few dramatic series with Black casts.<sup>100</sup> Moreover, less than one-fifth of situation comedies have racially mixed casts.<sup>101</sup> Some popular shows such as “Friends” and “Seinfeld”, which are set in New York City, with all of its diversity, have all White casts. Likewise, very few Latino/a actors star in nighttime dramas or situation comedies, although a few have succeeded as non-Latino characters.<sup>102</sup> When Latinos do appear, they are frequently depicted as violent foreigners “with no ties to the United States.”<sup>103</sup> Asian Pacific Americans and Native Americans rarely star in television shows, and when portrayed at all, are often presented in an offensive, stereotypic manner.<sup>104</sup> Additionally, a study by Children Now found that nearly half of all middle-eastern characters appearing in primetime television are cast as criminals.<sup>105</sup>

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<sup>98</sup> FAIR, *Women’s Opinions also Missing on Television*, Mar. 24, 2005.

<sup>99</sup> Baynes, *WHITE OUT* at 239-48.

<sup>100</sup> *Id.* at 240.

<sup>101</sup> *Id.* at 240.

<sup>102</sup> *Id.* at 242. For example, Martin Sheen stars in *The West Wing*, but not as a Hispanic character.

<sup>103</sup> *Id.* at 243.

<sup>104</sup> *Id.* at 386-90. For example, many Asians (especially older Asians) are depicted as speaking English poorly, whereas, Native Americans are presented as one-dimensional, antiquated stereotypes -- either as savage warriors or hyper-spiritualistic shamans.

<sup>105</sup> Children Now, *Fall Colors: Primetime Diversity Report 2003-2004*, 6 (“Fall Colors 2003-2004”).

While racial stereotypes are abundant on primetime television, the Children Now study indicates that broadcast television presents a skewed vision of women as well. Even though census statistics show that women outnumber men in the real world, in TV-land male characters outnumber females two to one.<sup>106</sup> Moreover, between 70% and 80% of characters with high status occupations, such as lawyers, doctors and CEOs, are played by males.<sup>107</sup> Women are merely seen as “young, attractive, thin, and ornamental.”<sup>108</sup>

Furthermore, in the television world the vast majority of female characters are significantly younger than their male counterparts and older women are few and far between.<sup>109</sup> Even when an older woman is depicted on television, she is normally portrayed negatively and shown as less successful compared to older men.<sup>110</sup> While men over 50 are seen as active and vibrant, once a woman reaches 50 she is diminished in capacity (particularly in occupation and prestige).<sup>111</sup>

The prevalence of gender stereotyping is not limited to primetime television, but is also evident in children’s educational/information (E/I) shows. A content analysis of children’s E/I programs from five networks found that male characters outnumbered female characters.<sup>112</sup> Moreover, it found that “[t]he typical male character makes and carries out plans, is active, dominant, aggressive, and seeks attention. He also receives consequences for his behavior more

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<sup>106</sup> *Id.* at 7

<sup>107</sup> *Id.* at 8.

<sup>108</sup> Susan D. Witt, *The Influence of Television on Children’s Gender Role Socialization: A Review of the Literature*, J. CHILDHOOD EDUC.: INFANCY THROUGH ADOLESCENCE, Vol. 76, no.5, 322-324 (2000).

<sup>109</sup> Children Now, *Fall Colors 2003-2004* at 7.

<sup>110</sup> Laurie Russell Hatch, *Gender and Ageism*, GENERATIONS, 19 (2005).

<sup>111</sup> Nancy Signorielli, *Aging on Television: Messages Relating to Gender, Race, and Occupation in Prime Time*, J. BROAD. & ELEC. MEDIA, 296 (2004).

<sup>112</sup> Mark R. Barner, *Sex-Role Stereotyping in FCC-Mandated Children’s Educational Television*, 43 J. BROAD. & ELECT. MEDIA 551, 558 (1999).

often than his female counterparts. The typical female character is deferent, dependent, and nurturing. Also, she tends to receive no consequences for her behavior; in other words, she is ignored much of the time.”<sup>113</sup> The study expresses concern that sex-role stereotyping in children’s programs may help to naturalize gendered behaviors in real life.

In sum, minorities and women continue to be underrepresented in both news and other types of programming. When they are portrayed, it is often in a stereotypical manner.

### **3. Increasing the Numbers of Broadcast Stations Owned by Minorities and Women is in the Public Interest**

In the *2002 Biennial Review Order*, the Commission reaffirmed that encouraging minority and female ownership was an important Commission objective.<sup>114</sup> Commenters agree. Increasing the level of minority and female ownership would serve the public interest by increasing the diversity of programming, helping to break down gender and racial stereotypes, providing increased service to underserved audiences, and remedying the effects of past discrimination against women and minorities.

#### **(a) Increasing Minority and Women Owned Stations will Increase Program Diversity**

Media researchers have consistently found that increasing minority and female ownership of broadcast stations will result in increased program diversity. One of the studies commissioned by the FCC under Section 257, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (“*Santa*

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<sup>113</sup> *Id.* at 561.

<sup>114</sup> *FNPRM* at ¶46.

*Clara Study*”),<sup>115</sup> surveyed news directors and public affairs programming directors of minority and majority-owned radio and television stations to determine the difference in attitudes and actions between minority and majority station owners.<sup>116</sup> It found that particularly for radio stations, “minority-owned stations pay special attention in public affairs broadcasting to events of greater concern to ethnic or racial minority audiences. They report putting greater effort toward live coverage of government meetings” and to “issues concerning women, particularly health issues.”<sup>117</sup>

Another significant difference appeared when television station owners were asked whether they broadcast political or current events shows other than news. A significantly greater proportion of minority television station owners, 80 %, broadcast this type of programming while only 47 % of majority-owned television stations broadcast this type of public affairs programming.<sup>118</sup>

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<sup>115</sup> Christine Bachen, Allen Hammond, Laurie Mason, & Stephanie Craft, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (1999) available at [http://www.fcc.gov/opportunity/meb\\_study/content\\_ownership\\_study.pdf](http://www.fcc.gov/opportunity/meb_study/content_ownership_study.pdf) (“Santa Clara Study”).

<sup>116</sup> *Id.* at 5. The *Santa Clara Study* found that even though minority stations had an average of 3.28 people working in the news department and majority stations had an average of 10.57 people, *id.* at 7, no differences emerged between minority and majority-owned stations in the amount or type of news they produced overall. *Id.* at 11.

<sup>117</sup> *Id.* at 20. Further analysis of this data by one of the co-authors, found that ownership indirectly affects news and public affairs. When employees perceive the owner to be involved in the day-to-day news and public affairs activities, they are more likely to air programming consistent with the values of the owner. See Stephanie Craft, *Translating Ownership into Action: Owner Involvement and Values at Minority and Non-Minority-Owned Broadcast Stations*, 14 HOWARD J. OF COMM’NS 147, 156 (2003).

<sup>118</sup> Bachen et. al, *Santa Clara Study* at 14-15. This disparity also extends to programming aimed at the elderly. While 60% of minority television owners broadcast programs about issues of concern to senior citizens, only 30% of majority-owned television stations followed suit. *Id.* Disparities also arose when asked about the coverage of Native Americans. Twenty-nine percent of minority-owned radio stations reported this type of coverage compared 13% of majority-

(continued on next page)

Significant differences between minority and majority owners also arose when asked whether the station does live broadcasts of community events. Seventy-three percent of minority radio stations carried such live broadcasts compared with only 55 % of majority-owned radio stations.<sup>119</sup> In addition, 92 % of minority-owned radio stations participated in community events targeted at women and minorities compared to 70 % of majority-owned radio stations.<sup>120</sup>

The findings of the *Santa Clara Study* are consistent with many others. For example, Professors Dubin and Spitzer's econometric study concluded that "increasing the number of minority-owned broadcasting stations increases the amount of minority-oriented programming."<sup>121</sup> They also concluded that increasing women-owned stations would increase minority-oriented programming.<sup>122</sup> After reviewing these and other studies on the nexus between minority ownership and broadcast diversity, Professors Bachen et al. conclude that "minority-owned stations do indeed provide 'desired additional views' and that majority-owned stations are less likely to broadcast 'under-represented programming.'"<sup>123</sup> Similarly, Professors

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(footnote continued)

owned radio stations. *Id.* at 16. Similar patterns arise when owners are questioned about programming of interest to Hispanic audiences. Minority-owned radio stations broadcast this type of programming at a rate of 54% while majority-owned stations lag behind at 25%. *Id.* at 17.

<sup>119</sup> *Id.* at 15.

<sup>120</sup> *Id.* at 20. This difference between minority and majority-owned stations also has a significant effect on broadcasts about culture, music or the arts. *Id.* at 15. Seventy-two percent of minority-owned and 35% of majority-owned radio stations said they broadcast programs about culture, music, or the arts in order to appeal to certain racial or ethnic minority groups. *Id.* Television station owners showed less of a difference with 64 % of minority-owned and 45 % of majority-owned stations airing arts-related programming with a racial or ethnic community as the intended audience. *Id.*

<sup>121</sup> Jeff Dubin and Matthew Spitzer, *Testing Minority Preference in Broadcasting*, 68 S. CAL. L. REV. 841, 841 (1995).

<sup>122</sup> *Id.*

<sup>123</sup> Bachen et. al, *Serving the Public Interest* at 294 (responding to Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990))

Baynes has analyzed evidence of the relationship between racially diverse ownership and content, concluding, “it is clear that minority-owned broadcasters continue to broadcast distinct and different programming than their non-minority counterparts.”<sup>124</sup>

**(b) Increasing Minority and Female Ownership Can Help Break Down Stereotypes**

The under representation and stereotyping of minorities and women is contrary to the public interest. Minorities and women suffer when they do not see themselves or only see themselves portrayed negatively in the media. These racial and gender disparities have an even greater impact on children, who appear to make generalizations about race based on what they see on their TV screens.

Research suggests that the shortage of positively represented minority groups on TV affects how children view themselves and others. A Children Now poll of children ages 10 to 17 reports that most minority children think their race is not adequately or accurately represented on TV.<sup>125</sup> When asked the question, “which race do you usually see playing this role on TV?”, 59 % of children responded that an African American would play the role of a criminal, 35% responded that an African American would play a janitor or maid, while 71% felt that a White person would be most likely to be cast as the boss.<sup>126</sup> Not only are minority characters more likely to be cast in less prestigious job roles, the children surveyed also associated breaking the law and being poor with minority characters, while White characters were associated with being

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<sup>124</sup> Baynes, *Making the Case* at 252-53.

<sup>125</sup> Children Now, *A Different World: Children’s Perceptions of Race and Class in the Media 1999*, 3 (“A Different World”).

<sup>126</sup> *Id.* at 10.

smart and having money.<sup>127</sup> The study notes that “the absence of group members suggests that they are not worthy of viewers’ attention, while stereotypes of negatively-valued roles indicate that they are not worthy of respect.”<sup>128</sup> Because the current generation of children will be the first to grow up in a society where racial minorities will become the numeric majority, it is more important than ever that the power of the media be harnessed to generate greater understanding, rather than perpetuate false stereotypes.<sup>129</sup>

While the impact on children alone should be a major concern, under-representation and stereotyping have broader consequences as well. America remains a racially divided society. It has been estimated that 85% of Whites live in a community with few or no neighbors of color.<sup>130</sup> Moreover, most White students attend schools that are predominantly White.<sup>131</sup> Studies show that White Americans and minority Americans have quite different perceptions on a range of important policy issues, and that many Whites still hold stereotypic view of people of color.<sup>132</sup>

As Professor Baynes explains:

Since we live in a fairly segregated society, . . . most of these stereotypes are probably learned through electronic encounters, i.e., what people see on television. Consequently, the absence and stereotyping of people of color by the broadcast media has an effect on the attitudes that White people have towards people of color and the attitudes that each group has about itself.<sup>133</sup>

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<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.* at 3.

<sup>130</sup> Sheryl Cashin, *The Failures of Integration: How Race and Class are Undermining the American Dream* (PublicAffairs 2004) (citing Joseph Lelyveld, *How Race Is Lived in America: Pulling Together, Pulling Apart*. (New York: New York Times Books, 2001)).

<sup>131</sup> Frankenberg et al, *A Multiracial Society With Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project at Harvard University, 4 (January 2003) available at [www.civilrightsproject.harvard.edu/research.php](http://www.civilrightsproject.harvard.edu/research.php).

<sup>132</sup> Baynes, *WHITE OUT*, at 233-34 (summarizing studies of racial attitudes).

<sup>133</sup> *Id.* at 234.

He demonstrates how stereotypical views influence policy choices as well as affect every day dealings among people.<sup>134</sup>

Indeed, there is a great deal of evidence on the link between news media coverage and public attitudes about race.<sup>135</sup> One study suggests that the way local TV stations cover crime actually heightens negative attitudes of White viewers towards African Americans.<sup>136</sup> Another study finds that:

Both print and electronic journalism frequently connect the following concepts with [young men of color]: crime, violence, hypersexuality, poverty (especially undeserving poverty—that is, poverty due to character flaws of the individual) and welfare. These reports not only stereotype the [young men of color] who are featured in them, but they also reinforce negative emotions and a sense of social distance that may promote a belief in inherent group. All of these can feed white support for policies counter the interests of [young men of color].<sup>137</sup>

By increasing opportunities for women and minorities to obtain broadcast licenses, the public will have greater exposure to minorities and women on air.<sup>138</sup> Minority and women owned media may also be less likely to present minorities and women in stereotypic manner. Thus, increasing minority and female ownership of broadcast stations will serve the public interest by helping to break down racial and gender stereotypes.

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<sup>134</sup> *Id.*

<sup>135</sup> Bachen et al, *Serving the Public Interest* at 280-82 (summarizing studies). See also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1549-63 (Mar. 2005) (Local news broadcasts strengthen implicit biases against certain minorities by linking their races with crime and the fear and loathing that such crime invokes. Viewers do not notice the formation of these linkages, but they can be detected by scientific measurements).

<sup>136</sup> Gilliam, F.D., Jr. and Iyengar, S., *Prime Suspects: The Influence of Local Television News On the Viewing Public*, 44 AM. J. POL. SCI., 560-573 (2000).

<sup>137</sup> Robert M. Entman, *Young Men of Color in the Media: Images and Impacts*, Joint Center for Political and Economic Studies, 13 (2006).

<sup>138</sup> For example, the Santa Clara Study found that minority ownership resulted in a significant difference in the number of on-air personalities who are minorities. On average, 89% of on-air talent in a minority-owned radio station is from a minority group compared to just 33% for majority-owned radio stations. Bachen et. al, *Santa Clara Study* at 19.

**(c) Increasing Minority and Women Owned Stations will Lead to Better Service for Underserved Segments of the Population and Increased Civic Participation**

Increasing minority and female owned stations should also improve the quantity and quality of service for underserved segments of the audience. The Santa Clara Study found that minority owned radio stations were more likely to adapt wire news to fit their own communities than were majority-owned stations.<sup>139</sup> This study also found that minority-owned radio and television stations were significantly more likely to cover local stories that were not covered by their competitors. Many of minority-owners tailored news coverage to specific racial or ethnic minority audiences, while very few majority-owned stations made such a consideration when deciding which stories to report.<sup>140</sup>

Similarly, a 2001 study by Peter Seigelman and Joel Waldfogel found that increasing minority ownership in a given market “increases the amount of minority-targeted programming.”<sup>141</sup> This study examined “preference externalities” and showed how Black and White/Hispanic radio programming preferences are “substantially different.”<sup>142</sup> Because radio

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<sup>139</sup> Seventy-three percent of minority-owned stations tailor a national or regional wire story to local minority community concerns, while only 36% of majority-owned stations tailored stories on this basis. *Id.* at 12.

<sup>140</sup> *Id.* at 12-13. A similar pattern developed when majority and minority-owned stations were asked whether they could remember reporting a story with an approach that differed from their competitors. *Id.* at 13. Minority-owned radio stations had a racial or ethnic minority audience in mind 78% of the time they used a different approach than their competitor while majority-owned stations had racial and ethnic minority audiences in mind 13% of the time. *Id.* Minority and majority-owned stations also displayed a significant difference when asked about their news directors’ missions. The majority, 68%, of majority-owned radio stations sought to aim for wide audiences while the majority, 52%, aimed for more particular audiences. *Id.*

<sup>141</sup> Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities and the Provision of Programming to Minorities*, 4 (2001) available at [http://www.fcc.gov/ownership/roundtable\\_docs/Waldfogel-c.pdf](http://www.fcc.gov/ownership/roundtable_docs/Waldfogel-c.pdf).

<sup>142</sup> *Id.* at 1-2.

stations are primarily White-owned, White preferences in programming result in the under-provision of broadcasting for minorities.<sup>143</sup> However, the study found that minority-owned stations were highly motivated to provide programming that is responsive to minority issues and concerns.<sup>144</sup> They concluded that promoting minority ownership worked to combat the problem of preference externalities and thus the under-provision of minority-targeted broadcast media.<sup>145</sup>

The lack of minority owned media not only results in less service to minority audiences, but it may also affect the ability of minorities to participate fully in democratic society. In a 2006 study, Professors Oberholzer-Gee and Waldfogel found that the availability of Spanish language television news raised Hispanic voter turnout by a sixth (from 46% to 54%) in presidential election years, and by over a third (from 30% to 41%) in non-presidential election years.<sup>146</sup> A 2005 study by the same authors similarly found increased voter turnout among African Americans where Black-oriented radio stations were available.<sup>147</sup> In addition to these studies, testimony at the FCC's localism hearing demonstrate that minority audiences are underserved and could be better served by increasing the number of minority-owned stations.<sup>148</sup>

The 1996 Act amended the Communications Act to make clear that the purpose of the FCC to was to make communications services available “to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin or sex.*”<sup>149</sup> Adopting

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<sup>143</sup> *Id.* at 25.

<sup>144</sup> *Id.* at 24-25.

<sup>145</sup> *Id.* at 25.

<sup>146</sup> Felix Oberholzer-Gee and Joel Waldfogel, *Media Markets and Localism: Does Local News en Español Boost Hispanic Voter Turnout?* 10 (2006).

<sup>147</sup> Felix Oberholzer-Gee and Joel Waldfogel, *Strength in Numbers: Group Size and Political Mobilization*, 46 J.L. & ECON 73-92 (April 2005).

<sup>148</sup> Common Cause, *Citizens Speak: The Real World Impact of Media Consolidation*, 29-32 (October 2006), attached at Appendix D (“Citizens Speak”).

<sup>149</sup> 47 USC §151 (new language in italics).

rules to increase minority and female ownership of broadcast stations would further this goal and would also serve the public interest in assuring that all segments of society have the information they need to be active participants in our democratic form of government.

**(d) Increasing Minority and Women Owned Stations will Help Remedy Past Discrimination in Which FCC was at Least a Passive Participant**

Increasing opportunities for female and minority ownership is also an important means of remedying past discrimination. The FCC has repeatedly recognized that discrimination is contrary to public interest.<sup>150</sup>

To survive an equal protection challenge, a race-based program must be found to be narrowly tailored to serve a compelling government interest.<sup>151</sup> Professor Baynes has analyzed whether remedying past discrimination in broadcast licensing constitutes a compelling governmental interest.<sup>152</sup> “To establish such a compelling interest, the governmental actor must show ‘a strong basis in evidence for its conclusion that remedial action is necessary.’ It is not sufficient to rely on general societal discrimination. Rather, the government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has been a ‘passive participant.’”<sup>153</sup>

A historical survey of discrimination in spectrum licensing found that “interviewees consistently reported that for minority and women licensees these market entry barriers have

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<sup>150</sup> See e.g., *Petition for Rulemaking to Require Broadcast Licenses to Show Nondiscrimination in their Employment Practices*, 13 F.C.C. 2d 766 (1968). See also Bachen, *Serving the Public Interest* at 274 (summarizing the FCC’s early efforts to combat discrimination).

<sup>151</sup> See *Adarand Constructors, Inc. v Pena*, 515 U.S. 2000 (1995).

<sup>152</sup> Baynes, *Making the Case* at 261-98.

<sup>153</sup> *Id.* at 261 (quoting *City of Richmond v. Croson*, 488 U.S. 469 (1969)).

been compounded by the discrimination they have encountered . . . in the broadcasting industry itself, in the advertising industry, . . . and as a result of the various actions and inaction on the part of the FCC and Congress.”<sup>154</sup> The government played a significant role in exacerbating discrimination against minorities and women via its initial awards of broadcast spectrum to White males, elimination of the tax certificate program, inconsistent enforcement of the equal employment opportunity policies, and looking the other way when non-minority male applicants used females and minorities as “fronts” to gain advantage in comparative hearings.<sup>155</sup> In particular, minority and female broadcasters cited the market deregulation and consolidation resulting from the 1996 relaxation of the media ownership caps as a major factor impeding their entry and successful competition in the broadcast industry.<sup>156</sup>

In addition to examining the past discrimination by the FCC, Professor Baynes analyzes the FCC’s passive participation in discrimination in the communications industry, capital

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<sup>154</sup> Ivy Planning Group, *Whose Spectrum Is it Anyway?: Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing*, 14 (2000); see also KPMG, *History of Broadcast License Application Process (2000) (Part I)*; KPMG, *Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC (2000) (Part II)*; KPMG, *Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (2000) (Part III)*. KMPG produced a lengthy three-part report that documented disparities hurting minority and female applicants in the broadcast licensing process during the FCC’s period of comparative hearings. The report found that there was a lower overall probability of winning a license for an application with minority ownership, that minorities were less likely to have uncontested applications, and that minority participation in comparative hearings was very low compared to the minority population of the country. KMPG Part III at 4. (For a summary of the KMPG report’s findings, see KMPG, Part III at 4-5.) Another study indicated that because there is discrimination in capital markets, minorities will be “capital constrained” and therefore less likely to qualify for or win an auction. William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* 27 (2000). The data Dr. Bradford studied suggested that “a national policy of auctioning spectrum, without remedying discrimination in capital markets, is a national policy of discrimination against minorities and women in the allocation of spectrum licenses.” *Id.* at 27.

<sup>155</sup> *Whose Spectrum Is It Anyway?* at 2-3.

<sup>156</sup> *Id.*

markets, and advertising.<sup>157</sup> He concludes that “Overall minority applicants . . . had a lower probability of winning a license than their similarly situated demographic counterparts, even in the presence of a minority enhancement credit. Given the Commission’s passive complicity in third party discrimination and the lower minority rate of success, a compelling governmental interest based on past discrimination exists for establishing narrowly tailored affirmative action programs.”<sup>158</sup> Thus, adopting rules to promote opportunities for minorities and women would serve the public interest by remedying the effects of past discrimination.

**B. The Commission Should Increase Opportunities for Minorities and Women by Lowering Current Ownership Limits and Eliminating Grandfathering**

One of the most important things that the Commission can do to advance opportunities for minorities and women to own broadcast stations, as well as to advance the goals of diversity, localism, competition and efficient use of the spectrum, is to adopt the ownership limits advocated in these comments. Specifically, by limiting station ownership to one television station per market, lowering the maximum number of radio stations in a market, retaining the prohibition on newspaper-broadcast cross-ownership and reinstating the prohibition on radio-television cross-ownerships, the Commission will enhance the opportunities for minorities and women to own broadcast stations.

As UCC explained in prior comments, lower limits would foster minority ownership:

Industry consolidation impedes the ability of minorities and women to obtain and keep broadcast stations. For example, concentration in the radio industry has led to increased station prices, which has exacerbated long-standing problems that minorities and women have faced in obtaining financing. Moreover, the substantial increase in the size of group owners has

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<sup>157</sup> Baynes, *Making the Case* at 290-94.

<sup>158</sup> *Id.* at 300.

led to decreases in advertising revenues for minorities and women who tend to own smaller, stand-alone and AM stations that lack the audience reach and resources enjoyed by larger, consolidated stations.<sup>159</sup>

If ownership limits are lowered, it will be easier for minorities and women to find stations to purchase, to obtain the capital needed to purchase them, and to compete on a more level playing field. In fact, Free Press's recent analysis found that minority-owned television stations are more likely to be found in markets that are less concentrated.<sup>160</sup>

Lower limits should be combined with a requirement that station owners come into compliance with the new limits within a reasonable period of time. By so doing, the FCC would free up additional stations for purchase. The numbers could be quite significant. For example, were the current local radio limits to be reduced by one, approximately 272 radio stations in 157 markets (out of a total of almost 300 Arbitron markets) would need to be divested.<sup>161</sup> Even if the FCC were to retain the current radio limits but eliminate grandfathering, approximately 96 radio stations in 54 markets would have to be divested.<sup>162</sup> Were the FCC to reinstate the television duopoly rules, approximately 65 television stations would need to be divested.<sup>163</sup>

Lowering ownership limits has the advantage of being a completely race and gender neutral means of increasing opportunities for minorities and women to own broadcast stations. In addition, strong ownership limits are prerequisite for the success of several other proposals put

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<sup>159</sup> *UCC Comments*, Dkt. No. 02-277, at 17-18 (Jan. 2, 2003) (footnotes omitted).

<sup>160</sup> Turner and Cooper, *Out of the Picture* at 22.

<sup>161</sup> See Appendix B. The table shows owners with stations above the actual market cap, as well as the number of owners with excess stations if the cap were hypothetically lowered by one. These figures take into account the overall limits only. These numbers would be even higher if the subcaps are included; see also Peter DiCola, *Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?* (2006) (Listing markets and owners exceeding local ownership caps).

<sup>162</sup> *Id.*

<sup>163</sup> See Appendix C.

forth by MMTC and the Diversity Advisory Committee involving preferences for socially and economically disadvantaged small businesses (SDBs). For example, under Proposal 3, SDB Transfer as Factor in Waiver, the Commission would afford weight to proposed spin-offs to SDBs in reviewing large mergers in which temporary waivers of the ownership rules are required. The Advisory Committee notes that this proposal “is especially timely, since lifting the stay ... will probably trigger a wave of broadcast mergers and acquisitions.”<sup>164</sup> But without meaningful ownership limits, there will be little or no need for spin-offs.

Similarly, MMTC Proposal 5, Incubators, which is based on a proposal made by the FCC in 1995, would allow a group owner to have controlling interest in some number of stations beyond the number otherwise permitted if it establishes and successfully implements a broadcast ownership incubator program designed to ease entry barriers and provide assistance to SDBs. Examples of assistance might include management or technical assistance, loan guarantees, loans or equity investments, training and business planning assistance. The Diversity Advisory Committee has endorsed a similar proposal. However, the success of this proposal turns on having strict ownership limits.<sup>165</sup>

**C. The Commission Should Promptly Adopt Other Race and Gender Neutral Measures to Increase Ownership Opportunities**

In addition to lowering the local limit and eliminating grandfathering, the Commission should promptly adopt additional race and gender neutral measures that will increase

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<sup>164</sup> Advisory Committee on Diversity for Communications in the Digital Age, *Recommendation on Incentive-Based Regulations*, 5-6 (June 1, 2004). This document was submitted along with others by the Advisory Committee on June 8, 2006 into Dkt. No. 02-277.

<sup>165</sup> In addition, MMTC’s Proposal 2, Transfer of Grandfathered clusters and Proposal 8, Nonattributable EDPs, both depend on exceptions to the ownership limits. Without strong ownership limits, exceptions would rarely be necessary, thus rendering ineffective these means of promoting minority and female ownership.

opportunities for new entrants. In particular, Commenters support the adoption of an Equal Opportunity Transaction Rule. In addition, if the Commission continues to allow waivers of the local television rule for failing stations, it should reinstate the Failed Station Solicitation Rule.

### **1. The FCC Should Adopt an Equal Opportunity Transaction Rule**

At a bare minimum, the FCC must ensure that discrimination based on race or gender does not occur in the sale of broadcast stations. Thus, the FCC should adopt MMTC's Proposal 1, an equal opportunity transaction rule. In the *2002 Biennial Review Order*, the FCC found MMTC's proposal to be "worthy of further exploration," but declined "to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of the broadcast licensees." It promised to refer the question of how to ensure that interested buyers were aware of properties for sale to the Advisory Committee on Diversity and to carefully review any recommendation from that Committee. At the same time, the Commission "reiterate[d]" that discriminatory action in the sale of broadcast stations was contrary to the public interest.<sup>166</sup>

The Transactional Transparency and Outreach Subcommittee of the Advisory Committee prepared a White Paper on Equal Transactional Opportunity (April 29, 2004) ("White Paper") examining in detail whether and why sellers discriminate, why transactional discrimination is rarely complained about, and the precedent for FCC addressing this problem.<sup>167</sup> It specifically addressed the concerns raised in the FCC's order. Regarding efficacy, it found that the rule would have a "substantial prophylactic effect on broadcasters who might discriminate but for their trepidation about signing, under penalty of perjury, a statement that they know to be

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<sup>166</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13637.

<sup>167</sup> Submitted into Dkt. No. 02-277 on June 8, 2006 by the Advisory Committee.

false.”<sup>168</sup> As to the effect of the proposed rule on the value of licenses, the White Paper noted that discrimination artificially reduced the pool of potential buyers, thereby depressing demand and reducing property values.<sup>169</sup> As to alienability of licenses, it found no reason to expect that broadcasters would refuse to sell because they would have to permit qualified minorities to bid, distinguishing this from home sales, where White homeowners often wished to avoid offending their neighbors.<sup>170</sup>

On June 14, 2004, the Advisory Committee adopted a proposal for an Equal Transactional Opportunity Rule.<sup>171</sup> The explanation of the proposal included a discussion of the FCC’s authority to adopt the rule, what the rule would and would not require, and how it would be enforced. It explained that adoption of this proposal would not require fundamental changes in the way broadcast stations were sold. For example, licensees would not be required to publicly or widely solicit buyers so long as the methods they used were nondiscriminatory.<sup>172</sup> Moreover, the Advisory Committee anticipated that few enforcement actions would be necessary.<sup>173</sup>

Commenters support the adoption of an equal transaction opportunity rule. Since the Commission has already held that discrimination in the sale of a broadcast station contravenes

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<sup>168</sup> *White Paper* at 8 - 9.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> The proposed text: “No FCC licensee shall discriminate intentionally against a qualified person or entity with respect to the offering for sale or the entertaining of offers to purchase any FCC-licensed facility because of race, color, national origin, or gender.” *Adoption of an Equal Transactional Opportunity Rule* (June 14, 2004) available at [www.fcc.gov.DiversityFAC/adopted.html](http://www.fcc.gov.DiversityFAC/adopted.html) (adopted recommendations, June 14, 2004 meeting).

<sup>172</sup> *Id.* at 3.

<sup>173</sup> *Id.* at 6.

the public interest,<sup>174</sup> requiring a seller to check a box stating that it did not discriminate merely reminds broadcast station owners of this important obligation and will provide, in rare cases, an opportunity to enforce the nondiscrimination provision. In addition, Commenters believe that the Commission should require sellers to undertake outreach efforts to find qualified minority and women buyers, if not in all cases, at least in those situations where sales are necessary to comply with the ownership limits.

**2. The Commission Should Retain the Requirement that Applicants Seeking a Failing Station Waiver Demonstrate that they Made Reasonable Efforts to Find an Out-of-Market Buyer If it Permits Waivers of the Local TV Rule**

Commenters argue below in Part II(A) that there is no need, and it is contrary to the public interest, to allow common ownership of overlapping television stations in any market. Should the Commission nonetheless continue to permit waivers for failing stations, it should also reinstate the Failed Station Solicitation Rule (“FSSR”).

In 1999, the Commission established criteria for waivers of the Local Television Multiple Ownership Rule for an in-market sale of a failed, failing, or unbuilt station, thereby allowing an entity to achieve ownership of more stations in a single market than otherwise allowed.<sup>175</sup> To qualify for a waiver, the applicant had to show “that the in-market buyer is the only entity ready, willing, and able to operate the station” and “that the sale to an out-of-market applicant would result in an artificially depressed price.”<sup>176</sup> The FSSR required that this element be satisfied by

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<sup>174</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13637.

<sup>175</sup> Review of the Commission’s Regulations Governing Television Broadcasting, 14 FCC Rcd 12903 (1999) (“1999 Television Rule Review”).

<sup>176</sup> *Id.* at 12908.

the applicant giving “public notification that the station is for sale.”<sup>177</sup> After noting its concern about the “general problem of the decline in minority broadcast ownership,” the Commission found that with the public solicitation requirement, “minorities and women interested in purchasing a station will have an opportunity to bid.”<sup>178</sup>

In its *2002 Biennial Review Order*, the FCC repealed the requirement that a waiver applicant show it tried to find an out-of-market buyer.<sup>179</sup> The Third Circuit found that “in repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission “entirely failed to consider an important aspect of the problem’ and this amounts to arbitrary and capricious rulemaking.”<sup>180</sup> Thus, the court remanded for the FCC to reconsider or better explain its decision to repeal the FSSR.<sup>181</sup>

The *FNPRM* provides no indication of whether the Commission intends to reinstate the FSSR. Because any benefits of common ownership may be obtained by multicasting, Commenters oppose the grant of more than one television license per market. Therefore, we do not believe that waivers of the single license limit would serve the public interest.<sup>182</sup> However, if the Commission decides to continue granting waivers for failing stations, it should also retain the FSSR. As the Commission found in the case of radio, “barriers to entry are high because virtually all available radio spectrum has been licensed,” and “numerical limits help to keep the

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<sup>177</sup> *Id.* at 12937.

<sup>178</sup> *Id.*

<sup>179</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13708.

<sup>180</sup> *Prometheus*, 373 F.3d at 421.

<sup>181</sup> *Id.* at 435 & n.82.

<sup>182</sup> As we explain below, programming on a failed station may be picked up and broadcast by another station in the market using its multicast capability. This in turn would allow the spectrum used by the failed station to be auctioned, possibly in an auction limited to SDBs, or perhaps, even for purposes other than broadcasting.

available capacity from becoming ‘locked up’ in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.”<sup>183</sup> The same reasoning applies with even greater force to local television markets because there are fewer television licenses available than radio licenses and television is more expensive to operate. Requiring the seller of a failing station to give public notice and attempt to find a buyer outside of the market provides one avenue for new entry. Public notice is important because research shows that minorities and women often have difficulty finding out about opportunities to purchase stations.<sup>184</sup>

#### **D. The Commission Should Adopt Preferences for Socially and Economically Disadvantaged Small Businesses**

While adoption of rules designed to decrease the already excessive levels of concentration is a necessary first step, without more, it will not be sufficient to significantly increase opportunities for minorities and women. Ownership by minorities and women has been stagnant or decreasing from already low levels since 1994.<sup>185</sup> For this reason, the FCC should adopt a broadcast-appropriate definition of socially disadvantaged businesses (SDBs) and policies specifically designed to help women and minorities overcome the effects of past discrimination.

##### **1. The Commission Should Define SDBs in an Appropriate Manner for the Broadcast Industry**

SDB is a term used in the Small Business Act for the purpose of awarding contracts with the federal government. To qualify as a SDB, a company must first qualify as a small business. The SBA defines small businesses as those with annual revenues of \$6.5 million or less in radio

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<sup>183</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13730-31.

<sup>184</sup> Minority- and women-owned businesses are excluded from “the powerful network of information, deals and dealmakers,” which limits access to license purchase opportunities. Ivy Planning Group, *Whose Spectrum Is it Anyway?* at 11.

<sup>185</sup> See *supra* Part I(A)(1)-(2)

and \$13 million or less in television.<sup>186</sup> In addition, socially and economically disadvantaged individuals must own at least 51 % of the small business. Members of certain racial and ethnic groups are “presumed” to be socially disadvantaged individuals under the SBA’s SDB certification program.<sup>187</sup> This presumption may be rebutted by a preponderance of the evidence.

In order for a group to merit designation by the SBA as a presumptively socially disadvantaged group, that group must have suffered prejudice, bias, or discriminatory practices which have resulted in economic deprivation for the group, and which have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.<sup>188</sup> Even where a group is among those designated by the SBA after a public notice and comment period, the presumption as to individual group members can be refuted by a preponderance of the evidence.<sup>189</sup>

Similarly, individuals who are not members of a designated group may establish by a preponderance of the evidence that they have been disadvantaged by (1) an objective, distinguishing feature that has contributed to social disadvantage (race, ethnicity, gender, handicap, long-term residence in an environment isolated from the mainstream of American society, etc.); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world

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<sup>186</sup> 13 C.F.R. 121.201 (NAICS codes 515112 and 515120). In determining revenue, the SBA considers the revenues of the parent corporation and affiliates. *Id.* §§ 121.103, 121.105.

<sup>187</sup> *Id.* § 124.103. Conversely, economic disadvantage is never presumed. To qualify as economically disadvantaged, the majority owner(s) of the applicant business must have a net worth of less than \$750,000, after excluding his or her (their) equity in the firm and in a primary residence. SBA also looks at each individual’s average two-year income, fair market value of all assets, access to credit and capital, and the financial condition of the firm in evaluating economic disadvantage. *Id.* § 124.104.

<sup>188</sup> *Id.* § 124.103(d)(2).

<sup>189</sup> *Id.* § 124.103(d)(4).

because of the disadvantage.<sup>190</sup> For instance, although women are not presumed socially disadvantaged under the SBA’s SDB definition, about 60% of non-minority women business owners who apply are granted SDB status.<sup>191</sup>

Most other agencies either use a similar SDB certification in granting preferences for federal acquisitions and contracting or recognize SBA certification. Notably, the Department of Transportation (“DOT”) and Environmental Protection Agency (“EPA”), have preferences for SDBs in contracting, but include women as a presumed socially disadvantaged group.<sup>192</sup> Given the compelling evidence of historical and ongoing disadvantage in the broadcast industry experienced by both minorities and women, the Commission should adopt a definition of SDBs similar to that of the DOT or EPA.

## **2. The Commission Should Consider Proposals for Giving Preferences to SDBs**

Several of MMTC’s proposals would involve set-asides or preferences for SDBs. While all merit consideration, Commenters wish to stress their support for Proposal 2, Transfer of Grandfathered Clusters. Commenters also urge the Commission to explore and study further a variety of options for directly supporting SDB media ownership, such as SDB-only Auctions and SDB Incubator Programs.

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<sup>190</sup> *Id.* § 124.103(c). If a similar standard were applied by the FCC, the final factor, “negative impact on entry into or advancement in the business world because of the disadvantage,” could be tailored to the media context.

<sup>191</sup> SBA/DOT Certification Reciprocity for Disadvantaged Businesses, <http://www.sba.gov/sdb/sbadot.html>.

<sup>192</sup> *See*, DOT at 49 C.F.R. § 26.67; EPA at 42 U.S.C. 4370d. The DOT’s similar program was modified after the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and was upheld in its current form by the 10th Circuit Court on remand *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). The Supreme Court ultimately dismissed its grant of certiorari to review this decision.

**(a) The Commission Should Limit the Transfers of Grandfathered Clusters to SDBs**

In the 2002 *Biennial Review Order*, the FCC generally prohibited the transfer of grandfathered radio clusters in violation of the local radio rule, but created an exception for “small business entities, which often include businesses owned by women and minorities.”<sup>193</sup> In creating this exception, the Commission stated:

We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities . . . outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, *including those owned by minorities and women*, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.<sup>194</sup>

However, Commenters are concerned that allowing the transfer of grandfathered clusters to small businesses will not do much to promote opportunities for minorities and women to own broadcast stations. The FCC does not indicate what percentage of small businesses are owned by minorities or women. However, the FCC’s Regulatory Flexibility Analysis suggests that many current station owners, most of whom are not minority or female, could qualify as small businesses.<sup>195</sup>

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<sup>193</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13810-11. The FCC uses the SBA standards to define small businesses.

<sup>194</sup> *Id.* at 13636-37 (emphasis added).

<sup>195</sup> The Regulatory Flexibility Analysis attached to the *FNPRM* finds that the vast majority of radio and television stations may fall within the SBA’s “small business entities” category. It notes that “[a]ccording to the Commission staff review of the BIA Financial Network, Inc., Media Access Radio Analyzer Database as of June 6, 2005, about 10,425 (95%) of 11,000 commercial radio stations in the United States have revenues of \$6 million or less.” *FNPRM*

(continued on next page)

Instead of allowing transfers to any small business, the FCC should limit the exception to SDBs. This type of exception would better serve the public interest in two ways. First, it would maximize diversity and opportunities for new entrants by limiting the number of clusters exceeding the ownership caps. Second, it would limit the exceptions to the “no transfer rule” to buyers that would contribute the most diversity, i.e., to minorities, women and other economically or socially disadvantaged applicants. Further, if as suggested above, the Commission were to require all station owners to come into compliance with the new limits by a date certain, this would increase the incentives for companies to seek SDB buyers.

This approach would undoubtedly be upheld by the Third Circuit. The *Prometheus* court already upheld the small business exception.<sup>196</sup> It agreed with the FCC that forcing divestitures at the time of transfer served the public interest by affording new entrants an opportunity to enter the media market.<sup>197</sup> While the court rejected MMTC’s argument that the FCC should have chosen SDBs instead of small businesses as the waiver-eligible class, it did so because it accepted the FCC’s argument that “because of pending legislation, the definition of SDBs is currently too uncertain to be the basis of its regulation.”<sup>198</sup> The court anticipated that by the next

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(footnote continued)

*Appendix B* at ¶ 53. Likewise citing the BIA Financial Network, Inc. Media Access Pro Television Database, the Commission note that “about 852 (66 %) of the 1,286 commercial television station” have revenues of \$12 million or less. Although the Commission notes that these numbers overstate the number of small business entities because the data does not include revenues from affiliated companies, it makes no attempt to determine the impact of including these revenues. *Id.* at ¶¶ 51, 53. Further, the Commission notes that another element of the “small business” definition is that an entity may not be dominant in its field of operation and must be “independently owned and operated.” *Id.* at ¶ 54. The Commission notes that it is “unable to define or quantify the criteria that would establish whether a specific radio [or television] station is dominant.” *Id.* Moreover, it does not assess how many broadcast stations are independently owned and operated, noting that it is “difficult” to assess. *Id.*

<sup>196</sup> *Prometheus*, 373 F.3d at 426-28.

<sup>197</sup> *Id.* at 427.

<sup>198</sup> *Id.* at 428 n. 70.

review, the FCC would have the benefit of a “stable definition of SDBs” and would “reevaluate whether an SDB-waiver will better promote the Commission’s diversity objectives.”<sup>199</sup> While the FCC has not yet adopted a definition of SDBs for broadcasting, many other government agencies employ “stable” definitions of SDBs that the FCC could use as a model in creating its own regulations. Were the FCC to find that a SDB-waiver would better promote the Commission’s diversity objectives than a small business waiver, the court would defer to such a finding.

**(b) The Commission Should Consider Other Means of Fostering SDB Ownership**

Commenters also encourage the Commission to consider other measures fostering the ownership of broadcast stations by SDBs. Other commenters have suggested that the Commission set-aside auctions only for certified SDBs.<sup>200</sup> Federal acquisition policy contemplates a similar measure through the SBA’s setting-aside federal contracts for socially and economically disadvantaged businesses.<sup>201</sup> Also, Incubator Programs waiving some ownership limits for business entities that partner with or otherwise assist an SDB in entering into or advancing in the broadcast industry are deserving of further consideration. Commenters believe that carefully considered SDB programs will survive constitutional scrutiny.

**E. The Commission Must Strictly Enforce its Ownership Rules and Policies**

Commenters support MMTC’s Proposal 10, Zero Tolerance. This proposal is premised upon the idea that the FCC must ensure that its ownership rules are not circumvented. It

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<sup>199</sup> *Id.*

<sup>200</sup> *See Comments of American Women in Radio and Television, Inc.*, MB Dkt. No. 04-228 at 9 (October 12, 2004).

<sup>201</sup> *See SBA 8(a) Business Development Program, Contractual Assistance*, 13 C.F.R. § 124.501 et seq.

proposes that the FCC conduct random audits aimed at uncovering ownership fraud, encourage whistleblowers to come forward, conduct investigations where serious allegations are made, and put ownership fraud cases on a fast track. The FCC should not tolerate abuse of its ownership rules because failure to do so undermines the opportunities for minorities and women to obtain stations and other public interest goals.

**F. The Commission Should Implement Any Changes Slowly and Should Revise Its Processes for Collecting and Analyzing Minority and Female Ownership of Broadcast Stations**

While lowering the existing limits will promote opportunities for minority and female ownership of broadcast stations, should the Commission nonetheless decide to relax the limits, Commenters support in principle MMTC's Proposal 13, Staged Implementation. Regardless of the rules adopted, the FCC should improve its collection and analysis of ownership data to better assess the effectiveness of its rules.

MMTC proposed that the FCC implement any new rules in five two-year stages. For example, in stage one, the new rules would apply to the top 10 DMAs; in stage two, DMAs 11-25; and so on. Every other year, the FCC would "measure the health of the markets" using a "healthy markets algorithm" to be developed through a negotiated rulemaking. If the market remained healthy, deregulation would proceed, but if it did not, the next stage could be postponed or corrective steps could be taken. While Commenters are skeptical that a negotiated rulemaking would lead to an agreed-upon method for evaluating the health of markets, especially in this abbreviated time frame, we strongly support the idea of proceeding cautiously and frequently monitoring of the impact of any rule changes.

To monitor the effect of the ownership rules on minority and female ownership and to better serve the public interest, the FCC must reform its processes for collecting and analyzing

ownership data. In 1998, the Commission amended its Broadcast Ownership Report Form 323 to include information on the race and gender of station owners.<sup>202</sup> The Commission found that collecting this information would allow it to assess the continued effectiveness of its minority and female initiatives, accurately determine the current state of minority and female ownership of broadcast facilities, determine the need for measures designed to promote ownership by minorities and women, and fulfill its statutory mandates under Section 257 of the 1996 Telecommunications Act and Section 309(j) of the Communications Act.<sup>203</sup>

While the FCC does collect this information, it collects incomplete data and fails to make this data available to the public in a timely manner. Researchers have uncovered additional problems with the way the Commission gathers and analyzes this information that undermine its usefulness.<sup>204</sup> For example, sole proprietors and partnerships of natural persons are exempt from filing.<sup>205</sup> Moreover, because group owners need only file once for all of their stations, it is difficult for the staff to determine whether every station has filed.

Most importantly, the FCC staff conducts no analysis of the data relevant to the reason for its collection, that is, to assess the effectiveness of the FCC current rules and whether those rules need to be changed. At most, the staff totals up the numbers and posts this information on its website without checking for completeness or accuracy. It took two years for the FCC to even post the 2001 data. Nor does the FCC perform the most basic types of analysis, such as breaking down the data by type of station ownership or geographic location. It is essential that the Commission revise its rules and procedures to ensure that its ownership data is accurate,

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<sup>202</sup> *1998 Biennial Review -- Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23099 (1998).

<sup>203</sup> *Id.* at 23096-98.

<sup>204</sup> *See supra* Part I(A)(1).

<sup>205</sup> 47 CFR § 73.3615(a).

made available to the public on a timely basis, and is analyzed to determine whether the FCC is meeting its statutory obligations and public interest goals.

## **II. THE COMMISSION SHOULD TIGHTEN CURRENT OWNERSHIP LIMITS FOR TV AND RADIO WHILE RETAINING THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP AND RADIO-TELEVISION CROSS-OWNERSHIPS RULES**

Broadcast television, newspapers, and broadcast radio dominate the local news landscape. Television and newspapers are the primary sources of information for most people; local radio, while used less frequently than these two sources, remains extremely important, especially for minority audiences.<sup>206</sup> In a recent survey, 88% of respondents listed one of these three media as their most frequently used local news source, and 72% listed one as their second most frequently used source.<sup>207</sup>

The American public relies on broadcast television as the “go to” source for news.<sup>208</sup> Over 65.5% of Americans get most of their news from local television broadcasts.<sup>209</sup> In fact, over half say they watch local television news regularly, a number far greater than those who report that they regularly view nationally focused cable or nightly network news.<sup>210</sup> Local television is more likely than other media to feature people from the local community, rather

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<sup>206</sup> Radio reaches 94.7% of African-Americans and 95.4% of Hispanics. Thirty percent of Native Americans recently indicated that radio is their primary source of news. *See* Radio Advertising Bureau, *Radio Marketing Guide & Factbook 9-10* (2006), available at <http://www.rab.com/public/media/2006RMG&FB-LR.pdf>. *See also*, Bob Papper, The Radio-Television News Directors Association and Foundation, *The Future of News* (Oct.3. 2006), <http://www.rtnda.org/resources/future/index.shtml> at Section 2 (“2006 Future of News”).

<sup>207</sup> Mark Cooper, *Media Usage: Traditional Outlets Still Dominate Local News and Information* at 11-12 (2006) (“Media Usage”) (referring to local TV, local dailies and weeklies, and radio).

<sup>208</sup> PEJ, *State of the Media 2006* at Local TV: Public Attitudes; *see also* Cooper, *Media Usage* at 10 (“TV plays a much more prominent role in national news (than local news), primarily because of national TV”).

<sup>209</sup> RTNDA, *2006 Future of News* at Section 1.

<sup>210</sup> *Biennial News Consumption Survey*, Pew Research Center, 1 (July 30, 2006), available at <http://people-press.org/reports/pdf/282.pdf> (“Pew, 2006 Media Study”).

than officials or experts.<sup>211</sup> The public prefers local television news to any other news source -- 63.3% report that they would choose local television if they could get the same news wherever they wanted.<sup>212</sup>

Newspapers are the second most used news source in the United States overall, with 40% of respondents to a Pew survey reporting they used the newspaper the previous day for news.<sup>213</sup> That survey also found newspaper to be the single most important source of local and community news, with 61% of those who follow news about “people and events in their community” citing newspapers as their major information source.<sup>214</sup> In addition, more people turn to newspapers than any other source for news about their local government.<sup>215</sup>

Radio is the third leading source of all news for Americans, after television and newspapers, and also the third leading source for local news.<sup>216</sup> The Project for Excellence in Journalism’s 2006 State of the News Media report found that on a given day, 57% of radio news was focused on local news and another 16% was focused on regional news.<sup>217</sup> Moreover, a

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<sup>211</sup> PEJ, *State of the News Media 2006* at Local TV: Content Analysis.

<sup>212</sup> RTNDA, *2006 Future of News* at Section 1.

<sup>213</sup> Pew, *2006 Media Study* at 11; *see also* RTNDA, *2006 Future of News* at Section 1 (noting that 28.4% of respondents cited newspapers as their primary source news. This is far below the number who cited local TV news (65.5%), but slightly above those who cited national TV news (28.3%)).

<sup>214</sup> *Id.* at 28; *see also* Cooper, *Media Usage* at 12, Ex. 4 (stating that about one-third of respondents cited local newspapers, and about 10% cited local weeklies as their most important and frequently used source of local news compared with about one-third for local television).

<sup>215</sup> Pew, *2006 Media Study* at 28 (“53% who follow local government cite newspapers as their main source, compared with 45% who rely mostly on television news”).

<sup>216</sup> Cooper, *Media Usage* at 12. Ten percent of respondents indicated that radio is their most important source of local news; about the same number indicated that it is their most frequently used source of local news. These numbers are similar to the numbers for “local weeklies,” a category that Cooper separated from “local newspapers.” *Id.* at 12, Ex. 4.

<sup>217</sup> By contrast, the stories that dominated the national media received only five percent of radio news airtime. PEJ, *State of the News Media 2006* at Radio: Content Analysis.

study by the Center for Media Research reports that broadcast radio is the second most trusted source for emergency information.<sup>218</sup>

The emergence of non-traditional media does not reduce the public's reliance on television, newspapers, and radio.<sup>219</sup> Only 11.2% of Americans report using the Internet as a major source for news.<sup>220</sup> In addition, virtually all original newsgathering that ends up on the Internet is still being done by the "old media."<sup>221</sup> Moreover, those who do rely on the Internet overwhelmingly go to web sites of traditional media outlets.<sup>222</sup> As the Third Circuit has indicated, websites of local newspapers and broadcast stations "that merely republish the information already being reported by the newspaper or broadcast station counterpart . . . do not present an 'independent' viewpoint and thus should not be considered as contributing diversity to local markets."<sup>223</sup> Additionally, while Internet bloggers may offer alternative editorial content, Americans ranked blogging dead last in a list of what they considered to be news sources in a

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<sup>218</sup> See Center for Media Research, *Mainstream Professional Journalists Trusted Most to Report Pandemic Events* (Oct. 13, 2006) (finding that 42% of those surveyed would turn to radio in an emergency).

<sup>219</sup> Fifty-seven percent of respondents to the Pew study reported using television for news in the last day, 40% reported newspaper use, 36% radio news use, and 23% Internet news use. Pew, *2006 Media Study* at 11. When RTNDA asked people where they got most of their news, radio placed fourth with 14.7%, behind local TV (65.5%), newspapers (28.4%), and national TV news (28.3%). The Internet, with 11.2%, still trailed the radio. RTNDA, *2006 Future of News* at Section 1.

<sup>220</sup> RTNDA, *2006 Future of News* at Section 2; see also Pew, *2006 Media Study* at 11 (noting that Internet news placed fourth behind TV, newspaper, and radio in last day usage; Cooper, *Media Usage* at 12 ( finding that 11% indicated that the Internet is their first or second most used news source).

<sup>221</sup> PEJ, *State of the News Media 2006* at Online: Content Analysis.

<sup>222</sup> Cooper, *Media Usage* at 12 (noting that 51% of those who use the Internet as one of their top two sources for news visit the websites of local TV and daily newspapers most frequently); see also Pew, *2006 Media Study* at 15-18 (stating that web news is dominated by a few sites); Nielson/Netratings, *Online Newspapers Enjoy Double-Digit Year-Over-Year Growth, Reaching One Out of Four Internet Users* (Nov. 15, 2005) at [http://www.nielsen-netratings.com/pr/pr\\_051115.pdf](http://www.nielsen-netratings.com/pr/pr_051115.pdf).

<sup>223</sup> *Prometheus*, 373 F.3d at 405-06.

RTNDA poll asking “What is news?”<sup>224</sup> Couple this with statistics demonstrating that a significant number of Americans are without broadband Internet access,<sup>225</sup> and it becomes clear that online content should be treated as a supplement rather than a competitor of traditional media.<sup>226</sup>

Likewise, alternatives such as cable and satellite broadcasting do not reduce the public’s reliance on broadcast television, newspapers, and broadcast radio for *local* news. As the Commission and the Third Circuit have recognized, while cable may re-transmit local broadcast signals, it provides negligible independent local news.<sup>227</sup> Satellite television provides no independent local news; if a satellite subscriber receives local news, it is only from a broadcast channel contained in that subscription. Nor can satellite radio be considered a diverse source of local content given that the Commission has placed limits on satellite radio providers’ ability to offer local news services to its customers.<sup>228</sup>

While new media technologies certainly offer the promise of supplemental news services, they in no way replace the local news and public affairs programming function performed by

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<sup>224</sup> RTNDA, *2006 Future of News* at Section 3.

<sup>225</sup> Less than half (42%) of adult Americans currently have broadband at home. See Pew/Internet, *Home Broadband Adoption 2006* at 1 (May 28, 2006). Twenty-seven percent report they do not use the Internet at all. Pew/Internet, *Internet Evolution: Internet Penetration and Impact* at 3 (Apr. 26, 2006). Blacks, Hispanics, and almost certainly Native Americans use the Internet significantly less than Whites. See Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 JOURNAL OF LAW REFORM 199, 211-27 (2006) (discussing America’s “Digital Divide”). Furthermore, broadband penetration in rural areas lags behind the rest of the country. Pew/Internet, *Home Broadband Adoption* at ii.

<sup>226</sup> See Pew, *2006 Media Study* at 1-2.

<sup>227</sup> *Prometheus*, 373 F.3d at 405 (excluding cable from the Diversity Index calculations because of serious doubts as to the extent that it provides independent local news).

<sup>228</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, 5769 (1997).

broadcast television, radio, and newspapers. Thus, when promulgating appropriate ownership rules, the Commission should consider the reality of the public's reliance on over-the-air broadcasters and newspapers.

**A. The Local TV Rules Should Be Modified to a Single-License Restriction**

The *FNPRM* asks a variety of questions concerning the local TV ownership rule, including whether it should be revised.<sup>229</sup> However, it does not put forth any specific proposal or provide any additional evidence that would support its earlier, remanded decision to relax the rule.

Commenters urge the FCC to revise the local television rule to limit ownership to a single license within a DMA.<sup>230</sup> In addition, the Commission should require compliance with this single-license rule within a reasonable period of time. Allowing common ownership of more than one television station is no longer justified for two main reasons. First, digital broadcasting allows a broadcaster to air several channels in a locality without having to buy additional stations, thereby providing whatever benefits duopolies would provide. Second, as empirical data demonstrates, duopolies have not resulted in the benefits predicted by the Commission as its basis for permitting duopolies.

**1. Digital Television Allows Licensees to Obtain the Benefits of Multiple Channels with a Single License**

Changes in the media market permit television broadcasters to receive any potential efficiency benefits of duopolies without harming the public by reducing competition, diversity,

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<sup>229</sup> *FNPRM* at ¶18.

<sup>230</sup> The Commission could retain the exception that would allow more than one television station within a DMA so long as the service contours did not overlap more than a de minimus amount.

and localism. With a single television license to use 6 MHz, an entity can program six standard definition channels (or video program streams) with the technology available ten years ago.

With more modern technologies, broadcasters can “multicast” between twelve and nineteen video streams,<sup>231</sup> and likely even more as technology evolves.<sup>232</sup> Thus, broadcasters can receive all the benefits of duopolies merely by using digital technologies.

Many broadcasters are already multicasting to create virtual duopolies and triopolies. At least “434 commercial stations provide 624 multicast services in 163 of the 210 television markets.”<sup>233</sup> These multicast streams include local weather, news, sports, and other

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<sup>231</sup> See Jim Snider, *Speak Softly But Carry a Big Stick: How Local TV Broadcasters Exert Political Power*, at 309 (iUniverse, Inc., 2005) (suggesting that new compression technologies permit transmission of a standard television signal in 1 Mbps, while each license has a budget of 19.4 Mbps) (citing Ken Kerschbaumer, *DVD-Quality Video at 1Mb/s*, BROADCASTING & CABLE, at 38, May 29, 2000).

<sup>232</sup> Ex Parte Submission of Wiley, Rein & Fielding, *Promoting the Public Interest Benefits of Broadcasting in the New Millennium: The FCC Can and Should Update Its Existing Carriage Regulations to Meet the Demands of the Digital Age* at 8 n.35 (June 2, 2006) (discussing innovation in compression technology for cable operators, though the same innovation principle holds for broadcasting). Broadcasters can provide an even greater number of streams if they program also for mobile television on cell phones, PDAs, and other devices. (“Wiley Rein Ex Parte”) Craig Birkmaier, *A Multiple Choice Media Future*, BROAD. ENGINEERING (June 1, 2006) (discussing broadcasters’ desire, enunciated at the NAB’s 2006 convention, to “serve the growing market for mobile and portable video”). As the NAB has commented, “there is every reason to expect that [one] current signal compression technology [for video], known as MPEG-2, will be replaced by more advanced technologies, such as MPEG-4 (and no doubt future generations thereafter).” *NAB’s Echostar Petition* at 89 (relying on its expert’s opinion, discussing satellite television). MPEG-4 may permit two to three times the programming in the same spectrum space as MPEG-2. See, e.g., *Echostar Communications*, 17 FCC Rcd 20559, 20590 (2002). Beyond compression, other technologies will result in more programming in existing spectrum, including perhaps improved modulation and coding and improved statistical multiplexing. *NAB’s Echostar Petition, Declaration of Richard G. Gould* (NAB Expert).

<sup>233</sup> *Supplemental Submission by CBS and NBC Affiliate Associations*, CS Dkt. 98-120, June 8, 2006, at 8. (“Affiliates Supplement”)

programming.<sup>234</sup> In addition, many broadcasters have negotiated carriage for digital streams on cable systems and on Verizon's FiOs-TV service.<sup>235</sup>

Stations are even affiliating their secondary streams with new television networks. CBS and NBC affiliates recently explained that many television stations "affiliated with one of the 'big four' networks are using their multicast streams to affiliate secondarily with a smaller network such as the CW or MyNetworkTV."<sup>236</sup> These affiliations are happening even in the smallest markets: when the CW and MyNetworkTV debut, "stations in about two dozen small and midsize markets will distribute the networks" through digital streams.<sup>237</sup> Many other stations have affiliated their multicast streams with new networks, including DIC Kids Network and the Tube Music Network,<sup>238</sup> or with new network services, such as NBC WeatherPlus (carried by stations and affiliates in 85 markets).<sup>239</sup> NBC plans to unveil another secondary network in the first quarter of 2007, and CBS has proposed an entertainment-stream called CBS 2.<sup>240</sup> ION Media Networks (formerly Paxson) has planned a children's multicast service and a 24-hour broadcast network on consumer healthcare and healthy living.<sup>241</sup>

These new developments undermine broadcasters' claims that they need a second (or third) station to provide additional programming to the public. Broadcasters can provide numerous channels of programming with only one license.

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<sup>234</sup> *Id.* at 4-6, 9-12 (arguing that multicast must-carry would support such streams).

<sup>235</sup> See Birkmaier, *A Multiple Choice Media Future*; Donahue, *Multicast Madness: TV Stations Slow to Add Digital broadcasts as Internet Distribution Rises*, MULTICHANNEL NEWS (June 26, 2006) ("Multicast Madness").

<sup>236</sup> *Affiliates Supplement*, at 11.

<sup>237</sup> Allison Romano, *Stations Build Virtual Duopolies*, BROADCASTING & CABLE (March 27, 2006).

<sup>238</sup> *Affiliates Supplement*, at 4-6, 9.

<sup>239</sup> Donohue, *Multicast Madness*.

<sup>240</sup> *Id.*

<sup>241</sup> *Affiliates Supplement*, at 9.

## 2. The Commission's Relaxation of the Prohibition on Owning More Than One TV Station in a Market Was Premised on Predicted Efficiencies of Common Ownership that Would Benefit the Public

Even without the digital transition, the Commission should return to a single-license rule because the predicted benefits of duopolies have not materialized. The FCC maintained a single-license local television limit to promote maximum diversification, maximum competition, and localism for over half a century.<sup>242</sup> In 1999, it relaxed the single-license rule to permit entities to own up to two television stations, or a “duopoly,” under certain circumstances.<sup>243</sup> Now that the 1999 rules have been in effect for seven years and a large number of duopolies have been created,<sup>244</sup> the Commission has a legal obligation to assess whether its predicated benefits have in fact materialized.<sup>245</sup>

The Commission's relaxation of the single-license rule was based largely upon predictions regarding the purported benefits of allowing duopolies because in 1999 the

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<sup>242</sup> The policy behind Commission's single-license TV policy was first articulated in 1938, in a hearing for a radio license. *1998 Biennial Review Order*, 15 FCC Rcd at 11058, n.110 (citing *Genesee Radio Corp.*, 5 FCC 183 (1938)). In 1940, the FCC extended this policy explicitly to television, deciding not to permit any entity to hold licenses for two television stations serving substantially the same area. 6 FCC Ann. Rep. 68 (1940). In 1964, the FCC adopted a rule forbidding an entity from holding two television licenses with overlapping Grade B contours. *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 ¶ 3 (1964) (“1964 Ownership Order”). The Commission's 1964 Order and subsequent ownership orders emphasized the Commission's twin goals, “to promote the maximum diversification of program and service viewpoints and to prevent undue concentration of economic power.” *1964 Ownership Order*, 45 FCC at 1476-77. Maximum diversification, or diversity, rests on outlet diversity and is essential for the public to make political and personal decisions.

<sup>243</sup> *1999 Local TV Order*, 14 FCC Rcd at 12924

<sup>244</sup> There are approximately 65 markets containing television duopolies or in some cases triopolies. See Appendix C.

<sup>245</sup> *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

Commission would have had very few real-world examples of duopolies to analyze.<sup>246</sup> The “anecdotal” evidence for efficiencies and programming benefits was provided by broadcasters with obvious self-interest.<sup>247</sup> Nonetheless, the Commission cautiously concluded that theory and limited evidence suggested that there “*may* be certain efficiencies inherent in joint ownership and operation”<sup>248</sup> and these “cost savings ... *may* contribute to programming benefits, including more *news, public affairs,* and other non-entertainment [and entertainment] programming.”<sup>249</sup> Having little direct evidence, the Commission promised to “monitor the effects of our changes ... and adjust our ownership rules as needed in the context of future biennial reviews.”<sup>250</sup>

In deciding to further relax the duopoly limits in 2003, the Commission still had little evidence before it on the efficiencies of common local television ownership.<sup>251</sup> Although the 1999 revisions were challenged and found to be inadequately justified in *Sinclair*, the Court nonetheless permitted the new rules to take effect.<sup>252</sup> In 2003, the Commission could make only weak conclusions that common local ownership may give owners the “ability and incentive” to offer responsive programming “and that in many cases, that is what they do.”<sup>253</sup> The

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<sup>246</sup> *1999 Local TV Order*, 14 FCC Rcd at 12904-05 (noting that the Commission had only “rarely,” in “unique or highly unusual circumstances,” granted permanent waivers of the single-license rule).

<sup>247</sup> *Id.* at 12929 (noting “[m]ost broadcasters” who commented “supported permitting same-market duopolies in some form”).

<sup>248</sup> *Id.* at 12920-21 (emphasis added).

<sup>249</sup> *Id.* at 12921 (emphasis added).

<sup>250</sup> *Id.* at 12924. In 2000, the Commission reaffirmed that promise: “The response of the market to these rule changes [including the duopoly television rule] will provide us concrete, empirical information about their impact on our public policy goals for use in our future biennial reviews.” *1998 Biennial Review Order*, 15 FCC Rcd at 11108.

<sup>251</sup> Although the new rule had been in effect for approximately three years, it took time for deals to be made, for transfers to be approved by the FCC, for duopolies to actually start working together, and for researchers to collect data needed to study the effects.

<sup>252</sup> *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002).

<sup>253</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13683.

Commission cited only two studies for this proposition;<sup>254</sup> both were submitted by broadcasters and both were criticized for their methodology.<sup>255</sup> Thus, the Commission necessarily had little evidence for its assumption that duopolies lead to efficiencies and better news programming. It should revise its assumption based on more recent evidence.

### **3. Evidence Shows That Duopolies Do Not Provide Programming Benefits for the Public**

Both theoretical and empirical evidence demonstrate that duopolies do not lead to programming benefits envisioned by the Commission.

#### **(a) The Assumption that Duopolies Will Result in Programming Benefits is Based on Faulty Reasoning**

As a theoretical matter, the connection between common local ownership and programming benefits is tenuous. The Commission's supposition that common ownership "may" or "can" improve programming rests on two questionable assumptions. The first assumption is that same-market combinations all lead to efficiencies. However, increasing a

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<sup>254</sup> One, submitted by Fox News, purportedly showed that commonly owned stations were more likely to air local news while having a similar quantity and quality of this news. The second, submitted by a coalition of broadcasters, suggested a 3.2% increase in ratings from common ownership in seven markets, though the increase was not specifically for news or public affairs programming. *Prometheus*, 373 F.3d at 415 (citing Bruce M. Owen et al., *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality*, in *Comments of Fox Entertainment Group, Inc. et al.*, MB Dkt. 02-277 (Jan. 2, 2003) and Mark R. Fratrik, *Television Local Marketing Agreement and Local Duopolies: Do They Generate New Competition and Diversity?* (Jan. 2003), appendix to *Comments of Coalition Broadcasters et al.*, MM Dkt. 02-277 (Jan. 2, 2003)).

<sup>255</sup> *Reply Comments of Consumer Federation of America, et al.*, MB Dkt. 02-277, at 24 (Feb. 3, 2003).

firm's size can lead to *diseconomies* of scale as well as economies of scale.<sup>256</sup> Also, the loss of a competitor reduces the merged entity's incentives to seek efficiencies.

The second questionable assumption is that broadcasters will reinvest efficiency-enabled cost-savings into better local informational programming to the benefit of the public interest. In reality, broadcasters have little economic incentive and no specific concrete public-interest obligations to do so. Broadcasters have as much or more incentive instead to take any cost-savings as increased dividends or capital gains. In addition, in a competitive advertising market, any cost-savings could be passed onto advertisers instead of viewers. Even if broadcasters were to reinvest any cost-savings back into programming, nothing suggests they would invest in local or informational programming. Local public affairs and news programming are considered costly to produce<sup>257</sup> and may generate less revenue than certain advertiser-preferred programming.<sup>258</sup> As advertiser-preferred programming is more profitable, an entity with two stations has an increased "opportunity cost for providing financially less lucrative informational programming," which "may actually compel commonly owned stations to eschew informational programming."<sup>259</sup> Thus, as a matter of theory and logic, there is no reason to believe that common local television ownership would lead to improved local programming.

**(b) Empirical Evidence Demonstrates that  
Duopolies Do Not Provide Better  
Programming**

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<sup>256</sup> Mark L. Sirower, *The Synergy Trap: How Companies Lose the Acquisition Game*, 50 (1997) (noting a "growing body of evidence" that "negative synergies are in fact very common").

<sup>257</sup> See, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13684-85 (discussing broadcaster-submitted evidence on the expense of news programming).

<sup>258</sup> Michael Z. Yan & Yong J. Park, *Duopoly Ownership and Local Information Programming on Television: An Empirical Analysis*, 6, Paper presented at the Telecommunications Policy Research Conference, Washington, D.C. (2005), available at [http://web.si.umich.edu/tprc/papers/2005/488/tprc2005\\_yan.pdf](http://web.si.umich.edu/tprc/papers/2005/488/tprc2005_yan.pdf). ("Duopoly Ownership").

<sup>259</sup> *Id.* at 6.

In addition to theory, recent empirical evidence shows that duopolies do not provide superior local programming. In a study published in 2005, Michael Yan & Yong Park, two communications scholars at the University of Michigan, refuted the “assumption that economies of scale [in local television duopolies] contribute to greater production of local informational programming.”<sup>260</sup> The study analyzed a two week sample of television programming in 1997 and 2003 for 116 commercial, full-power television stations. In 2003, 40 of these stations involved duopolies. The study found that duopoly stations aired significantly less local news than non-duopoly stations.<sup>261</sup> In 2003, duopoly stations aired on average 22.6 hours of local news programming, while non-duopoly stations in the same market aired a full 63% more -- 35.8 hours. While duopoly stations increased news programming from 1997 to 2003, so did non-duopolies.<sup>262</sup> In addition, any increase in the duopolies’ news-programming came from the station in the duopoly with higher revenues. This result suggests that common ownership did not increase the local news on the *weaker* station, where the Commission assumed, and the broadcasters argued, the programming benefits would be most pronounced.<sup>263</sup> The study found “no evidence that joint ownership induces weaker stations to produce more local news programming,” while, on average, non-duopoly stations increased their local news programming.<sup>264</sup>

A 2004 study by Yan and Philip Napoli, the director of a communications research center and a business school professor at Fordham University, also suggests that duopolies provide no

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<sup>260</sup> *Id.* at 6.

<sup>261</sup> *Id.* at 11-12.

<sup>262</sup> *Id.* at 1. They found no significant difference between the amount of local public affairs programming on duopoly and non-duopoly stations. *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 13.

programming benefits.<sup>265</sup> The study, which analyzed a two week sample of broadcast television programming from 289 full power television stations in 2003, found that relaxation of the local television ownership rule “would not appear to encourage the production of [public affairs] programming” because duopolies do not result in a significant increase in local informational programming.<sup>266</sup>

A study by Peter Alexander, an economist at the FCC, and Brendan Cunningham, an economics professor at the Naval Academy, found that “increasing concentration [in local television markets] appears to diminish diversity in local broadcast news both at the firm and market level.”<sup>267</sup> The study measured the relationship between market structure and diversity in local news programming, using a sample that included 10,600 stories aired on the local news programs for the CBS, NBC, and ABC affiliates in twenty DMAs in 1998. The study defined diverse news stories with two measures (to identify stories unique to each station) and market structure based on a DMA’s total number of stations and its HHI.<sup>268</sup> It found that increased HHI “has a negative impact on local news diversity.”<sup>269</sup> As duopolies increase local market HHIs, the

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<sup>265</sup> Michael Yan & Philip M. Napoli, *Market Structure, Station Ownership, and Local Public Affairs Programming on Local Broadcast Television*, Paper presented at the Telecommunications Policy Research Conference, Arlington, VA (2004), [http://web.si.umich.edu/tprc/papers/2004/374/tprc2004\\_yan.pdf](http://web.si.umich.edu/tprc/papers/2004/374/tprc2004_yan.pdf) (“Market Structure”).

<sup>266</sup> *Id.* at 16. The study also found that stations in markets with more television households were, on average, *less* likely to air local programming, that ownership by one of the big four networks “hampered the provision of local public affairs programming,” and that cable penetration “bore no significant relationship with the availability and amount of local public affairs programming on television.” *Id.* at 15-16.

<sup>267</sup> Peter J. Alexander & Brendan M. Cunningham, *Diversity in Broadcast Television: An Empirical Study of Local News*, 6 INT’L J. MEDIA MGMT 176 (2004) (“Diversity in Broadcast Television”).

<sup>268</sup> Alexander & Cunningham, *Diversity in Broadcast Television* at 178 (defining diversity to include the seconds of local news coverage unique to each of the three major network affiliates within the DMA and the total time devoted to all unique stories covered by the three affiliates).

<sup>269</sup> *Id.* at 177-78, 180.

study's result suggests duopolies would reduce the number of diverse stories covered in any DMA.<sup>270</sup>

These studies all suggest that *competition*, not concentration, has a positive correlation with informational programming and with diversity. Yan & Napoli found that “the intensity of competition from competing program sources may be reflected in a station’s news and public affairs programming outputs as stations respond to the program offerings of their competitors.”<sup>271</sup> Several studies suggest that competition leads not just to more news but to more accurate news.<sup>272</sup> These findings are not surprising, as one inevitable detriment of concentrated market power is “reduced incentive to improve programming.”<sup>273</sup>

Common Cause has documented instances within communities where consolidation has decreased the number of jobs in local journalism, has decreased the amount of original or locally-produced programming, has decreased the community-responsiveness of programming, and has resulted in the censorship of divergent viewpoints.<sup>274</sup> These experiences are consistent

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<sup>270</sup> The economists even speculate that “single station owners might contribute more to diversity than [network] owned-and-operated chain stations,” because, based on economic incentives, stations in a national chain might rely heavily on relatively less expensive national broadcast feeds over gathering local news independently. *Id.* at 182. In their earlier 2002 MOWG study, Cunningham and Alexander found that an increase in concentration leads to a decrease in the total amount of non-advertising broadcasting because of the profit maximizing response of broadcasters. The broadcasters devote more time to advertising, resulting in less informational and other programming. Brendan M. Cunningham & Peter J. Alexander, *The Theory of Broadcast Media Concentration and Commercial Advertising*, Federal Communications Commission, Media Bureau Staff Research Paper, Media Ownership Working Group (2002)

<sup>271</sup> Yan & Napoli, *Market Structure* at 4-5 (discussing studies showing the number of outlets and market size may increase informational programming).

<sup>272</sup> Alexander & Cunningham, *Diversity in Broadcast Television* at 177 (and citations therein) (noting “competitive market structure induces greater accuracy in reporting of news”).

<sup>273</sup> *Prometheus*, 373 F.3d at 417.

<sup>274</sup> Common Cause, *Citizens Speak* at Appendix D.

with the empirical data demonstrating that consolidation of local television does not serve the public interest.<sup>275</sup>

#### **4. A Single-License Rule Would Best Promote the Commission's Goals**

Because the digital transition has obviated any benefit to be gained by acquiring a second station in the same market and, in any event, the predicted benefits of duopolies for the public have not materialized, the public interest would be better served by adopting a single license limit. A single license limit would further all of the policy objectives identified in *FNPRM* and the *2002 Biennial Review Order* -- diversity, increasing minority and female ownership, competition, localism, and spectrum efficiency.<sup>276</sup>

##### **(a) A Single-License Rule Promotes Diversity**

Limiting each entity to a single license will maximize the number of owners and consequently maximize diversity, since the owners bear ultimate responsibility for what programming is aired, issues are covered, and perspectives are presented. Limiting each owner to a single license will also maximize the likelihood that minorities and women will be able to acquire television stations.

In light of the digital transition, a rule permitting more than one license per owner in each locality would pose far too large a threat to viewpoint diversity. A local broadcaster with even two licenses, which permits 12-38 local digital channels depending on the technology, would unmistakably have “inordinate political influence.”<sup>277</sup> Moreover, the risk to diversity is not lessened by other media outlets. Few other media outlets provide local news or programming

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<sup>275</sup> *Id.*

<sup>276</sup> *FNPRM* at ¶4 (stating that the Commission intends to be guided by the policy goals identified in the *2002 Biennial Review Order*).

<sup>277</sup> *1998 Biennial Review Order*, 15 FCC Rcd at 11082.

that adds significantly to local diversity. As the *Prometheus* court noted, most other media outlets, such as cable or the Internet, are not good diversity substitutes.<sup>278</sup> Moreover, since broadcast television remains the primary source of local news and information for most Americans,<sup>279</sup> ensuring ownership diversity in local television news is particularly important.

**(b) A Single-License Rule Promotes Competition**

Television stations compete in a number of different product markets. For example, they compete for viewers, for advertisers, and in acquiring programs.<sup>280</sup> A single license limit promotes competition in each of these areas.

In providing some types of programming, such as entertainment programming and national news, broadcast television stations compete to some extent with cable and DBS.<sup>281</sup> It has been argued that broadcasters need multiple stations to compete with the multi-channel providers. However, with the development of digital television, as discussed above, television broadcasters no longer need multiple licenses to provide multiple channels. In addition, other media, such as the Internet, provide broadcasters with additional platforms for distributing their content. A Disney-ABC TV executive noted that distributing through the Internet and digital media complements its broadcast distribution.<sup>282</sup> One article concluded that television stations have been slow to multicast partly because they “have chosen to distribute programming directly

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<sup>278</sup> *Prometheus*, 373 F. 3d. at 403, 405.

<sup>279</sup> Cooper, *Media Usage* at 2.

<sup>280</sup> See, e.g., 2002 *Biennial Review Order*, 18 FCC Rcd at 13818.

<sup>281</sup> *Id.*

<sup>282</sup> Michael Feazel, *Networks See New Media Boosting Audience, Attracting Ads*, COMM. DAILY (Apr. 26, 2006). An NBC executive noted that Internet streams “generate heat for some shows” and have “boosted ratings.”

to viewers via the Internet”; the Big Four apparently “are holding their best content for Web distribution.”<sup>283</sup>

In the local advertising market, the Commission found “broadcast television” to be the relevant market.<sup>284</sup> Using local television advertising revenues to calculate HHI shows that most markets are well above 1800. Out of the 210 total local television DMAs, 202 are highly concentrated, with total day HHIs exceeding 1,800.<sup>285</sup> Indeed, the median HHI for all 210 markets is approximately 2,900, and the mean is nearly 3,600.<sup>286</sup> Moreover, concentration is high in both the largest markets and the smallest markets. The mean and median in the top ten markets is 1,958 and 1,926 (respectively), and in the top fifty is 2,236 (mean) 2,289 (median), and in the smallest 50 is 5,710 (mean) 5,226 (median).<sup>287</sup> As with competition for viewers, limiting an entity to a single license will increase competition for the sale of advertising time.

Limiting an entity to a single license will also promote competition in the video programming market. Duopolies are of concern to program syndicators that sell their programming directly to individual local television stations and to programmers hoping to launch new networks that would affiliate on secondary streams.<sup>288</sup> These syndicators and new networks would get a fairer deal, and therefore would have lower barriers to entry, with more local owners. As a result, the Commission could also encourage new networks through a single license rule.

### (c) A Single-License Rule Promotes Localism

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<sup>283</sup> Donohue, *Multicast Madness*.

<sup>284</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13675-76.

<sup>285</sup> See S. Derek Turner and Mark Cooper, *Out of The Picture: Minority and Female Television Station Ownership in the U.S.*, 22 n. 42 (revised October 2006).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See, e.g., Birkmaier, *A Multiple Choice Media Future*.

A single-license rule will also promote localism. A recent study suggests there is little local programming on commercial television; for example, nearly 60% of commercial TV stations aired no local public affairs programs over a two-week sample period.<sup>289</sup> As discussed above, studies have shown that duopolies have not resulted in the predicted benefit of increased local news or public affairs programming.<sup>290</sup>

In contrast, a single-license rule would increase the amount of local news produced by likely increasing the number of local owners. While national owners such as Sinclair provide local stations with “news packages on national stories” from a centralized news department,<sup>291</sup> locally owned stations devote far more time to local news. As the FCC’s “recently released” 2004 localism study shows, “local ownership appears to increase total, local, and local on-locations news” coverage, adding five-and-a-half minutes of local news per half-hour local news broadcast.<sup>292</sup> As noted above, competition, not concentration, improves news programming.

**(d) A Single-License Rule Promotes Efficient Use of the Spectrum**

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<sup>289</sup> Yan & Napoli, *Market Structure* at 12. The study also found a disturbingly low level of local public affairs programming on commercial stations. During the two-week trial period, 59% of the 233 commercial stations failed to air any local public affairs programming, and 11% of commercial stations did not broadcast any local or national public affairs programming. In contrast, out of the 52 public stations, only 9.6% failed to show any local public affairs programming during the same period. When commercial stations did air local public affairs programming they did so in small doses, averaging just under 45 minutes for the two week sample, whereas the public stations devoted over 6 hours for the same period. Finally, the commercial stations averaged considerably less non-local public affairs programming than the public stations. Commercial stations averaged around 2 and a half hours of non-local public affairs programming, while public stations averaged just under 16 hours. *Id* at 16.

<sup>290</sup> See *supra* Part II(A)(2). In addition, even if there were local programming benefits, however, multicasting would produce them.

<sup>291</sup> See Allison Romano, *Sinclair Rethinks News Mission*, BROADCASTING & CABLE, (March 20, 2006).

<sup>292</sup> *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*, FCC Draft Working Paper, 14-15 (June 17, 2004) (“FCC Localism Study”).

In the *2002 Biennial Review Order*, the Commission recognized promoting spectrum efficiency as an important public interest goal.<sup>293</sup> Indeed, the Commission has “a long-standing policy goal in favor of efficient and non-duplicative use of the spectrum.”<sup>294</sup> Broadcast ownership rules determine the amount of spectrum that entities can use exclusively, and because of the digital transition and other rapid advances in spectrum technologies, ownership limits will have an enormous impact on spectrum innovation in the next few years.

Strict limits will promote innovation in broadcasters’ use of spectrum, particularly for digital television, in several ways. First, an entity with the exclusive right to less spectrum (*i.e.* the right to fewer local or national broadcast stations) naturally has incentives to use that spectrum more efficiently. As the Commission has recognized, an entity possessing more spectrum “will use it less effectively,” and “may be less willing to invest in productivity-enhancing technology” because the “marginal value of a firm’s spectrum will decline as the total amount of spectrum it controls increases.”<sup>295</sup> Second, large firms are “most likely to innovate only if they face significant competitive pressure.”<sup>296</sup> With more competitors, broadcasters would be more likely to innovate in spectrum. Third, a larger number of competitors will experiment with a larger number of different investment and technological strategies in order to be more efficient. Such expanded experimentation will render innovative breakthroughs more likely.

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<sup>293</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13674. *See also*, at 13642 (“innovation should be a policy objective of our broadcast ownership regulations.”); 47 U.S.C. § 303(g) (charging the Commission with ensuring “the larger and more effective use of radio in the public interest”).

<sup>294</sup> *Echostar Communications*, 17 FCC Rcd 20559, 20573 (2002); *see also Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503, 17552-53 (2004).

<sup>295</sup> *Echostar Communications*, 17 FCC Rcd 20559, 20633 (2002).

<sup>296</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13642 (noting but not specifically endorsing or rejecting an argument made by the Information Policy Institute).

## 5. In Adopting a Single-License Limit, the Commission Should Require All Licensees to Comply Within a Reasonable Period of Time

In adopting a single-license limit, the Commission should require all licensees that currently hold two or three licenses for overlapping television stations in the same DMA to come into compliance with the new rule within a reasonable time period, such as one year. Requiring divestiture would have significant public benefits. It would provide opportunities for new entry, including entry of women and minorities. It would promote all four public interest goals -- diversity, competition, localism, and spectrum efficiency. There would be little or no detriment to licensees that currently have duopolies (or in some cases, pursuant to temporary waiver, triopolies). They should be able to sell their licenses for their fair market value, as a market exists for stations, and station prices have been high.<sup>297</sup> Any programming that they want to put on a second channel can be placed instead on a multicast program stream, and retransmitted on cable and DBS through market negotiation.

For the reasons above, Commenters also question whether there continues to be a need for waivers of the single-limit rules for failing or failed stations. It would offend all four of the Commission's policy goals to permit a licensee to control 12 MHz of prime local spectrum after the digital transition. If a station is failing, other local broadcasters may be able to purchase the rights to the programming and air it on one of their multicast streams. The spectrum can then be returned and made available for other uses.<sup>298</sup>

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<sup>297</sup> Allison Romano, *Station Market Still Sizzling*.

<sup>298</sup> According to leading communications theorists and technologists, based on current technology, the spectrum can and should be available to all Americans without licensing any speakers. See, e.g., Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J. L. & TECH. 25, 82-83 (2002); Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 298 (1998); Lawrence Lessig, *The Future of Ideas* (2002).

**B. The Commission Should Retain the Current Newspaper-Broadcast Cross-Ownership Rule with Modifications**

The *FNPRM* seeks comment on how to approach limits on local newspaper-broadcast cross-ownership (“NBCO”), but makes no proposals and suggests no options.<sup>299</sup> Commenters urge the Commission to preserve the current rule prohibiting the common ownership of a daily newspaper and either a television station or radio station serving the same area. The rule should be modified, however, to close a loophole created by the extension of license terms from three to eight years. Finally, even though Commenters demonstrate that retaining the current rule would best serve the public interest, if the Commission determines to relax the rule, it should do so by modifying the waiver criteria.

**1. The Commission Should Preserve the Current Rule Prohibiting the Common Ownership of a Daily Newspaper and Either a Television Station or Radio Station Serving the Same Area**

The NBCO rule has promoted the public interest for over thirty years. Adopted in 1975, and unanimously endorsed by the Supreme Court, the rule prohibits the creation of new local newspaper-broadcast combinations, with limited exceptions.<sup>300</sup> In 1969, when the Commission began the proceeding leading to the adoption of the NBCO rule, 94 television stations were

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<sup>299</sup> *FNPRM* at ¶ 32.

<sup>300</sup> *Second Report and Order, Rules Relating to Multiple Ownership of Standard, FM, and Television Stations*, 50 FCC 2d 1046, 1046 (“1975 Cross-Ownership Rule”), *aff’d FCC v. Nat’l Citizens Committee for Broadcasting*, 436 U.S. 775, 815 (1978). The rule also required divestiture for some existing combinations and prohibited the transfer of existing combinations. 50 FCC 2d 1046. Long before 1975, indeed as far back as 1938, the Commission employed a preference for non-newspaper-owners over newspaper-owners in comparative hearings, which “better serve[d] the public interest,” by affording “a degree of competition” in the “dissemination of news and information.” *Stevens and Stevens*, 5 F.C.C. 177, 182 (1938), *cited in* Henry B. Weaver, Jr. & Thomas M. Cooley, II, *Competition in the Broadcasting of Ideas and Entertainment—Shall Radio Take Over Television?*, 101 U. PA. L. REV. 721, 726 (1953).

affiliated with local newspapers; in 2001, only 23 were affiliated.<sup>301</sup> Thus, the NBCO rule resulted in over 70 new local media voices.

While the 1996 Act directed the FCC to relax certain other local ownership rules, Congress did *not* direct the Commission to loosen the NBCO rule. In the *1998 Biennial Review*, the Commission reviewed the rule as required by Section 202(h) and determined that the blanket NBCO prohibition continued to serve the public interest but issued a notice to determine whether the prohibition could be relaxed in particular situations.<sup>302</sup> In the *2002 Biennial Review Order*, however, the Commission found that a blanket prohibition on cross-ownership was no longer necessary in the public interest, but that some limits were necessary.<sup>303</sup> It adopted cross-media limits based on a methodological tool it called the Diversity Index.<sup>304</sup>

Based on the then-available evidence, the *Prometheus* Court upheld the Commission's decision not to retain a blanket prohibition on newspaper broadcast cross-ownership.<sup>305</sup> The Court also held that retaining some cross-ownership limit was both necessary in the public interest and constitutional.<sup>306</sup> It further found that the Commission had failed to provide reasoned analysis to support the Cross Media Limit it adopted because the Commission's Diversity Index unreasonably overestimated the Internet's importance for local diversity and

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<sup>301</sup> See *UCC Comment*, Dkt. No. 01-235, at attachment 4 (2001); *UCC Comment*, Dkt. No. 96-197, at attachment 4 (2001). See also Michael Yan, *Newspaper/Television Cross-Ownership and Local News and Public Affairs Programming on Television Stations: An Empirical Analysis* (Oct. 17, 2006) at table 1 (listing twenty-seven current combinations) ("Newspaper/Television Cross-Ownership").

<sup>302</sup> It noted that the record was unclear on several matters, including the level or type of potential efficiencies produced by the mergers and whether joint ventures would result in the same efficiencies as mergers. *1998 Biennial Review Order*, 15 FCC Rcd at 11108.

<sup>303</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13767.

<sup>304</sup> *Id.* at 13775

<sup>305</sup> *Prometheus*, 373 F.3d at 398.

<sup>306</sup> *Id.* at 400-02.

unreasonably assumed outlets with far disparate market share had an equal impact on diversity.<sup>307</sup>

**(a) A Complete Prohibition is Again  
Necessary in Light of New Technological  
and Business Developments**

In the 2002 *Biennial Review Order*, the Commission relaxed the cross-ownership prohibition largely because it believed that, even though cross-ownership reduces diversity, consolidating newspaper and broadcast resources could lead to efficiencies that could lead to improved local news programming.<sup>308</sup> The same unsupported assumptions underlie the Commission's relaxation of cross-ownership rules as the local television, see above in Part II(A)(3)(a). Indeed, the possibility of efficiencies resulting from cross-ownership is even less, because broadcasters and newspapers are in different industries and do not share many of the same fixed costs.<sup>309</sup>

Even if these assumptions were correct, broadcasters and newspapers have new technological options for expanding local news and using their assets more efficiently. Broadcasters who wish to distribute their news through the printed word and pictures need not purchase newspapers, but can provide text and pictures on their websites (or other sites), email alerts, and interactive reader blogs, which they can cross-promote during their newscasts. Broadcasters may also distribute news programming on platforms including mobile platforms

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<sup>307</sup> *Id.* at 402-411.

<sup>308</sup> 2002 *Biennial Review Order*, 18 FCC Rcd at 13760-67. The Commission found the blanket prohibition unnecessary to promote competition because television, radio, and newspaper do not compete. It further found the prohibition unnecessary because an abundance of news sources exist and further found it detrimental to promoting localism because cross-ownership could lead to more local news programming. *Id.*

<sup>309</sup> See Carrie Anna Criado and Camille Kraeplin, *The State of Convergence Journalism: United States Media and University Study*, ASS'N. FOR EDUC. IN JOURNALISM AND MASS COMM. CONF. PAPERS (AEJMC, San Francisco, CA), Sep. 28, 2003. ("State of Converged Journalism")

such as iTunes, webcasting, and wireless phones, by text or video, or on their secondary digital channels. Indeed, broadcasters use *all* these media to distribute news.<sup>310</sup> Likewise, newspapers wishing to distribute news in audio or video formats can also do so through Internet streams or downloads, podcasts, cell phones, and other devices outside of broadcast. For example, many papers use their websites to broadcast news video: the *Washington Post* has been posting videos on its website since 1999, the *Wall Street Journal* “is increasingly adding video to its Web site,” and one of Gannett’s papers has a “daily video newscast.”<sup>311</sup> As a result of these new technologies, broadcasters and newspapers can achieve any efficiencies similar to those claimed from cross-ownership merely by investing in new digital and network technologies. And, unlike mergers between the two main local rivals in news programming, expanding into new technologies does not harm the public interest by reducing the numbers of significant local voices.

In addition to technological options, broadcasters and newspapers have taken advantage of new business options that render cross-ownership superfluous. Broadcasters and newspapers may realize any potential efficiencies through convergence partnerships instead of outright mergers. “Convergence partnerships” include a varied range of flexible partnerships involving

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<sup>310</sup> See, e.g., Micro Persuasion, *ABC News Content Now on Sale in iTunes*, [http://www.micropersuasion.com/2006/08/abc\\_news\\_conten.html](http://www.micropersuasion.com/2006/08/abc_news_conten.html); News.com, *CBS to Webcast Couric News Program*, [http://www.news.com.com/CBS+to+Webcast+Couric+news+program/2100-1038\\_3-6106744.html](http://www.news.com.com/CBS+to+Webcast+Couric+news+program/2100-1038_3-6106744.html); Online Media Daily, *Verizon V Cast Adds ABC News Clips*, <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s-37824&Nid-17401&p=314851>; *Wiley Rein Ex Parte*.

<sup>311</sup> Brian Steinberg, *Ready for Their Close-Up; From Country Living to Time, Magazines See Web Video As Way to Tap TV Ad Dollars*, THE WALL STREET JOURNAL, Sep. 5, 2006, at A15; see also James Surowiecki, *Printing Money*, THE NEW YORKER, Apr. 3, 2006, at 33 (noting the new media environment presents a “sizable opportunity for newspapers, a chance to reinvigorate their product and, eventually, improve the economics of their business.”).

two media platforms sharing content and/or staff.<sup>312</sup> Such partnerships are increasingly common among U.S. media companies.<sup>313</sup> The *Washington Post*, for example, recently began broadcasting its own news on radio station WTWP.<sup>314</sup> A recent study of 42 television stations and 64 newspapers found that four out of ten television stations had a newspaper partner, and 94.74% of those included a local newspaper *not* owned by the television station's parent company.<sup>315</sup> These partnerships, which are flexible but fall short of ownership, should confer all or most of cross-ownership's hypothetical efficiencies while retaining two independent voices. As a result, any benefits of cross-ownership are possible without accepting the harms of cross-ownership.

**(b) Evidence Suggests that the Public Has  
Not Benefited from Cross-Ownership**

While new technologies and business models have rendered cross-ownership superfluous, evidence also suggests that — contrary to the Commission's prediction in 2003 — cross-ownerships do not lead to benefits in news and public affairs programming. Because of the limited number of existing cross-ownerships, there are not many studies of the impact of their effect. A recent study by Michael Yan, however, demonstrates that the supposed benefits in local news and public affairs programming are nonexistent. Using a multivariate analysis of

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<sup>312</sup> Criado and Kraeplin, *The State of Convergence Journalism* at 9.

<sup>313</sup> See, e.g., Media Center U.S. Convergence Tracker, <http://www.mediacenter.org/convergencetracker> (listing convergence partnerships in each state); Larry Dailey et al., *Most TV/Newspapers Partner at Cross Promotion Stage*, 26 NEWSPAPER RESEARCH J. 36 (Fall 2005).

<sup>314</sup> Paul Farhi, *The Sound of A Newspaper: Post Radio Hits the Air*, WASHINGTON POST, Mar. 31, 2006, at 31.

<sup>315</sup> Carrie and Kraeplin, *The State of Convergence Journalism*, at 33-34. For newspapers, seven out of ten of the newspapers surveyed had paired with a television station; in 65.31% of those relationships, the station in the partnership was not owned by the newspaper's parent company. *Id.*

two-week random sample of television programming of 226 commercial television stations and 27 cross-owned stations, Yan analyzed local news programming and public affairs programming on cross-owned and non-cross owned stations.<sup>316</sup> The study found that cross-owned stations did *not* broadcast more local news than other stations that provided news.<sup>317</sup> In addition, the analysis demonstrated that cross-ownership had no substantial impact on either the incidence or the quantity of local public affairs programming on commercial television stations.<sup>318</sup>

Anecdotal experience also indicates that cross-ownership does not create the efficiencies long prophesied by broadcasters and newspapers. The attached report by Common Cause, *A Tale of Five Cities: Why the Newspaper-Broadcast Cross-Ownership Ban Should Be Preserved*, provides concrete examples of how cross-ownership has harmed the public.<sup>319</sup> These harms include less aggressive reporting, failing to cover protests by minorities, confusing promotion with substantive journalism, and ignoring stories that involve the cross-owned media.

The experience of the Tribune Company also illustrates the problems with cross-owning broadcast and newspaper outlets in major markets. Tribune's management had touted supposed "synergistic growth opportunities of cross-ownership" to shareholders and until June 2006 still predicted that cross-ownership would lead to growth far exceeding Wall Street estimates.<sup>320</sup> But,

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<sup>316</sup> Yan, *Newspaper/Television Cross-Ownership* at 2. Yan controlled for other ownership characteristics and market conditions.

<sup>317</sup> *Id.* at 11.

<sup>318</sup> *Id.* The data did suggest that cross-owned stations were more likely to be in "local news business." *Id.* As Professor Yan concludes, however, comparing stations that are involved in the local news business is more significant than comparing all cross-owned stations to all non-cross-owned stations. *Id.* Cross owned stations with news do not provide more news than non-cross-owned stations without news.

<sup>319</sup> See Appendix E.

<sup>320</sup> *Letter from Chandler Trusts, Shareholder, to Tribune Co.* (June 13, 2006) (on file with the SEC) ("Chandler Trusts Letter").

according to a letter from Tribune’s second largest shareholder,<sup>321</sup> the Chandler Trusts, cross-ownership does not produce real efficiencies, let alone promote localism. Tribune limited “local interactive [digital] growth initiatives at the newspapers in favor of a ‘one size fits all’ [national] corporate approach.”<sup>322</sup> In light of its failed strategy, the Trusts advocate that management “must find a way to separate the newspaper business from television broadcasting.”<sup>323</sup>

Others have also recognized that cross-ownership is a failing strategy. Tribune’s stock price “declined over 38% from January 2003 to June 2006,” which is far worse than comparable newspaper and broadcasting stocks.<sup>324</sup> Cross-ownership and its attendant cost-cutting in Los Angeles have even undermined the *LA Times*’ ability to serve its community. In fact, the *LA Times* publisher was recently fired for refusing to undertake additional cost-cutting measures demanded by the corporate parent.<sup>325</sup> Moreover, cross-ownership is clearly unnecessary to the paper’s survival, as several prominent Los Angeles residents without local broadcast licenses have sought to purchase the *LA Times*.<sup>326</sup> Based on Tribune’s experience, as well as the study cited above, the Commission cannot continue to reasonably find that newspaper-broadcast cross-ownership leads to efficiencies or benefits the public.

**(c) Cross-Ownership is Not Necessary to  
“Save” the Newspaper Industry**

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<sup>321</sup> *Id.* at 2 (“Not only did synergistic growth from cross-ownership not appear, but investments in interactive growth suffered.”).

<sup>322</sup> *Id.*

<sup>323</sup> Devin Leonard, *Showdown in Chicago: Why Do the Chandlers of L.A. Want to Break up the Tribune Co.?*, FORTUNE 49 (July 10, 2006).

<sup>324</sup> *Chandler Trusts Letter* at 3.

<sup>325</sup> Katharine Q. Seelye, *Publisher is Fired at Los Angeles Times*, N.Y. TIMES, Oct. 5, 2006, at C1.

<sup>326</sup> Sara Ellison, *Tribune Faces Pressure to Sell L.A. Times*, WALL STREET J., Sep. 18, 2006, at A1.

One of the arguments frequently made to support relaxing the blanket NBCO restriction is that newspapers, or broadcasters, will not survive without local cross-ownership. Rumors of a crumbling newspaper industry have been greatly exaggerated, and evidence does not suggest newspapers need to cross-own broadcast stations to survive.<sup>327</sup> Because of strong advertising expenditures, newspapers have continued to garner average operating profits of approximately 20%, which is more than *double* the average profits of Fortune 500 companies and higher than “the average pre-tax operating margin . . . for the high-flying pharmaceutical and oil industries.”<sup>328</sup> Further, while print circulation has dropped in recent years,<sup>329</sup> online newspaper readership has increased by 15.8% in 2005, and online advertising revenues at public newspaper companies grew 30%-60% in 2005.<sup>330</sup>

For those newspapers that *are* financially faltering, their plight might be better dealt with by ridding themselves of cross-owned TV stations – not by buying more. The Tribune experience recounted above suggests that shareholders of newspaper companies are calling for divestiture of broadcast properties to improve financial performance. The New York Times Co. has announced it will sell its television stations to focus on the newspaper industry and emerging technologies and because selling its broadcast group should increase the value of its existing

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<sup>327</sup> Ensuring the vitality of the newspaper industry is not the Commission’s job. The Commission regulates broadcasting, not the newspaper industry. It is charged by Congress to regulate for the benefit of the public, not the benefit of any industry.

<sup>328</sup> Project for Excellence in Journalism, *State of the News Media 2006: An Annual Report on American Journalism*, available at <http://stateofthemediamedia.org/2006>. These operating profits derive from strong advertising expenditures in print newspapers, which increased by 3.8% through the first nine months of 2004 to 33 billion dollars, and increased again from 1% to 2% in 2005. They combined with strong growth in online and niche publications to push total revenues up from 2% to 4%.

<sup>329</sup> Julia Angwin and Joseph T. Hallinan, *Newspaper Circulation Continues Decline, Forcing Tough Decisions*, WALL ST. J., May 2, 2005, at A1.

<sup>330</sup> Newspaper Association of America, *The Source: Newspapers by the Numbers*, available at <http://222.naa.org/thesource>.

holdings.<sup>331</sup> Indeed, analysts suggest it is not the lack of cross-ownership that has hurt faltering newspaper companies, but “bureaucratic inertia, hierarchical organizational structure and a legacy mentality that have paralyzed many news organizations from developing a meaningful strategy in this dynamic informational age.”<sup>332</sup>

Like the newspaper industry, television stations are succeeding financially and do not need blanket consolidation with local newspapers to survive. Although most industries strive for a profit of 11%, television stations generally see profits close to 20%.<sup>333</sup> Television station sales increased from \$1.2 billion in 2004 to \$3.2 billion in 2005, and stations sold at an average of 16.5 times cash flow in 2005, significantly more than in 2004.<sup>334</sup>

**(d) Retaining the Cross-Ownership Ban  
Promotes the Commission’s Policy Goals**

In 1975, the Commission adopted the cross-ownership ban based on the “twin goals of promoting diversity of viewpoints and economic competition,” noting, however, that the “diversity goal is paramount.”<sup>335</sup> The Commission explained that the ban promoted the public’s First Amendment right to wide dissemination of information from diverse and antagonistic sources.<sup>336</sup> The Commission concluded, and the Supreme Court agreed, that “it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergence of their

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<sup>331</sup> Katharine Q. Seelye, *Times Company Puts Its Nine Television Stations Up for Sale*, N.Y. TIMES, Sept. 13, 2006, at C2.

<sup>332</sup> Shayne Bowman & Chris Willis, *The Future is Here, But do News Media Companies See It?*, NEIMAN REP., Winter 2005, at 6.

<sup>333</sup> Mathew P. McAllister, *Television News Plugola and the Last Episode of Seinfeld*, 52 J. COMM., 383, 387 (June, 2002).

<sup>334</sup> Allison Romano, *Station Market Still Sizzling*, BROADCASTING & CABLE (Apr. 3, 2006).

<sup>335</sup> *1975 Cross-Ownership Rule*, 50 FCC 2d at 1074.

<sup>336</sup> *Id.* at 1048-51.

viewpoints cannot be expected to be the same as if they were antagonistically run.”<sup>337</sup> In 2003, however, the Commission found little threat to diversity in relaxing the blanket prohibition because of a “plethora of voices” in most local markets.<sup>338</sup>

A cross-ownership prohibition remains necessary to ensure diversity. As discussed above, newspapers and broadcasters continue to dominate the provision of local news and political information.<sup>339</sup> As a result, cross-ownership would permit one entity to have an inordinate effect on local political opinion and threatens the diversity of viewpoints available to citizens. In addition, a blanket prohibition would increase the diversity of local news on the Internet and on emerging platforms, because independent local broadcast and newspaper outlets would provide independent news over those platforms. Retaining the cross-ownership prohibition also helps ensure that more TV stations are available for purchase by new entrants, such as minorities and women.

Retaining the cross-ownership limit also promotes competition. While newspapers and broadcast stations may not compete in the market for local advertising, they do compete in the market for providing local news.<sup>340</sup> While the number of distribution platforms for local news has expanded, the number of entities with local news gathering capabilities remains small.<sup>341</sup>

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<sup>337</sup> *Id.*; *Nat’l. Citizens Committee for Broadcasting*, 436 U.S. at 775.

<sup>338</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13,766. The Commission confirmed the connection between outlet and viewpoint diversity, *id.* at 13630, but found insufficient evidence of a monolithic and “uniform bias” among co-owned properties to justify a complete ban for diversity purposes, *id.* at 13764. The later conclusion misses the key point that regardless of whether a cross-owner consistently displays a uniform bias, the owner has the ability to slant or even suppress stories when it is in the owner’s interest to do so.

<sup>339</sup> *See supra* Part II at 40-44.

<sup>340</sup> *Cf.* Howard Shelansky, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 404 (2006).

<sup>341</sup> Indeed, that number perhaps has decreased as large absentee owners replace local news with centralized news or cut news from stations altogether. PEJ, *State of the News Media 2006*.

Whether or not a broadcast station currently provides local news, that station would remain an important *potential* competitor in news provision for two independent reasons. First, unlike most Internet sites and cable networks, the audience reach of local newspapers and local broadcast stations is generally local, and newspapers and broadcasters have established dealings with local advertisers. Second, unlike other theoretical competitors, broadcast stations and newspapers have the resources (and supporting audience-habits) to engage in local newsgathering. Very few Internet and cable networks have entered the market of reporting on local elections, corruption, local educational or transportation issues, suggesting lack of incentive and/or resources.

Moreover, permitting cross-ownership, even temporarily, could permanently undermine competition in local news-gathering. According to data submitted by broadcasters in 1998, local news may have high entry and sunk costs, requiring perhaps 16 years to break even, while existing news operations are highly profitable, averaging up to 40% profit margins.<sup>342</sup> As a result, if consolidated entities close down an existing news operation, even if the entity eventually divests itself of broadcast or newspaper assets, the competing news operation may never return.

The cross-ownership ban also promotes localism. As discussed above, neither theory nor empirical evidence shows that merging newspapers and broadcast stations results in better news products benefiting the public. Even if there were benefits of efficiencies that could lead to better news, broadcasters and newspaper owners can exploit those efficiencies through emerging and established digital technologies.

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<sup>342</sup> See *Review of the Commission's Regulations Governing TV Broadcasting*, 14 FCC Rcd 12903 (1999).

## 2. The Commission Should Close the Loophole Created by the Extension of License Terms

The NBCO rule was intended to prohibit the creation of new cross-ownership. Because the FCC must approve the transfer or renewal of broadcast licenses, but has no authority over newspaper acquisitions, the rule provides that where an existing licensee subsequently purchases a newspaper, it has up to one year or the end of the license term, whichever is later, to come into compliance with the rule so as to avoid a fire sale.<sup>343</sup> At the time this provision was adopted, license terms were only three years, so the amount of time a cross ownership could exist was relatively limited. The 1996 Act, however, extended license terms to eight years.<sup>344</sup> Thus, a broadcast licensee can acquire a newspaper in the same community and operate both for a substantial period of time.

In fact, in at least four communities, Media General has done just that—acquired a television station and then acquired a daily newspaper.<sup>345</sup> Each of these cities is in a relatively small market. In each, Media General has been able to acquire a top-rated television station and the only daily newspaper, thus significantly reducing the diversity of news sources for residents of these communities. Instead of coming into compliance by the date of license renewal, Media General has asked the FCC to permanently waive the rule and renew their television station licenses. Community groups have opposed Media General's waiver requests. Some of these applications have been pending for nearly two years, thus allowing Media General to hold the prohibited cross ownership well beyond the maximum time intended.

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<sup>343</sup> *1975 Report and Order*, 50 FCC 2d at 1076, n.25.

<sup>344</sup> Telecommunications Act of 1996 § 203.

<sup>345</sup> The four markets are Florence, S.C., Panama City, FL., Columbus, GA., and Bristol, TN.

The Tribune Company has engaged in the same practice in Hartford and Los Angeles. In Hartford, the Tribune not only owns the dominant *Hartford Courant*, but two television stations.<sup>346</sup> In Los Angeles, where Tribune is the licensee of KTLA (Channel 5), Tribune acquired the *LA Times* in March 2000. Since California television stations did not come up for renewal until 2006, Tribune has been able to operate both for many years. And instead of coming into compliance with the cross-ownership rule, Tribune included a request for a permanent waiver with its renewal application.<sup>347</sup>

The Commission should close this loophole by revising its rules to require compliance within a reasonable period of time, such as one year. The Commission should also act promptly to enforce any temporary waivers.<sup>348</sup>

### **3. If Necessary, Relaxation of the Prohibition Should be Accomplished Through Modification of the Waiver Policy**

For the reasons discussed above, the Commission should find that the current cross-ownership rule, modified to eliminate the loophole, is necessary in the public interest. Nonetheless, should the Commission determine that the public interest would be served by relaxing the rule, the Commission should act cautiously and monitor the effects of its decision.

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<sup>346</sup> The FCC initially conditioned Tribune's acquisition of the second television station pursuant to a failing station waiver on coming into compliance within sixteen months. Tribune did not comply, and instead of enforcing the condition, the Commission recently extended the waiver of the cross-ownership rule until 2006. *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582, 8583-8590 (2005).

<sup>347</sup> Gannett has also sought a waiver to continue its cross-ownership in Phoenix, AZ.

<sup>348</sup> *Counterpoint Communications, Inc.*, 20 FCC Rcd at 8590 ("We also do not intend to continue the practice of allowing waivers to remain in force through inaction for long periods of time. Rather, we expect to address compliance with the terms of waivers as their expiration dates approach.").

Any relaxation is best accomplished by modifying the existing waiver policy.<sup>349</sup> The Commission could develop criteria for when a waiver would presumptively serve the public interest, or presumptively contravene the public interest. Proposed cross-ownerships that did not fit either category could continue to be considered on a case-by-case basis.

For such a waiver approach to work, it is especially important that the listeners, viewers and readers in the affected community learn about the proposed cross-ownership and have an opportunity to bring relevant information to the Commission and to make their views known. The Commission's decision-making would benefit from receiving a more complete record on the effects of a proposed merger, as opposed to merely hearing from the companies involved. Thus, Commenters suggest that the Commission enhance its requirements for public notice, along the line that have been proposed in comments in MB Docket No. 05-6.<sup>350</sup>

To illustrate how the modified waiver policy might work, Commenters suggest some examples of the types of cross-ownership that could generally be allowed, and those that should never be permitted. For example, in the top five markets the Commission could allow the acquisition by a daily newspaper of a television station that had not aired any regularly scheduled local news programming for several years, and where the new owner agreed as a condition of the merger to air a significant amount of local news and local public affairs programming. Such a combination would be presumptively in the public interest because it would increase the amount of local news. Another example might be the acquisition by a broadcast station of a non-

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<sup>349</sup> Under the current waiver policy, a waiver may be obtained by showing that: (1) the licensee is unable to sell the station; (2) the licensee could only sell the station at an artificially depressed price; (3) the locality cannot support separate ownership of a newspaper and station; or (4) the purposes of the rule would be disserved by divestiture. *1975 Cross-Ownership Rule*, 50 FCC 2d at 1048.

<sup>350</sup> See *Comments of the Office of Communication for the United Church of Christ, Revision of the Public Notice Requirements of Section 73.3580*, MB Dkt. No. 05-6 (Aug. 1, 2005).

dominant daily newspaper in the area. Here, the acquisition would presumptively serve the public interest because it would strengthen a small newspaper relative to its dominant competition by tying it to a broadcast station, while the station would receive certain local news-gathering resources. Examples of cross-ownerships that should never be permitted would include cross-ownerships between a top-four ranked television station and a daily newspaper, a dominant daily newspaper and a television station, or between a television duopoly and a daily newspaper. In such circumstances, it is difficult to imagine that any benefits to the merger would ever outweigh the harm to diversity, competition and localism.

### **C. The Commission Should Revise the Radio-Television Cross-Ownership Rule**

In the *FNPRM*, the Commission asks whether the radio/television cross-ownership rule remains necessary in the public interest.<sup>351</sup> Commenters believe that this rule not only remains necessary, but should be considerably tightened.

From 1970 until 1989, new radio/television combinations were generally prohibited.<sup>352</sup> In 1989, the Commission adopted a relaxed waiver policy in top markets relying on the benefits of efficiency and speculating without evidence that “a broadcaster ... may, because of economics of scale and cost savings ..., produce or purchase more informational programming than would two separate [TV and radio] stations.”<sup>353</sup> In the 1996 Act, Congress directed the Commission to extend its waiver policy to the largest 50 markets.<sup>354</sup> In 1999, the Commission adopted a complicated rule permitting an entity to own up to two television stations (if permitted under the television duopoly rule) and up to six radio stations (if permitted under the radio rule, or a

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<sup>351</sup> *FNPRM* at ¶32.

<sup>352</sup> *1989 Radio/TV Relaxation*, 4 FCC Rcd 1741 at ¶21.

<sup>353</sup> *Id.*

<sup>354</sup> Telecommunications Act of 1996, § 202(d).

seventh station instead of a permitted second television station), subject to a requirement that 20 independent “voices” remained.<sup>355</sup> In counting the number of independent voices, the Commission included independently owned and operated full power TV stations, independently owned and operated radio stations, daily newspapers with more than 5% circulation in the DMA, and cable service (counted as a single voice).<sup>356</sup> In 2003, the Commission replaced the 1999 radio/television rule with the Cross Media Limit that permits radio-television cross-ownership in all markets except those with three or fewer television stations.<sup>357</sup>

In *Prometheus*, the Third Circuit found that the Commission’s reliance on the Diversity Index to develop the Cross Media Limit was arbitrary and capricious. Among other things, the Commission failed to justify its choice of and weight given to specific media outlets.<sup>358</sup> While it excluded cable due to “serious doubts as to the extent that cable provided independent local news,”<sup>359</sup> it should have discounted the Internet for the same reason.<sup>360</sup> The Commission also failed to justify its assumption of equal market shares within the same media type, when it could have used actual market share data to measure the influence of each voice.<sup>361</sup>

Now that the Cross Media Limit has been invalidated, the Commission cannot simply revert back to the 1999 radio-television rule. Although the 1999 rule was never challenged, under the reasoning of *Prometheus*, it is arbitrary and capricious for the same reason as the

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<sup>355</sup> *Local TV Order*, 14 FCC Rcd at 12947. An entity was permitted to own up to two television stations and up to four radio stations if ten independent voices remained. *Id.* A combination of one television station and one radio station was permitted regardless of the number of voices remaining. *Id.*

<sup>356</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13801.

<sup>357</sup> *Id.* at 12951-52.

<sup>358</sup> *Prometheus*, 373 F.3d at 405-08.

<sup>359</sup> *Id.* at 405.

<sup>360</sup> *Id.* at 406-08. As the Third Circuit indicated, “most sources of local news on the Internet are the websites for newspapers and broadcast television stations.” *Id.*

<sup>361</sup> *Id.* at 408-09.

Diversity Index. First, the 1999 rule's "independent voices" test included cable as a source of local news,<sup>362</sup> which the Third Circuit agreed should not count as an independent source of local news. Second, the 1999 rule ignored market share data in its calculations of what counted as an "independent voice," and was even more arbitrary because it assumed each voice, regardless of media type, was of equal importance.<sup>363</sup>

Moreover, a prohibition on radio-television cross-ownership would better promote the Commission's goals of localism, diversity, and efficient use of the spectrum. The Commission's study on localism, which has only recently come to light, found that if a local television owner also owned a radio station within the DMA, the television station aired almost six minutes less local news.<sup>364</sup> Thus, prohibiting cross-ownership should result in increased local news. Prohibiting radio-television cross-ownership would also promote program diversity by diversifying editorial control and by creating more opportunities for women and minorities to own stations. Finally, a complete ban would foster spectrum efficiency, innovation and competition. The digital transition enables television broadcasters to program audio streams, allowing television broadcasters to compete with radio without purchasing a radio station.

#### **D. The Commission Should Lower the Local Radio Limits**

The *FNPRM* asks whether the numerical limits for local radio should be revised but does not make any specific proposals.<sup>365</sup> Since the local ownership limits were raised in 1996, the radio industry has become highly concentrated. In *Prometheus*, the court concluded that the

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<sup>362</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd at 12953 (including "cable systems because we believe that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets").

<sup>363</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13767, n.847.

<sup>364</sup> *FCC Localism Study* at 13.

<sup>365</sup> *FNPRM* at ¶22.

existing radio limits permitted this excessive concentration. Because the Commission must ensure competition, it should tighten the limits. In addition, tightening the limits will promote the Commission's diversity and localism goals, as lower limits will promote local news diversity and entry by minorities and women. In lowering the limits, the Commission should adopt implied limits per market, based on actual market share, and a formula ensuring each market is not highly concentrated. It should also require divestiture of stations held in excess of those per-market limits.<sup>366</sup> The Commission should also retain the AM/FM subcaps.

### **1. The Third Circuit Found that the Existing Local Radio Limits Resulted in Excessive Concentration**

From 1938 to 1992, FCC rules prohibited common ownership of more than one radio station in any service in any one market.<sup>367</sup> In 1992, the Commission relaxed the radio ownership rule so that an entity could own two to four stations, depending on the market.<sup>368</sup> In the 1996 Telecommunications Act, Congress directed the FCC to further relax the local radio ownership limits by adopting a tiered system of numerical limits depending upon the number of commercial radio stations in the market.<sup>369</sup> In addition, Congress required the Commission to

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<sup>366</sup> Commenters disagree with the Commission's decision in the *2002 Biennial Review Order* to count noncommercial radio stations in determining market size. Because Commenters propose using a formula to calculate an implied limit based on HHI and not directly on the number of stations per market, as discussed below at Part V(D), this comment does not address the inclusion of noncommercial stations.

<sup>367</sup> See, e.g., *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2755 (1992) ("1992 Radio Order") (citing *Genesee Radio Corp.*, 5 F.C.C. 183 (1938)).

<sup>368</sup> *1992 Radio Order*, 7 FCC Rcd at 2760-12767, 2759.

<sup>369</sup> Telecommunications Act of 1996 § 202(b)(1); see also *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12369. Under this tiered system, one entity could own up to eight radio station in a market.

ensure, periodically, that the rules continued to serve the public interest. In 1996, the Internet was still in its infancy and digital radio was unheard of.

In the 2002 *Biennial Review Order*, the Commission modified the local radio rules but did not alter the numeric limits *per se*. The *Prometheus* court upheld the FCC's decision to retain some numerical limits because "[w]ithout numerical limits, radio markets risk becoming 'locked-up' in the hands of a few owners," and concentration coupled with the limited number of licenses would create high barriers to new entrants.<sup>370</sup> The court noted that the record showed how consolidation has increased station prices, limited opportunities for new entrants, reduced the amount of locally produced radio content, and resulted in the loss of local news production.<sup>371</sup>

At the same time, however, the court found that the Commission had failed to support its decision to retain the existing numerical limits for two reasons.<sup>372</sup> First, the Commission failed to justify its choice of "five equal-sized competitors" as the right benchmark.<sup>373</sup> Second, "evidence shows that the existing numerical limits do not ensure five equal-sized competitors. According to the record, most markets are dominated by one or two large station owners."<sup>374</sup> The court was particularly critical of the Commission's failure to use actual market share data in measuring competition, noting that "[i]t defies logic to assume that a combination of top-ranked

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<sup>370</sup> *Prometheus*, 373 F.3d at 431.

<sup>371</sup> *Id.* at 432 (citing *UCC Comments* at 18, that "increased consolidation has increased station prices, which limits opportunities for new market entrants and as a result limits diversity in station ownership and output," and the *Future of Music Coalition Comments* at 13-4, that "Consolidation has also reduced the amount of locally produced radio content, as larger group-owners often broadcast remotely from national offices instead of having local employees produce programming").

<sup>372</sup> *Id.* at 432-34.

<sup>373</sup> *Id.* at 432-33.

<sup>374</sup> *Id.* at 433 (footnote omitted).

stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations.”<sup>375</sup> The court also found that the Commission failed to justify retaining the AM subcap.<sup>376</sup>

## **2. Concentration in Radio Markets Has Remained Extremely High Since the 2002 Biennial Review**

The current radio limits have allowed most radio markets to become dominated by one or two large station owners. Analysis of revenue share data from 2004 and audience share data from spring 2005 by Future of Music Coalition (FMC) found high levels of concentration in almost all of the 297 markets rated by Arbitron.<sup>377</sup> Arbitron does not cover another 5,700 stations based in smaller markets where the Commission’s rules permit even greater concentration.

Using revenue data to calculate HHI, FMC found that the HHI in 281 markets exceeded 1,800. Indeed, the *average* market HHI was almost double, at 3,545, and the median was 3,234, meaning half of all markets exceed that level of extremely high concentration. Using audience share to compute HHI, FMC found most markets were similarly highly concentrated: 232 had HHIs over 1800; the average HHI was 2,606 and the median HHI was 2501.

FMC also found high levels of concentration using four-firm and two-firm concentration ratios. The combined revenue share of the four top firms was, on average, 93% and the median was 95%. The combined share of the top two firms was, on average, 73.9% and the median was

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 434.

<sup>377</sup> Revenue data was not available for two Arbitron-rated markets, Bend, OR and the Florida Keys. Nor was audience share data available for Rocky Mountain-Wilson, NC and the Florida Keys.

73.6%. Audience share was also highly concentrated. The four firm average was 84.75% and the median was 86%. The two firm average was 63% and the median was 62.9%.

**3. The Commission Should Lower the Maximum Number of Stations that May be Commonly Owned in the Same Market**

The above analysis demonstrates that the current limits, which do not take actual market share into account, are failing to prevent excessive concentration. The Commission should adopt limits that at the very least ensure that local markets are not “highly concentrated” under the DOJ/FTC’s guidelines, that is, that they do not have HHIs above 1800.

Commenters understand that FMC is devising a mathematical formula that, using actual market share, will set a numerical limit in each market. While permitting concentration up to 1800 HHI in each market, this limit will aim to keep each market below this benchmark. Commenters urge the Commission to adopt FMC’s proposed method, or a similar method.

**(a) Lowering the Local Radio Limits Will Promote the Commission’s Goals of Diversity and Localism**

In relaxing the radio rules in 1992, the Commission assumed that concentration would spur efficiencies in fixed and administrative costs possibly resulting in “higher investment in news.”<sup>378</sup> However, many listeners have complained that consolidation has resulted in valuable community programming and political discussion being replaced by nationally produced programs.<sup>379</sup> While concentration may result in efficiencies, it also reduces incentives to respond to public demands for local news.

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<sup>378</sup> *1992 Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2767.

<sup>379</sup> See Common Cause, *Citizens Speak*, at Appendix D.

Because they face minimal competition in most markets, radio broadcasters have been able to cut costs by downsizing radio news staff,<sup>380</sup> producing news at the lowest possible cost,<sup>381</sup> relying on outside sources for stories rather than producing their own local content,<sup>382</sup> and airing less local news.<sup>383</sup> As a result, many radio listeners find that their interests are no longer being served by local stations.<sup>384</sup>

According to a RTNDA/Ball State survey concluding in the fourth quarter of 2004, overall, “[g]roup-owned stations were less likely to have increased the amount of news last year and more likely to have cut it back.”<sup>385</sup> Pew found that staffing at radio newsrooms “plummeted 57% between 1994 and 2001.”<sup>386</sup> Moreover, the number of stations that even maintain staffs of local reporters is abysmally low.<sup>387</sup> Newsroom cuts have had a particularly devastating impact

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<sup>380</sup> PEJ, *State of the News Media 2006* at News Investment; see also, Common Cause, *Citizens Speak* at Appendix D.

<sup>381</sup> PEJ, *State of the News Media 2006* at News Investment.

<sup>382</sup> See, e.g., Scott Dodd, *Posing of Actors as Reporters is on Rise*, CHARLOTTE OBSERVER, Mar. 21, 2004 (discussing how scripted audio news releases featuring local officials are paid for by advocacy groups, released to radio stations, and aired as actual news); Common Cause, *Citizens Speak* at Appendix D.

<sup>383</sup> A recent survey by RTNDA of a random sample of 1,509 radio stations found that 50.5% had decreased the amount of news aired. Bob Papper, *News, Staffing, and Profitability Survey*, RTNDA COMMUNICATOR 38 (Oct. 2005). (“News, Staffing and Profitability Survey”)

<sup>384</sup> See Common Cause, *Citizens Speak* at Appendix D.

<sup>385</sup> Papper, *News, Staffing and Profitability Survey* at 38.

<sup>386</sup> Project for Excellence in Journalism, *2004 Annual Report – Radio Newsroom Investment*, (Mar. 15, 2004) available at <http://www.journalism.org/node/609>

<sup>387</sup> See Camille T. Taiara, *Invasion of the Media Snatchers*, SAN FRANCISCO BAY GUARDIAN ONLINE at [http://www.sfbg.com/38/42/cover\\_freepress.html](http://www.sfbg.com/38/42/cover_freepress.html) (citing Larry Bensky, Media Studies Professor at Cal State Hayward and host of San Francisco’s KPFA-FM *Sunday Salon*, that “Whereas 20 or 30 years ago, most stations had full-time news staff, ‘maybe 10 percent of the jobs that once existed in radio news still exist.’”); see also Common Cause, *Citizens Speak* at Appendix D.

on minority employees, as the number of journalists of color working in local radio declined from 11.8% in 2004 to 6.4% in 2006.<sup>388</sup>

By reducing news resources, radio broadcasters have decreased the quantity of local radio news. In 2004, the average radio stations aired on average fewer than 40 minutes of locally produced news on week days and far less on weekends.<sup>389</sup> Indeed, 41% of respondents to a RTNDA survey agree that radio news broadcasts are too short to provide useful information, while 24% often switch from one radio station to another to find a news broadcast.<sup>390</sup>

In addition to reducing quantity, radio broadcasters have reduced news quality. According to a recent annual study by the Project for Excellence in Journalism, local radio news “rarely involves sending reporters out to explore the community and tell stories about local voices and personalities – the hallmarks of traditional local news coverage.”<sup>391</sup> In addition, local radio news “had the shallowest sourcing and explored the fewest angles of any media studied.”<sup>392</sup>

Lowering local radio limits would promote the Commission’s goals of diversity and localism. By preventing group-owned stations from controlling numerous stations in a given market, there will be more local station owners and the greater competition should force stations to respond to listener demand for more and better local news.

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<sup>388</sup> Compare Bob Papper, *Lost Ground*, RTNDA COMMUNICATOR, 27 (July/August 2004) with Bob Papper, *Year of Extremes*, RTNDA COMMUNICATOR, 27 (July/August 2006).

<sup>389</sup> *Id.* In the year 2000 minorities made up 10% of radio newsrooms, compared to 30.9% minorities in the U.S. population. In 1995 minorities made up 14.7% of the newsroom, but 27.9% of the population.

<sup>390</sup> RTNDA, *Supplemental Charts for New, Staffing and Profit Survey*, OCT. 2005 COMMUNICATOR, [www.rtna.org/research/chart-05.shtml](http://www.rtna.org/research/chart-05.shtml).

<sup>391</sup> PEJ, *State of the News Media 2006* at Content Analysis.

<sup>392</sup> *Id.*

**(b) Lowering the Limits will Promote  
Efficient Use of the Spectrum**

To the extent that radio station owners seek to distribute audio content over many platforms, they can use new technologies such as podcasts and Internet radio,<sup>393</sup> or use platforms made possible by digital radio. As with television broadcasting, the transition to digital enables radio broadcasters to program multiple streams with a single license. The Commission has observed that radio broadcasters see the digital transition as a “competitive necessity.”<sup>394</sup> In 2002, when the Commission adopted standards for digital radio for both AM and FM stations,<sup>395</sup> the NAB stated that the standard “works; it’s ready.”<sup>396</sup> Since then, hundreds of stations have been broadcasting in digital; there are at least 814 HD radio stations on the air and 249 HD2 (multicast) stations.<sup>397</sup> Two hundred Clear Channel stations already broadcast in digital.<sup>398</sup> After the digital transition is complete, radio broadcasters may be able to multicast as many as 20 streams per FM license.<sup>399</sup> Tightened ownership limits will lead to increased innovation because, if radio broadcasters cannot obtain additional spectrum through purchasing more stations, they will have incentives to use their existing spectrum more efficiently.<sup>400</sup>

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<sup>393</sup> Bill Rose & Larry Rosin, *Arbitron Radio Listening Report, The Infinite Dial: Radio’s Digital Platform*, 3-4 (2006) (noting that the audience for weekly Internet radio, defined as over-the-air radio stations rebroadcast on the internet, increased 50 percent during 2005).

<sup>394</sup> *Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service*, 17 FCC Rcd 19990, 19991 (2002) (“DABS”).

<sup>395</sup> *Id.* at 19990.

<sup>396</sup> *Id.* at 19992.

<sup>397</sup> iBiquity Digital Corp., *Ex Parte Notification*, MM Dkt. No. 99-325, at 5 (July 6, 2006).

<sup>398</sup> Press Release, Clear Channel, *Turn It On! Clear Channel Radio Launching HD Digital Radio Multicasts in Birmingham* (February 13, 2006) (on file with author).

<sup>399</sup> Jim Snider, *Some Important FCC Developments Concerning the Future of the Broadcast Band* (July 26, 2006) [http://quixote.blogs.com/telecompolicy/fcc\\_docket\\_99-325\\_the\\_radio\\_broadcasters\\_digital\\_transition/index.html](http://quixote.blogs.com/telecompolicy/fcc_docket_99-325_the_radio_broadcasters_digital_transition/index.html) ( Jim Snider, *Future of the Broadcast Band*)

<sup>400</sup> *Echostar Communications*, 17 FCC Rcd at 20573.

#### 4. The Commission Should Retain the AM/FM Subcaps

In its *2002 Biennial Review Order*, the Commission retained the AM/FM subcaps because FM stations have “technological and economic advantages” over AM.<sup>401</sup> The *Prometheus* court did not question the Commission’s conclusion to retain the FM cap, but found merely that the Commission’s reasoning “does not explain why it is necessary to impose an AM subcap at all.”<sup>402</sup>

Nothing has changed the need for the FM subcap. As the Commission noted in 2003, FM stations have tremendous technological and economic advantages.<sup>403</sup> The digital transition does not upset, and possibly increases, these technological and economic advantages, as FM stations have rights to more spectrum and are further along in their digital transition.<sup>404</sup>

Retaining the AM subcap serves the public interest for two reasons. First, the limit on AM stations promotes new entry. Radio remains one of the most affordable means by which a potential new entrant can enter the media business, and AM stations are generally far less expensive than FM stations, permitting entry with far lower capital investment. As a result, according to the Commission's data, while minorities own a mere 3.6% and women a mere 3.4% of the 12,844 stations that filed ownership reports,<sup>405</sup> the AM station comprises more than half of that broadcast ownership by minorities (52% as of 2005), and a large percentage of stations

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<sup>401</sup> *2002 Biennial Review Order*, 188 FCC Rcd at 13733-34.

<sup>402</sup> *Prometheus*, 373 F.3d at 434 (emphasis added).

<sup>403</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13733 (AM stations “have significantly less bandwidth,” inferior audio signal and fidelity, and signals that vary by time of day; in 2002, 82 percent of radio audience came from FM, while 18 percent came from AM).

<sup>404</sup> See *DABS*, 17 FCC Rcd at 19997; see also Jim Snider, *Future of the Broadcast Band*.

<sup>405</sup> Byerly, *Questioning Media Access* at 2.

owned by women (43% as of 2005).<sup>406</sup> If the AM subcap were removed, large companies could bid up the price of AM stations and further erode this abysmally low representation.

Second, retaining the AM subcap will foster viewpoint-diversity. Because of their inferior sound quality, AM stations are more likely to provide talk rather than music formats. FMC has provided Commenters data demonstrating that a substantial number of stations devoted to news and public affairs programming are commercial AM stations. As this chart shows, 67.2% (987/1468) of stations devoted to news are commercial AM, while less than 5.7% (83/1468) are commercial FM.<sup>407</sup>

<b>AM or FM</b>	<b>Commercial</b>	<b>Noncommercial</b>	<b>Total</b>
<b>AM</b>	987	28	1015
<b>FM</b>	83	370	453
<b>Total</b>	1070	398	1468

Without the AM subcap, one entity in a locality could own a large number of the stations devoted to news or public affairs, considerably reducing local diversity in news and public affairs programming.

### **5. The Commission Should Require Station Owners to Come into Compliance with the Revised Limits**

The Commission should also require that all licensees comply with the revised limits within a reasonable period of time. As discussed above in Section I(B), this is an important means of promoting opportunities for minorities and women to acquire radio stations.

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<sup>406</sup> *Id.* at 5

<sup>407</sup> The FMC relied on BIA Financial Networks' Media Access Pro (Radio Only) database and included the number of stations claiming on November 2005 to provide one of three program-genres among their top three formats --"news," "public affairs," or "NPR." A considerable number of these stations reported News/Talk as their top two genres.

Moreover, grandfathering combinations over the limit provides a double-standard in favor of consolidation. While rule changes raising numerical limits allow increased consolidation as soon as the rule goes into effect, rule changes lowering the limit *without requiring divestiture* take effect only when consolidated owners decide, if ever, to sell. As a result, some communities benefit from the rule change, while others do not, depending on the whim of consolidated owners.

Grandfathering can also make it more difficult for other companies to compete against the grandfathered owner. For example, the Commission recently granted a temporary waiver of the local radio ownership rule to Triad Broadcasting for the Fargo, North Dakota, market.<sup>408</sup> Triad holds attributed ownership interests in seven radio stations, including 5 FM stations, accounting for 41.2% of the radio revenue. Under the attribution rules adopted in the *2002 Biennial Review Order*, Triad was required to divest one of the FM stations. However, Triad's competitor, Clear Channel, also owns seven stations, including 5 FM stations, which account for 49.4% of the radio revenue, but is not required to divest due to grandfathering. The waiver thus allows two companies to own 14 of the 15 commercial radio stations in the market and control over 90% of the revenue. The Commission's goal of competition and the public interest would have been served far better by disallowing grandfathering and requiring both companies to comply with the local radio limits.

## CONCLUSION

For the foregoing reasons, Commenters respectfully request that the Commission retain the prohibition against newspaper-broadcast cross-ownership and tighten the local TV, radio and

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<sup>408</sup>Letter to David D. Oxenford re: KEGK(FM), Wahpeton, ND, DA 06-1741 (Sep. 1, 2006).



# **APPENDIX B**

Comments of UCC et al., filed MB Dkt. 06-121 (Oct. 1, 2007)

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

2006 Quadrennial Regulatory Review –	)	MB Docket No. 06-121
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
2002 Biennial Regulatory Review – Review	)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act of	)	
1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MM Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To	)	MB Docket No. 04-228
Build on Earlier Studies	)	

**COMMENTS OF  
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.  
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## **SUMMARY**

UCC et al. submit these comments in response to the Commission's request for comments on proposals put forth by the Minority Media and Telecommunications Council (MMTC) for advancing broadcast ownership opportunities for women and minorities consistent with constitutional requirements and the Commission's statutory authority. UCC et al. have already commented at length on MMTC's proposals, as well as the Failed Station Solicitation Rule (FSSR), in its comments filed in October 2006; therefore, it will not duplicate those points here.

The Commission is obligated to consider and adopt rules and policies for increasing minority and female ownership. Not only did the Third Circuit Court of Appeals instruct the Commission to consider proposals to encourage minority and women's ownership, the Commission is also bound by sections 257 and 309(j) of the Communications Act to review and eliminate barriers to entry for underrepresented groups, including women, minorities, and small businesses, and to develop policies to encourage their acquisition of broadcast licenses.

Taken in tandem, these provisions impose a compelling mandate on the Commission to adopt rules and procedures to increase women's and minority access to broadcast ownership. Recent developments in equal protection law emphasize the need to consider neutral alternatives before resorting to measures that would trigger elevated constitutional scrutiny. Case law does not foreclose the adoption of race- and gender-based preferences, but instead highlights contemplation and evaluation of neutral plans first.

These comments propose neutral methods that would encourage women's and minority participation in broadcast ownership without reliance on gender- or race-based classifications. First, we reiterate that tightening and enforcing current ownership restrictions is the single most

effective gender- and race-neutral method of increasing ownership by underrepresented groups. Data show that women and minorities are more likely to own broadcast stations in competitive, un-concentrated markets; as markets consolidate, ownership by underrepresented groups decreases. Limiting station ownership to current or even stricter levels will also enhance opportunities for minorities and women to own broadcast stations by freeing-up additional stations for purchase and by making it easier for them to obtain the capital needed to finance such purchases.

While the Commission must adopt ownership rules that will encourage ownership by women and minorities, it must also assess the impact of its current programs. In particular, the new entrant bidding credit, which was adopted by the Commission in 1998 to help women and minorities acquire licenses in broadcast auctions, has never been evaluated by the Commission. Unfortunately, the credit appears to have been exploited by wealthy incumbent broadcasters and, as a result, “true” new entrants have been edged out and tax payers have been deprived of millions of dollars in lost revenue.

Finally, the Commission must reform its data collection and analysis. The Commission is well aware of the myriad problems concerning its data on minority and women’s ownership levels. Good policy cannot be built upon bad data. Thus, the Commission must cure its chronic failure to collect and analyze information on ownership by underrepresented groups.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

2006 Quadrennial Regulatory Review –	)	MB Docket No. 06-121
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
2002 Biennial Regulatory Review – Review	)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act of	)	
1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MM Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To	)	MB Docket No. 04-228
Build on Earlier Studies	)	

**COMMENTS OF**  
**OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.**  
**NATIONAL ORGANIZATION FOR WOMEN FOUNDATION**  
**MEDIA ALLIANCE**  
**COMMON CAUSE**  
**BENTON FOUNDATION**

The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women Foundation (“NOW”), Media Alliance, Common Cause, and the Benton Foundation (collectively, UCC et al.), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the Second Further Notice of Proposed Rule Making (2007 FNPRM) in the above referenced proceeding, which was released

on August 1, 2007. The Commission seeks comments on proposals for advancing broadcast ownership opportunities for women and minorities consistent with constitutional requirements and the Commission's statutory authority.

This is the second FNPRM issued in response to the court's order in *Prometheus Radio Project v. FCC*.<sup>409</sup> The first, issued in July 2006, sought comment on proposals for advancing minority ownership put forth by the Minority Media and Telecommunications Council (MMTC), as well as the effect of its ownership rule proposals on minorities, women, and small businesses.<sup>410</sup> However, the 2006 FNPRM provided no additional proposals, nor did it address the effectiveness or legality of MMTC's proposals. In response, in August of 2006, MMTC filed a "Motion for Withdrawal" requesting that the Commission revise its 2006 FNPRM to remedy the above mentioned deficiencies.<sup>411</sup> Nearly one year later, the Commission has issued a Second Further Notice of Proposed Rulemaking seeking comments on MMTC's proposals for advancing broadcast ownership opportunities for women and minorities, as well as constitutional requirements and the Commission's statutory authority.<sup>412</sup> Additionally, the Commission has consolidated the ongoing section 257 proceeding on barriers to entry for small businesses, women, and minorities with the media ownership docket.<sup>413</sup>

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<sup>409</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 n.82 (3d Cir. 2004).

<sup>410</sup> 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 Rule Making, 21 FCC Rcd. 8834 (2006) ("2006 FNPRM").

<sup>411</sup> *Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice*, at 1, (filed in MB Dkt. 06-121, August 23, 2006) ("MMTC Motion for Withdrawal").

<sup>412</sup> *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, 2007 WL 2253100 (2007) ("2007 FNPRM").

<sup>413</sup> *2007 FNPRM*, at ¶2.

UCC et al. have already commented at length on MMTC's proposals, as well as the Failed Station Solicitation Rule (FSSR), in its comments filed in October 2006; therefore, it will not duplicate those points here.<sup>414</sup> Instead, these comments will focus on the Commission's obligations, by the order of the Third Circuit and the statutory mandates of sections 257 and 309(j) of the Communications Act, to analyze and remove barriers to entry for women and minorities and to consider policies and rules to promote ownership among underrepresented groups. To that end, these comments demonstrate that tightening and enforcing current ownership restrictions is the single most effective race- and gender-neutral way of promoting media ownership by underrepresented groups. We also urge the Commission to analyze the impact its current policies have on women and minorities. Finally, recent studies, including those commissioned by the FCC, demonstrate that the Commission must cure its chronic failure to collect and analyze information on minority and women ownership levels. Better data is essential if the Commission is to achieve its stated objectives, thus we urge the Commission to reform its data collection and analysis.

**I. The Commission Must Adopt Rules and Policies to Promote Ownership by Women and Minorities**

The Commission has acknowledged a "long history of recognition by this agency, as well as by courts, Congress, and the public, that minorities and women have experienced serious obstacles in attempting to participate in the telecommunications industry [and] that their greater participation would enhance the public interest."<sup>415</sup> Developing policies to encourage ownership

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<sup>414</sup> See *Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and Benton Foundation*, at Section I, (filed in MB Dkt. 06-121, Oct. 23, 2006) ("UCC et al 2006 Comments").

<sup>415</sup> *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802, 16831 (1997).

among minorities and women, in addition to assessing the impact of ownership rules on underrepresented and disadvantaged groups, is not merely an option for the Commission – it is an imperative. Not only did the Third Circuit Court of Appeals instruct the Commission to consider proposals to encourage minority and women’s ownership in the ownership proceeding,<sup>416</sup> the Commission is also bound by sections 257 and 309(j) of the Communications Act to review and eliminate barriers to entry for underrepresented groups, including women, minorities, and small businesses, and to develop policies to encourage their acquisition of broadcast licenses.

Under section 257, the Commission is instructed to identify and eliminate “market barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services” and to do so in a manner “favoring diversity of media voices.”<sup>417</sup> Section 257 requires the Commission to report to Congress every three years on its regulatory efforts to eliminate market entry barriers for entrepreneurs and other small businesses “in the provision and ownership of telecommunications services and information services,” and to recommend any such obstacles that should be eliminated.<sup>418</sup> Similarly, section 309(j) directs the Commission to adopt competitive bidding procedures and to issue licenses in a manner that avoids “excessive concentration of licenses” and to “disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of *minority groups and women.*”<sup>419</sup>

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<sup>416</sup> *Prometheus*, 373 F.3d at 435 n 82.

<sup>417</sup> 47 U.S.C. §257 (2007).

<sup>418</sup> 47 U.S.C. §257(a) (2007).

<sup>419</sup> 47 U.S.C. § 309(j)(3)(B) (2007) (emphasis added).

Taken in tandem, these provisions impose a compelling mandate on the Commission to adopt rules and procedures to increase women and minority access to broadcast ownership. The Supreme Court’s recent decision in *Parents Involved in Community Schools v. Seattle School District No.1* emphasizes that before employing constitutionally suspect classifications, such as race or gender, government must first demonstrate that it has taken into account available neutral alternatives.<sup>420</sup> In *Seattle Schools*, a majority of the justices stressed the necessity of first considering race-neutral approaches when the state’s goal is increasing diversity.<sup>421</sup> Indeed, Justice Kennedy, writing separately and concurring in the judgment, stated that race-neutral measures “must be exhausted.”<sup>422</sup>

Faced with a clear mandate, the Commission is required to consider ways to increase the level of broadcast ownership among women and minorities. *Seattle Schools* does not preclude adoption of race- and gender-based classifications for broadcasting; but it does strongly encourage government to first explore a wide array of neutral tools to achieve such goals before relying on classifications that would trigger heightened constitutional scrutiny. Thus, it is essential that the Commission consider available neutral rules and policies, and put in place measures that will encourage ownership by women and minorities.

**A. The Commission Should Tighten and Enforce Strict Ownership Limits**

As we have noted in prior comments, the most effective race- and gender- neutral step that the Commission can take towards increasing opportunities for women and minorities is to

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<sup>420</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S.Ct. 2738, 2760 (2007) (“Seattle Schools”).

<sup>421</sup> *See id.* at 2761.

<sup>422</sup> *Id.* at 2797.

tighten and enforce media ownership limits.<sup>423</sup> The continued concentration of the broadcast industry exacerbates the difficulties minorities and women face in obtaining financing by increasing the purchase price of stations. Additionally, because minorities and women are more likely to own smaller stand-alone stations, they are hard-pressed to compete for advertising revenues against the large station group owners that have resulted from increased consolidation in the industry.

Recent studies further support the position that minority and female ownership levels suffer in markets that are more concentrated. An FCC-commissioned study by Allen S. Hammond looked at the effects of the Commission's relaxation of ownership rules. The study entitled "*The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*" tracks the decline of the number of broadcast stations owned by women and minorities due to the emergence of corporations who are now permitted to own more than one station in a single market.<sup>424</sup> Hammond found that no minorities or women were able to create and sustain duopolies through the study's time period.<sup>425</sup> During the seven year period studied, levels of minority ownership fell by 27% nationwide, compared to a 39% drop in markets where a duopoly was formed subsequent to the Commission's relaxation of the rule.<sup>426</sup> The study also found that the relaxation of the duopoly rule most heavily benefited the 25 largest broadcast group owners—all of whom were non-minority and non-female owned.<sup>427</sup>

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<sup>423</sup> See *UCC et al 2006 Comments* at 25-28.

<sup>424</sup> Allen S. Hammond, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006* (July 2007).

<sup>425</sup> *Id.* at 46, 54.

<sup>426</sup> *Id.* at 55.

<sup>427</sup> *Id.* These "25 largest" accounted for 83 of the 109 duopolies formed, or 76%.

Similarly, research on minority and female ownership of radio stations conducted by Free Press illustrates that women and minorities are more likely to own broadcast stations in competitive, un-concentrated markets, and that as markets consolidate, ownership by these underrepresented groups decreases.<sup>428</sup> Limiting station ownership to one television station per market, lowering the maximum number of radio stations in a market, retaining the prohibition on newspaper-broadcast cross-ownership and reinstating the prohibition on radio-television cross-ownerships will enhance the opportunities for minorities and women to own broadcast stations by freeing-up additional stations for purchase and by making it easier for them to obtain the capital needed to finance such purchases.

**B. The Commission Must Assess the Effectiveness of Policies Intended to Facilitate Women and Minority Ownership**

Maintaining and enforcing ownership limits is critical to promoting ownership by women and minorities. However, the Commission must also assess the impact of existing programs intended to facilitate ownership by underrepresented groups. The Commission currently has very few rules in place to promote broadcast ownership by new entrants, such as women and minorities. Unfortunately, anecdotal evidence suggests that, in some cases, poor implementation and lax oversight of such rules has hurt these groups rather than helped them.

In 1998 the Commission adopted a race- and gender-neutral “new entrant bidding credit” aimed at meeting the command of section 309(j).<sup>429</sup> This new entrant program offered auction bidding credits to “entities holding no or few mass media licenses [to] promote opportunities by

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<sup>428</sup> S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (June 2007) (“Off the Dial”). Another study by Free Press, focusing on television ownership found similar results. S. Derek Turner and Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States* (Sept. 2006) (“Out of the Picture”).

<sup>429</sup> 47 U.S.C. § 309(j)(3)(B) (2007).

minorities and women consistent with congressional intent . . . .”<sup>430</sup> The Commission concluded that “a bidding credit for entities who have no or few other media interests will work to give these groups the additional opportunities intended by Congress, in furtherance of the statutory objectives” of section 309(j).<sup>431</sup>

The Commission’s new entrant bidding credit, which is intended to level the financial playing field between new entrants and incumbents, subsidizes the cost of a winning bid for broadcast licenses by awarding a 35% price reduction for auction participants with no attributable interests in any other “media of mass communications,” and 25% for those who have attributable interests in three or fewer.<sup>432</sup> However, the agency made clear that the new entrant bidding credit was adopted as a stop-gap measure and was not “as direct and fine-tuned as measures [the Commission] may ultimately adopt after further development of the record . . . .”<sup>433</sup> Instead, adoption of additional measures to increase broadcast ownership opportunities for small, minority- and women-owned businesses was deferred pending completion of the section 257 studies’ review of barriers to entry for women and minority groups, then underway. After the 257 studies were completed in 2000, however, the Commission never revisited the issue and over 400 broadcast licenses have been sold at auction with this makeshift definition in place.<sup>434</sup> Although these credits are aimed at promoting “opportunities by minorities and women

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<sup>430</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd. 15920, 15987 (1998) (“§309(j) R&O”).

<sup>431</sup> *Id.*

<sup>432</sup> 47 C.F.R. § 73.5007(a).

<sup>433</sup> §309(j) R&O, 13 FCC Rcd. at 15987.

<sup>434</sup> See *FCC Summary of Completed Auctions*, available at [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_all](http://wireless.fcc.gov/auctions/default.htm?job=auctions_all).

consistent with congressional intent,” the Commission has never assessed how many women- or minority-owned businesses have actually benefited from the new entrant credit.<sup>435</sup>

Not only is there no indication that the intended recipients of the new entrant credit have benefited from the program, there is actually evidence that non-women and non-minorities, who cannot reasonably be considered “new entrants” have taken advantage of the credit.<sup>436</sup> For example, Randy Michaels, former CEO of Clear Channel Radio, and founder of Radioactive, Inc., was able to take advantage of the credit in a 2004 auction of FM radio licenses. Because his company Radioactive had no attributable interests in any other communications media, it qualified for the new entrant bidding credit.<sup>437</sup> Further, because only properties owned at the time of the auction proceeding count against receipt of the credit, Radioactive received a 35% reduction on each of the 21 licenses it purchased, for a total cash discount of nearly \$5 million. If Radioactive had instead purchased the same number of licenses in successive auctions, as opposed to all at once, it could not have qualified for the discount. Thus, the auction process, in conjunction with the new entrant bidding credit, favors incumbent bidders who can amass enough capital to purchase multiple licenses in a single auction. As a result, women and minorities, who are more likely to be true “new entrants” and thus have greater challenges in accessing capital, cannot fairly compete in the current system. Additionally, the current system

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<sup>435</sup> §309(j) R&O, 13 FCC Rcd. at 15987.

<sup>436</sup> See e.g., Gregory F. Rose and Mark Lloyd, *The Failure of FCC Spectrum Auctions*, at 3, at [http://www.americanprogress.org/kf/spectrum\\_auctions\\_may06.pdf](http://www.americanprogress.org/kf/spectrum_auctions_may06.pdf) (concluding that the auction process favors incumbents and auction outcomes skew in favor of “a small subset of bidders – and those bidders are not small entrepreneurs”).

<sup>437</sup> See Federal Communications Commission, *Auction 37 Applicant Information for Radioactive, Inc.*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for “Radioactive”).

encourages multiple ownership and increased consolidation, which creates even more obstacles to new entrant participation.

Another example of how the bidding credit scheme has been exploited can be seen in the case of another “new entrant” bidder, Bigglesworth Broadcasting, LLC. Bigglesworth, an entity founded by long-time radio owners Jeffrey Warshaw and Mike Driscoll, also had no attributable media interests at the time of auction, and qualified for the new entrant bidding credit. It received a 35% reduction on the cost of 10 prime FM licenses, for a total cost reduction of nearly \$10 million.<sup>438</sup> What was not obvious from Bigglesworth’s application was that Warshaw and Driscoll had no attributable media interests because they had just sold all 39 of their broadcast stations to Cumulus Broadcasting for \$256 million shortly before the auction.<sup>439</sup> After acquiring the 10 new licenses at auction, Bigglesworth became Connoisseur Media, LLC and currently owns 22 radio stations.<sup>440</sup>

The Commission does not require auction applicants to identify their race or gender, nor does it appear that the Commission has ever undertaken an assessment of whether the new entrant bidding credit has accomplished Congress’ express intent to “promote economic opportunity and competition . . . by avoiding concentration of licenses and by disseminating licenses among a wide variety of applications, including small businesses . . . and businesses owned by members of minority groups and women.”<sup>441</sup> Indeed, when the Commission released

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<sup>438</sup> See Federal Communications Commission, *Auction 37 Applicant Information for Bigglesworth Broadcasting, LLC*, available at <https://auctionfiling.fcc.gov/form175/search175/index.htm> (At search page: select auction 37, search by applicant name for “Bigglesworth”).

<sup>439</sup> See *Jeff Warshaw is a Connoisseur of Fine Radio*, RADIO INK, March 26, 2006, at 17, available at <http://www.connoisseurmedia.com/content/radioink.pdf>.

<sup>440</sup> <http://www.connoisseurmedia.com/>.

<sup>441</sup> 47 U.S.C. 309(j)(3)(B) (2007).

its most recent triennial section 257 Report to Congress in early 2004 – nearly 6 years after broadcast bidding credits were adopted – it failed completely to discuss whether the measure had achieved its goal.<sup>442</sup>

Unfortunately, because of the Commission’s sloppy record keeping and lack of oversight of the implementation of the bidding credit in the auction process, we cannot assess the extent to which women and minority applicants have benefited from the new entrant bidding credit; nor do we know how many wealthy and established broadcasters have taken advantage of the bidding credit, edging out smaller applicants and depriving the U.S. treasury of millions in revenue.

## **II. The Commission Must Improve Its Collection and Analysis of Data on Women and Minority Broadcast Ownership**

The Commission must act immediately to cure its chronic failure to collect and analyze information on the level of minority and women ownership.

New FCC studies highlight the paucity of data collection and analysis that the FCC has conducted regarding minority and women broadcast owners. According to Study 7, conducted by Ari Beresteanu, “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”<sup>443</sup> The study further recommends “that the FCC take steps to ensure that a complete census of media firms is carefully assembled so that ownership patterns can be accurately reported and tracked over time.”<sup>444</sup> Even the FCC’s own staff admits the data is deficient. In

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<sup>442</sup> *Section 257 Triennial Report to Congress*, 19 FCC Rcd. 3034 (rel. Feb. 2004). Since then the FCC has taken no further action toward diversifying broadcast ownership, nor has it produced a new Triennial Report for Congress, despite the fact that the last report was released over three years ago.

<sup>443</sup> Ari Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (June 2007).

<sup>444</sup> *Id.* at 12.

Appendix A of Study 2, the Office of General Counsel’s Chief Economist finds that “every database supplied by the Video Division of the Media Bureau is noisy or incomplete” and that in fact “all FCC databases on station ownership contain noise.”<sup>445</sup>

These problems are not new and were brought to the FCC’s attention before the ownership studies were commenced. In our fall 2006 comments, we pointed out gross gaps in the FCC ownership data, citing studies by Dr. Carolyn Byerly and S. Derek Turner.<sup>446</sup>

According to Dr. Byerly, “these problems... mean that the data bases provided by the FCC on its website represent a greatly inadequate source of public information on women-and-minority media ownership... the extent and magnitude of these flaws suggest a troubling level of ineptitude and/or irresponsibility . . . .”<sup>447</sup> Turner also agreed, stating that “the FCC has abdicated its responsibility to monitor and foster increased minority and female broadcast ownership” and that “the Commission cannot account for the actual state of female and minority ownership.”<sup>448</sup>

The collection of race and gender data is imperative to fulfill the FCC’s statutory mandate under sections 257 and 309(j) to promote diversity and competition in broadcast ownership. Collecting ownership data is the only way to provide an accurate picture of the current state of minority and female ownership and to enable the Commission to identify and eliminate any barriers to entry. Additionally, in the *Seattle Schools* case, the Supreme Court recently affirmed the validity of collecting race-conscious data for the purposes of race-neutral

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<sup>445</sup> C. Anthony Bush, “*Minority and Women Broadcast Ownership Data*” at Study 2, Appendix A, at 18 (July 24, 2007).

<sup>446</sup> See *UCC et al 2006 Comments*, at 5-8, 39-40.

<sup>447</sup> Carolyn Byerly, *Questioning Media Access: Analysis of FCC Women and Minority Ownership Data*, at 4 (Sept. 2006) (“Questioning Media Access”).

<sup>448</sup> Turner, *Out of the Picture*, at 2.

programs.<sup>449</sup> Collection of race-conscious data does not distribute government benefits on the basis of race, and therefore is not subject to strict scrutiny.<sup>450</sup> Indeed, collection of race-conscious data is one of several race-neutral actions Justice Kennedy cites as being constitutionally desirable.<sup>451</sup>

Better data collection and analysis is essential if the Commission is to achieve its stated objectives. Good policy cannot be built upon bad data. Thus, the FCC must make a concerted effort to improve its data collection and analysis process to better assess the effectiveness of its rules.

Respectfully Submitted,

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<sup>449</sup> *Seattle Schools*, 127 S.Ct. at 2792 (Kennedy, J. concurring).

<sup>450</sup> *Id.* at 2792. Similarly, Justice Roberts in his Plurality Opinion, affirms the constitutionality of race-conscious data collection when he writes, “[A] provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, have nothing to do with the pertinent issues in these cases.” *Id.* at 2767 (citation omitted).

<sup>451</sup> *See id.*

# **APPENDIX C**

Reply Comments of UCC et al., filed MB Dkt. 06-121 (Oct. 16, 2007)

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review –	)	MB Docket No. 06-121
Review of the Commission’s Broadcast	)	MB Docket No. 02-277
Ownership Rules and Other Rules Adopted	)	MM Docket No. 01-235
Pursuant to Section 202 of the	)	MM Docket No. 01-317
Telecommunications Act of 1996	)	MM Docket No. 00-244
	)	MB Docket No. 04-228

**REPLY COMMENTS OF  
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.  
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION  
MEDIA ALLIANCE  
COMMON CAUSE  
BENTON FOUNDATION**

The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women Foundation (“NOW”), Media Alliance, Common Cause, and the Benton Foundation (collectively, UCC et al.), by their counsel, the Institute for Public Representation, respectfully submit these reply comments in the above referenced proceedings.

The Minority Media and Telecommunications Council (MMTC) has offered an impressive range of programs and policies designed to increase women and minority ownership. In earlier comments, UCC et al. already addressed many of MMTC’s proposals and urged the Commission to give them serious consideration.<sup>452</sup> Thus, these reply comments are limited to a few points. First, because many of MMTC’s proposals involve giving certain preferences to socially disadvantaged businesses (SDBs), the success of these proposals turns on having an appropriately tailored definition of a SDB. Only one commenter—Clear Channel—has proposed

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<sup>452</sup> See *Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and Benton Foundation*, at Section I, (filed in MB Dkt. 06-121, Oct. 23, 2006)

and SDB definition, and as detailed below, this proposed definition is too broad and subject to potential abuse. Second, in addition to having an appropriate definition for SDBs, MMTC's incubator proposal can only be effective if the Commission retains strict ownership limits and adopts clear and meaningful standards for evaluating incubator programs. Third, without having information regarding the number of expiring construction permits, it is difficult to evaluate MMTC's proposal to allow the transfer of expiring construction permits to SDBs. However, UCC et al. suggest it might be more effective to re-auction expired construction permits in an SDB-only auction. Finally, UCC et al. reiterate the need for the FCC to reform its data collection and analysis of minority and female ownership.

### **III. Clear Channel's Proposed Definition of SDBs Is Not Targeted to Achieve Its Intended Purpose**

Nearly all comments support the adoption of an SDB definition,<sup>453</sup> but only Clear Channel proposes a specific definition. Clear Channel's SDB definition includes any entity that:

- (1) Does not hold an attributable interest in more than fifty radio stations nationally and does not hold an attributable interest in any radio station in the local market where the transaction would take place, and
- (2) Does not hold an attributable interest in more than six television stations nationally and does not hold an attributable interest in any television station in the local market where the transaction would take place.<sup>454</sup>

UCC et al. are concerned that, although Clear Channel claims that its definition is "limited to individuals and entities that do not have a substantial presence in the broadcast

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<sup>453</sup> See e.g. *Comments of The National Association of Broadcasters* at Section III, (filed in MB Dkt. 06-121, Oct. 1, 2007); *Comments of Clear Channel Communications, Inc* at 2, (filed in MB Dkt. 06-121, Oct. 1, 2007).

<sup>454</sup> *Comments of Clear Channel Communications, Inc* at 2.

industry,” it would seem to allow the vast majority of existing broadcasters to qualify, as well as anyone else, regardless of resources or other media-related holdings.

**A. Clear Channel’s Proposed Definition Fails to Target Socially or Economically Disadvantaged Businesses**

Clear Channel’s proposal does not adequately target economically disadvantaged businesses because it fails to include any kind of revenue or income cap in its SDB definition.<sup>455</sup> Thus, this proposal would allow any person or entity without substantial broadcast holdings to benefit regardless of assets or resources. For example, Microsoft would meet Clear Channel’s definition of a socially disadvantaged business because, even though it possesses billions of dollars in assets, it currently owns no broadcast outlets.<sup>456</sup> The Google Corporation similarly would be able to successfully apply for SDB status under Clear Channel’s definition. Surely wealthy businesses like Google and Microsoft should not be beneficiaries of any Commission program designed to increase ownership by disadvantaged and underrepresented groups. Additionally, allowing powerful and highly capitalized businesses to enjoy SDB benefits alongside legitimately disadvantaged businesses removes much of the benefit that a disadvantaged business can enjoy. Giving SDB advantages to almost everyone gives an advantage to no one.

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<sup>455</sup> It is not clear whether Clear Channel is proposing these two factors as the sole limitations on SDB status. It may intend the two limitations to supplement the small business definition found in the Small Business Act. 13 C.F.R. 121.201 (NAICS codes 515112 and 515120). But even if this is the case, the Clear Channel proposal would still not be sufficiently targeted to disadvantaged businesses. The SBA defines small businesses as those with annual revenues of \$6.5 million or less in radio and \$13 million or less in television. *Id.* § 124.103. As we stated in our initial comments almost a year ago, “the vast majority of radio and television stations may fall within SBA’s ‘small business entities’ category.” *Comments of UCC et al.* at Section I(D)(2)(b) at note 153, (filed Oct. 23, 2006).

<sup>456</sup> Indeed, Microsoft is also part owner of a television station—MSNBC—which would not disqualify the company because it is a cable station and Clear Channel’s proposed definition applies only to broadcast station holdings.

A revenue cap would eliminate the ability of large corporations to take advantage of SDB benefits and help ensure that qualifying businesses are truly socially disadvantaged and in need of the Commission's assistance. Such a limit should be set low enough to ensure that a business is genuinely economically disadvantaged. However, in recognition that a successful broadcast venture requires a significant capital investment, it should also be set high enough to ensure that the business will be a viable one. Therefore, the Commission should devise and seek further comment on an appropriate revenue ceiling that would be sensitive to both of these concerns.

**B. Clear Channel's Proposed Ownership Caps Would Allow Large Media Companies to Gain SDB Status**

Clear Channel's proposal would allow companies with substantial media ownership interests to qualify for SDB benefits. Clear Channel provides no evidence or underlying rationale for its proposed 50-radio station and 6-television station caps, nor does it even address other media holdings. Thus, in addition to imposing a revenue ceiling, the Commission should limit SDB status to companies with limited media holdings.

We agree with Clear Channel's proposal to the extent that it would disqualify from SDB status entities already holding an attributable interest in a broadcast station in the same local market. However, the proposal, which allows SDBs to own up to 50 radio stations, fails to exclude companies with a substantial presence in the broadcast industry. Only the fifteen largest radio station owners control more than 50 stations.<sup>457</sup> Many large and well known broadcasters—such as Bonneville International with 37 stations, Beasley Broadcast Group with 42 stations, and Cumulus Media Partners with 36 stations—could qualify for preferential

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<sup>457</sup> Tasneem Chipty, *Station Ownership and Programming in Radio* at Table 2 (June 24, 2007).

treatment under Clear Channel's proposal.<sup>458</sup> Allowing such companies to receive the same preference as truly disadvantaged businesses would eliminate any comparative advantage disadvantaged businesses were supposed to receive.

The television station limit proposed by Clear Channel is also problematic. First, as the Commission recognized in adopting "audience reach" as the measure for its national ownership cap instead of station limits, "stations owned" is a very crude measure of a broadcaster's market power and influence because audience reach varies greatly from station to station depending on market size.<sup>459</sup> Thus a more relevant measure of "substantial presence" in the television broadcast industry would be the percent of the national audience that an owner reaches through its stations. Yet, even if one were to use station numbers as means to target socially disadvantaged businesses, Clear Channel has provided absolutely no explanation or justification for a six station limit.

These unreasonably high national ownership levels proposed by the Clear Channel proposal are also far higher than those in previous programs implemented by the FCC to increase participation by new entrants. For example, the FCC's current new entrant bidding credit grants auction discounts to bidders who have attributable interests in *three or fewer* media properties.<sup>460</sup>

Additionally, Clear Channel's definition is under-inclusive because it excludes only owners of multiple *broadcast* media. An appropriate definition of "socially disadvantaged" should not merely consider ownership interests in broadcast stations, but also ownership interests in *any media property* to account for the fact that owners of newspapers, satellite services, and

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<sup>458</sup> *Id.*

<sup>459</sup> *See* 47 C.F.R. § 73.3555(e).

<sup>460</sup> 47 C.F.R. § 73.5007(a).

cable companies, while not incumbents in the broadcasting arena, are certainly not disadvantaged.<sup>461</sup>

### **C. The Clear Channel Definition Fails to Prohibit Unjust Enrichment and Other Abuses**

Another problem created by Clear Channel's definition is its focus on individuals and corporations that *currently* possess attributable interests in television and radio stations. This limitation does nothing to avoid unjust enrichment, whereby a corporation that owns multiple broadcast outlets is able to sell those stations, qualify as an SDB, and then use the proceeds of its previous sale to re-enter the market as a heavily capitalized "new" entrant. As UCC et al. pointed out in its initial comments, such exploitation has occurred before in the commission's broadcast auctions.<sup>462</sup> Long-time radio owners Jeffrey Warshaw and Mike Driscoll sold all 39 of their broadcast stations to Cumulus Broadcasting for \$256 million.<sup>463</sup> Then, they applied as new entrants to purchase 10 prime FM licenses at the 35% reduced price reserved for new entrants, creating a total cost reduction of nearly \$10 million.<sup>464</sup> To eliminate this type of abuse, an effective SDB definition should employ a waiting period that forbids SDB qualification if an entity has *or has had in the past five years* an attributable interest in media outlets that exceeds the SDB definition limits on ownership. Similarly, the Commission would need to adopt anti-

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<sup>461</sup> The FCC new entrant bidding credit similarly limits benefits based on ownership of media properties, not merely broadcast interests. 47 C.F.R. § 73.5007(a); 47 C.F.R. § 73.5008(b). A medium of mass communications means a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder. *Id.*

<sup>462</sup> *Comments of UCC et al.* at Section II. B. (filed Oct. 1, 2007).

<sup>463</sup> See "Jeff Warshaw is a Connoisseur of Fine Radio," RADIO INK, March 26, 2006, *available at* <http://www.connoisseurmedia.com/content/radioink.pdf>.

<sup>464</sup> See Federal Communications Commission, *Auction 37 Applicant Information for Bigglesworth Broadcasting, LLC*, *available at* [https://auctionfiling.fcc.gov/form175/search175/results\\_detail\\_appInfo.htm?searchLevel=B&application\\_id=13265&file\\_num=0371531118&version=2&Pstart=1&auction\\_id=37](https://auctionfiling.fcc.gov/form175/search175/results_detail_appInfo.htm?searchLevel=B&application_id=13265&file_num=0371531118&version=2&Pstart=1&auction_id=37)

trafficking rules to prevent entities from using SDB benefits to acquire broadcast licenses for the purpose of re-selling them.

#### **IV. MMTC Proposal #5, “The Incubator Program,” Requires Strict Ownership Limits and Clear Oversight to Be Effective**

MMTC’s proposal #5 would allow a company to exceed ownership limits if that company fostered an SDB-run station.<sup>465</sup> Both the National Association of Broadcasters and Clear Channel support such an “incubator” program.<sup>466</sup> UCC et al. stress that such a program can only be effective if the Commission maintains strict ownership restrictions, a course of action we have advocated previously for a host of reasons.<sup>467</sup>

UCC et al. share Free Press’ concern that an incubator program could allow increased consolidation, which raises market hurdles for women and minorities and creates other problems, in return for the unproven and speculative benefits of incubation.<sup>468</sup> Thus, it is important that the Commission have clear and meaningful standards for assessing the adequacy of incubator programs and for ensuring that such programs are actually carried out.

#### **V. The Goal of MMTC Proposal # 4 Is Better Served by Re-Auctioning Construction Permits to SDBs**

Clear Channel supports MMTC proposal #4, which would allow holders of expiring construction permits to sell them to an SDB rather than having them revert back to the FCC. However, no party has presented any information regarding the likely number of such un-built stations. UCC et al. ask the FCC, which possesses such information, to report on the prevalence

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<sup>465</sup> *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, 2007 WL 2253100 at App. A § I, No. 5 (2007)

<sup>466</sup> See Comments of NAB at 8; *Comments of Clear Channel Communications, Inc* at 3.

<sup>467</sup> *Comments of UCC et al.* at Section II (filed Oct. 23, 2006).

<sup>468</sup> *Comments of Consumers Union, Consumer Federation of America and Free Press* at 34 (filed in MB Dkt. 06-121, Oct. 1, 2007).

of expired construction permits so that the public will be able to assess whether such a proposal could actually benefit a significant number of owners from underrepresented groups.

If the number of expiring construction permits is significant, UCC et al. suggest that rather than allowing companies to sell the permits, the Commission should instead allow such permits to expire and re-auction them in an SDB-only auction. Such a policy would ensure that an SDB receives the license. In addition, any amount raised by the auction would go to the U.S. Treasury instead of reimbursing the holder of the construction permit that failed to meet its build-out obligations.

**VI. Although Improving Its Data Collection is Essential, the Commission Should Not Delay Adoption of Policies to Further Broadcast Ownership Opportunities for Women and Minorities**

The Comments of CU, CFA and Free Press emphasize problems with the FCC's efforts to track broadcast station ownership by women and minorities. UCC et al. agree that the FCC's current processes are insufficient and that proper data collection and analysis is essential for the Commission to monitor the effects of its policies.<sup>469</sup>

At the same time, all of the available data show that minorities and women hold very few broadcast licenses. This is beyond dispute. All of the Commenters, industry and public interest groups alike, have urged the Commission to take action to increase the number of stations owned by women and minorities.<sup>470</sup> Thus, the FCC should promptly act adopt policies that will promote opportunities for minorities and women to fully participate in serving the public as broadcast licensees.

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<sup>469</sup> *Comments of UCC et al.* at Section II (filed Oct. 1, 2007).

<sup>470</sup> *See e.g. Comments of The National Association of Broadcasters* at Section I; *Comments of Clear Channel Communications, Inc.* at 1-2; *Comments of UCC et al.*, at Section I, (filed Oct. 1, 2007).

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# **APPENDIX D**

Comments of NOW et al., filed MB Dkt. 06-121 (Oct. 22, 2007)

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
2006 Quadrennial Regulatory Review –	)	MB Docket No. 06-121
Review of the Commission’s Broadcast	)	MB Docket No. 02-277
Ownership Rules and Other Rules Adopted	)	MM Docket No. 01-235
Pursuant to Section 202 of the	)	MM Docket No. 01-317
Telecommunications Act of 1996	)	MM Docket No. 00-244
	)	MB Docket No. 04-228

**COMMENTS OF  
THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION  
THE NATIONAL CONGRESS OF BLACK WOMEN  
THE RAINBOW PUSH COALITION  
THE FEMINIST MAJORITY FOUNDATION  
THE NATIONAL COALITION ON BLACK CIVIC PARTICIPATION – BLACK  
WOMEN’S ROUNDTABLE  
THE NATIONAL COUNCIL OF WOMEN’S ORGANIZATIONS  
WOMEN IN MEDIA & NEWS  
R.E.A.C.HIP HOP COALITION  
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## SUMMARY

NOW et al. submit these comments in response to the Commission's request for comment on the ten research studies it commissioned on media ownership. While the studies do not completely ignore women's ownership issues, NOW et al. are disappointed that they do not go further. The studies regrettably fail to consider the obstacles to women's ownership and most do not propose any solutions to help eliminate barriers to entry for underrepresented groups.

The Commission has both a statutory and Court-mandated obligation to consider and implement proposals for increasing broadcast ownership among women and minorities. However, the Commission has historically focused little attention on women's ownership levels. Unfortunately, the FCC-commissioned studies prove no different.

Of the ten studies, three address female and minority broadcast ownership. Two of these studies (#2 and #7) provide data on ownership levels, and both agree that the FCC's data collection and analysis is woefully substandard. We have consistently advocated for more research and better analysis of women's ownership levels and reiterate that request in these comments. The studies also agree that women are underrepresented as broadcast station owners. While the authors use data from different sources, they conclude that women's ownership levels are low. However, both studies fail to look at how the FCC's own rules have affected women's ownership, and neither proposes a solution to this problem.

Only one of the ten studies examines how the FCC's rules have affected women's ownership levels. Study #8 finds that relaxation of the TV duopoly rules hurt, rather than helped, women and minorities by increasing barriers to entry resulting from consolidation. The study suggests that the Commission should not further relax the ownership rules, because it will only exacerbate the problem.

The FCC must do a better job of promoting opportunities for women to own broadcast stations and can do so by tightening and enforcing the ownership rules, rather than further relaxing them. The FCC must also fix its data collection and analysis process. However, the FCC does not need more data to know that women's ownership levels are unacceptably low and that it must act quickly to remedy the problem. Therefore, the FCC should not delay in adopting proposals for increasing women's ownership. Improvements to data collection and analysis will then be essential to ensure that the proposals are working and that women's ownership levels are increasing.

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R.E.A.C.HIP HOP COALITION  
THE WOMEN’S MEDIA CENTER**

The National Organization for Women (NOW) Foundation, The National Congress of Black Women, The Rainbow PUSH Coalition, The Feminist Majority Foundation, The National Coalition on Black Civic Participation – Black Women’s Roundtable, The National Council of Women’s Organizations, Women in Media & News, R.E.A.C.Hip Hop Coalition, and The Women’s Media Center (collectively, “NOW et al.”), by their counsel, the Institute for Public Representation (“IPR”), respectfully submit these comments in response to the Public Notice, issued July 31, 2007, seeking comments on ten FCC-commissioned research studies on media ownership.<sup>471</sup>

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<sup>471</sup> Federal Communications Commission, *FCC Seeks Comment On Research Studies on Media Ownership*, Public Notice (MB Dkt. 06-121, July 31, 2007).

## **I. Interests Of Commenting Parties**

The National Organization for Women (NOW) Foundation is devoted to empowering women and furthering women's rights through advocacy, leadership training, education and litigation.

The National Congress of Black Women is an organization of women dedicated to strengthening the family, honoring women of high achievement and serving as mentors to young people.

The Rainbow PUSH Coalition is a civil and human rights organization that seeks to level the playing field in every field of human endeavor and believes that media diversity strengthens public discourse.

The Feminist Majority Foundation is dedicated to women's equality, reproductive health, and non-violence, utilizing research and action to empower women economically, socially, and politically.

The National Coalition on Black Civic Participation – Black Women’s Roundtable is dedicated to empowering women to lead and expand their voice in the democratic process on a national, state and local level.

The National Council of Women's Organizations is a nonpartisan, nonprofit coalition of over 200 member organizations that collaborate through substantive policy work and grass roots activism to address issues of concern to women.

Women In Media & News (WIMN) is a media analysis, education and advocacy group that works to increase women's presence and power in the public debate.

R.E.A.C.Hip Hop Coalition is an organization representing education, activism and community empowerment through Hip Hop.

The Women's Media Center was founded in 2005 by Jane Fonda, Robin Morgan and Gloria Steinem to make women more visible and powerful in the media.

## **II. The FCC Needs To Do More To Promote Opportunities For Women To Own Broadcast Stations**

The Commission has repeatedly identified increasing broadcast station ownership among women as an important public interest goal. Indeed, it reaffirmed that goal in the 2002 Biennial Review Order.<sup>472</sup> The FCC has also been directed by both Congress and the Third Circuit Court of Appeals to ensure opportunities for women to own broadcast stations and to consider proposals for increasing female ownership.<sup>473</sup>

Nonetheless, the Commission has historically focused little attention on women (as distinct from minorities) and has actually done very little to increase the opportunities for women to own broadcast stations.<sup>474</sup> In 1973, the Commission implemented preferences for minorities in comparative licensing hearings, but not for women.<sup>475</sup> When the Commission finally decided to implement preferences for women in 1978, they were doled-out as an afterthought to the benefits awarded to minorities.<sup>476</sup> Though the Commission “recognize[d] the various obstacles faced by prospective female entrepreneurs as a result of historic inequities, and the related low

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<sup>472</sup> *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*, 18 FCC Rcd. 13620, 13634 (June 2, 2003).

<sup>473</sup> *See* 47 U.S.C. § 257; *See* 47 U.S.C. § 309(j); *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

<sup>474</sup> For example, women were not beneficiaries of either the distress sale policy or the tax certificate policy when those policies were in effect.

<sup>475</sup> In *TV 9, Inc. v. FCC*, the D.C. Circuit held that the Communications Act of 1934 required the FCC to give “favorable consideration” to minority applicants if such applicants were involved in station ownership and management. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973).

<sup>476</sup> In *Gainesville Media, Inc.*, the FCC Review Board concluded that “the better course [was] to consider female ownership and participation, despite the absence of record evidence.” *Gainesville Media, Inc.*, 70 F.C.C.2d 143, 149 (Rev. Bd. 1978), *rev denied* 72 F.C.C.2d 795 (1979), *aff’d* by 652 F.2d 196 (D.C. Cir. 1981).

level of female ownership in certain industries and areas,”<sup>477</sup> the use of gender preferences to increase these levels was limited because the Commission claimed that “the historical and contemporary disadvantage [sic] suffered by women is [not] of the same order, [n]or has the same contemporary consequences, which would justify inclusion of a majority of the nation’s population in a preferential category defined by the presence of ‘minority groups.’”<sup>478</sup>

Subsequently, in *Lamprecht v. FCC*, the Court struck down the FCC’s policy of awarding comparative hearing preferences to women applicants on the grounds that the FCC had failed to collect sufficient evidence “to show that its sex-preference policy [was] substantially related to achieving diversity on the airwaves.”<sup>479</sup> Since then, despite available evidence, the FCC has made little effort to build a record that would demonstrate how ownership of broadcast stations by women specifically promotes diversity.

Even when women are not being added as an afterthought to policies, they are often bundled together with minorities, as one homogenous “disadvantaged” group, despite the fact that the obstacles faced by women and minorities are not necessarily identical. For example, the FCC’s Second Further Notice of Proposed Rule Making only makes mention of women in conjunction with minorities, never discussing them separately.<sup>480</sup> The Appendix to Study #2 is also troublesome in this regard because, despite the title of the study, “Minority and Women Broadcast Ownership Data,” the author only offers data and analysis on minority ownership, and

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<sup>477</sup> *Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 F.C.C.2d 1591, 1593 (Nov. 22, 1978) (“Petition for Issuance of Policy Statement”).

<sup>478</sup> *Id.*

<sup>479</sup> *Lamprecht v. FCC*, 958 F.2d 382, 398 (D.C. Cir. 1992).

<sup>480</sup> *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*, Second Further Notice of Proposed Rule Making (filed in MB Dkt. 06-121, Aug. 1, 2007).

ignores women's ownership numbers completely.<sup>481</sup> Not only are the obstacles facing women and minorities not identical, but programs aimed at increasing their ownership levels are treated differently under the law. Gender-based preferences are subject to intermediate scrutiny, while race-based programs are subject to strict scrutiny.<sup>482</sup> The automatic linking of minorities and women does a disservice to both groups, undermining the development of tools to increase diversity in broadcast ownership.

Unfortunately, the Commission's recent actions in connection with the ownership studies continue its historical pattern of giving short shrift to women's ownership. In November 2006, the FCC announced that it would be conducting ten media ownership studies "as part of its review of its media ownership rules."<sup>483</sup> There was no mention of women's ownership in the FCC's description of the ten studies, although two of the studies (#7 and #8) were to "examine levels of minority ownership of media companies and barriers to entry" while another (#3) was to analyze the effect of ownership structure on different types of programming, including minority programming.<sup>484</sup>

In March 2007, NOW sent a letter to FCC Chairman Kevin Martin expressing concern that none of the studies seemed specifically designed to address issues of women's ownership

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<sup>481</sup> C. Anthony Bush, *Minority and Women Broadcast Ownership Data*, at Appendix A of Study #2, at 12 (July 24, 2007) ("Appendix A, Study #2").

<sup>482</sup> Under intermediate scrutiny, the FCC must show that the preferences "serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Lamprecht*, 958 F.2d at 391 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565 (1990)). Under strict scrutiny, the FCC must show that the preferences "are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc., v. Federic Pena, et al.*, 515 U.S. 200, 227 (1995).

<sup>483</sup> Federal Communications Commission, *FCC Names Economic Studies to Be Conducted As Part of Media Ownership Rules Review*, Public Notice (Nov. 22, 2006).

<sup>484</sup> *Id.*

and asking the FCC to either expand the studies or initiate new ones.<sup>485</sup> The studies were released on July 31, 2007. While the studies do not completely ignore women's ownership issues, they fail to adequately address both the obstacles women face and solutions for remedying the problem.

### **III. The FCC-Commissioned Studies Show That Women's Ownership Levels Are Low, But Leave Many Questions Unanswered**

Of the ten FCC-commissioned studies, three (#2, #7, and #8) address the extent to which broadcast stations are owned by women. The purpose of these studies was to 1) examine levels of ownership and 2) examine barriers to entry.<sup>486</sup> While the studies rely on different statistical measures, they all find that women's ownership levels are low and that increased concentration is a barrier to entry for women broadcast owners. However, they also leave many questions unanswered, and, except for study #8, unfortunately fall short of analyzing why women's ownership levels are so low and fail to propose any kind of solution for remedying the problem.

#### **A. The Studies Confirm The Need For The FCC To Do A Better Job Of Collecting And Analyzing Ownership Data**

All of the studies were hampered in achieving their intended purpose by insufficient data regarding women's ownership of broadcast stations. We have consistently advocated that the Commission collect and analyze data regarding ownership of broadcast stations by women and minorities. For example, in 1995, NOW Legal Defense and Education Fund and others proposed that the FCC amend Ownership Form 323 to include questions concerning the race and gender of broadcast station owners in order to monitor the efficacy of the Commission's incentive

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<sup>485</sup> Letter from Kim Gandy, President, National Organization for Women Foundation, to Kevin Martin, Chairman, Federal Communications Commission (MB Dkt. 06-121, March 14, 2007).

<sup>486</sup> Public Notice (Nov. 22, 2006).

programs.<sup>487</sup> After the FCC so revised Form 323, NOW urged the Commission to compile, analyze, and publicly report about the data it collected.<sup>488</sup>

Eventually, the FCC did compile and post the minority and female ownership data on its website. At the request of NOW and others, Dr. Carolyn Byerly undertook an analysis of this data. Dr. Byerly's study, which was attached to the comments filed by NOW and others last fall,<sup>489</sup> detailed numerous problems with the FCC's Form 323 reporting process.<sup>490</sup> A separate study by Derek Turner also noted problems with the FCC's data.<sup>491</sup>

The three FCC studies that address ownership of broadcast stations by women and minorities also identify problems with the FCC's data collection. For example, in Appendix A to Study #2, author C. Anthony Bush notes that “[u]nfortunately, there are a variety of problems associated with Form 323 data.”<sup>492</sup> Bush acknowledges the problems found by Dr. Byerly and finds additional problems with the database. One problem he identifies is that the FCC changed the date for filing Form 323, so that the data no longer provided a “snapshot” that could be used as a benchmark. Another problem is that licensees who are sole proprietorships or partnerships of natural persons are not required to file ownership reports. Still another problem is that many

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<sup>487</sup> *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Comments of Black Citizens for a Fair Media, et al, at 9-14 (filed in MM Dkt. 94-149, May 17, 1995).

<sup>488</sup> See Letter from Amy R. Wolverton, Institute for Public Representation, to Michael K. Powell, Chairman, Federal Communications Commission (MM Dkt. 02-277, Oct. 30, 2002).

<sup>489</sup> Carolyn M. Byerly, *Questioning Media Access: Analysis of FCC Women and Minority Ownership Data* (September 2006), attached as App. A to Comments of Office of Communication, et al. (filed in MB Docket No. 06-121, Oct. 23, 2006).

<sup>490</sup> *Id.* at 3-5.

<sup>491</sup> S. Derek Turner and Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States*, at 2 (Oct. 2006) (“Out of the Picture”) (concluding that “the FCC has abdicated its responsibility to monitor and foster increased minority and female broadcast ownership” and that “the Commission cannot account for the actual state of female and minority ownership”).

<sup>492</sup> *Appendix A, Study #2* at 13.

stations failed to include the information requested. Bush concludes that “[b]ecause there is no verification of Form 323 data or quality control over the data (in addition to the inter-temporal problems), I find that Form 323 data are inadequate for the purpose at hand, but these data could be used to augment more reliable data.”<sup>493</sup>

The authors of the other studies also encountered problems with the FCC’s data. In fact, Arie Beresteanu and Paul B. Ellickson, the authors of Study #7, chose not to use it, finding that “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”<sup>494</sup> The authors of Study #8 further note that “[b]ecause relatively reliable data on broadcast owner race and/or gender does not exist before 1998, researchers conducting this study are unable to successfully examine the impact of the FCC’s broader set of ownership rule changes.”<sup>495</sup> Consequently, their study was limited to the television duopoly rule and did not examine the impact of changes in the radio ownership rules. Nor were they able to track the impact of various FCC policy changes from the time the FCC first adopted a minority ownership policy in 1968.<sup>496</sup> Even where data was available, these researchers noted that “verifying minority and female ownership status is sometimes difficult.”<sup>497</sup>

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<sup>493</sup> *Id.*

<sup>494</sup> Arie Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (June 2007) (“Study #7”).

<sup>495</sup> Allen S. Hammond, *The Impact of the FCC’s TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*, at 3 (“Study #8”).

<sup>496</sup> *Id.* at 12.

<sup>497</sup> *Id.* at 9.

NOW et al. reiterate their call for the FCC to act immediately to cure its chronic failure to collect and analyze information on the levels of minority and *women* ownership.<sup>498</sup> The filings last fall should have put the FCC on notice that it needed to reform its data collection practices. Its failure to act, as shown through the additional evidence presented in these studies, raises serious questions about the FCC's compliance with both the Communications Act and the court's order in *Prometheus*.

**B. All Studies Find That Women Are Underrepresented In Broadcast Station Ownership**

Despite problems with the data, there is no question that women's ownership of broadcast stations is very low compared to both their proportion of the population and their ownership levels in other industries. According to the U.S. Census Bureau, women make up over 50% of the American population<sup>499</sup> and own 28.2% of all non-farm businesses.<sup>500</sup> But, the FCC-commissioned studies show that women's ownership levels in broadcasting are considerably lower.

Only two of the studies (#2 and #7) examine the extent of women's ownership. Because the studies used data from different sources,<sup>501</sup> cross-comparison is difficult. For example, using FCC data, Study #2, "Ownership Structure and Robustness of Media," by Kiran Duwadi, Scott Roberts, and Andrew Wise, finds that women owned 3.05% of radio stations and 1.5% of TV

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<sup>498</sup> *Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and Benton Foundation*, at 11-13 (filed in MB Dkt. 06-121, Oct. 1, 2007) ("UCC et al. 2007 Comments").

<sup>499</sup> Women comprised 50.7% of the population in 2005. U.S. Census Bureau, *State and County Quickfacts: USA*, available at <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>500</sup> U.S. Census Bureau, *Survey of Business Owners: Women Owned Firms* (2002, revised Sept. 2006), available at <http://www.census.gov/csd/sbo/womensummaryoffindings.htm>.

<sup>501</sup> Study #2 uses data obtained from the BIA Financial Network and the FCC. Study #7 uses data from the 2002 Survey of Business Owners (SBO), which was part of the 2002 Economic Census.

stations in 2002.<sup>502</sup> Using data from the 2002 Survey of Business Owners (SBO), study #7, “Minority and Female Ownership in Media Enterprises,” by Beresteanu and Ellickson, finds that women owned 14.01% of radio stations and 13.68% of TV stations that same year.<sup>503</sup> However, both studies still come to the conclusion that women are underrepresented as broadcast station owners.

Study #2 also finds that “the number of female-owned radio stations fell 6.9%”<sup>504</sup> from 2002 to 2005,<sup>505</sup> and that “female-owned TV stations remained essentially constant at 26.”<sup>506</sup> But these conclusions are understated because they do not take into account the fact that, during that same period, the total number of broadcast stations increased by 1.4% in TV and by 2.5% in radio.<sup>507</sup> Thus, the number of female-owned radio stations fell by 9.18% and the number of female-owned TV stations did not “remain constant,” but actually decreased by 2%.

While Study #7 finds the percentage of female ownership to be higher than Study #2,<sup>508</sup> the authors still conclude that “females are clearly underrepresented in the [broadcast]

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<sup>502</sup> Kiran Duwadi, Scott Roberts and Andrew Wise, *Ownership Structure and Robustness of Media*, at 6-8 (“Study #2”). The authors give the data in actual numbers of stations owned and not percentages. In 2002, women owned 404 of 13,263 radio stations, which equals 3.05%, and 26 of 1,739 TV stations, which equals 1.5%.

<sup>503</sup> *Study #7* at 6.

<sup>504</sup> *Study #2* at 7.

<sup>505</sup> In 2005, women owned 376 of 13,590 radio stations, which equals 2.77%. *Id.* at 8.

<sup>506</sup> *Id.* at 5.

<sup>507</sup> The number of radio stations increased from 13,263 in 2002 to 13,590 in 2005. *Id.* at 8. The number of TV stations increased from 1,739 in 2002 to 1,764 in 2005. *Id.* at 6.

<sup>508</sup> Study #7’s figures are also higher than those found by other researchers. In October 2006 and June 2007, S. Derek Turner of Free Press conducted a study “represent[ing] the first ever complete assessment and analysis of female and minority ownership of full-power commercial broadcast” television and radio stations. In those studies Turner found that women own 4.97% of TV stations and 5.99% of radio stations. *See Out of the Picture* at 2, 10; *see also* S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States*, at 4, 16 (June 2007) (“Off the Dial”).

industr[y].”<sup>509</sup> Beresteanu and Ellickson’s numbers are higher than other studies because they use an overly broad statistical measure that vastly over-estimates the market presence of women in the broadcasting industry. Beresteanu and Ellickson chose not to use the FCC data, finding it “too incomplete to be utilized for any serious empirical analysis.”<sup>510</sup> Instead, they used data from the 2002 SBO.

While NOW et al. agree that the FCC data is incomplete, the SBO data is not suited for the purpose of analyzing station ownership. The SBO looks at the percentage of businesses owned instead of the percentage of stations owned.<sup>511</sup> This measure might be appropriate if every business owned the same number of broadcast stations. However, because non-minority male-owned businesses are more likely to own multiple stations, whereas women and minorities are more likely to be single station owners,<sup>512</sup> the SBO data artificially discounts the market power of white male owners while inflating the market presence of women and minorities.

Furthermore, while we agree with Beresteanu and Ellickson’s conclusion that women are underrepresented as broadcast station owners, we disagree with their claim that this underrepresentation is “broadly in line with the overall universe of businesses.”<sup>513</sup> Using the 2002 SBO data, the authors find that women own 17.74% of all non-farm businesses. However, the authors never explain why it is relevant to compare broadcasting to other industries. Unlike broadcasting, most businesses are not rooted in the government distribution of a scarce public

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<sup>509</sup> *Study #7* at 2.

<sup>510</sup> *Id.* at 12.

<sup>511</sup> According to the U.S. Census Bureau, “the SBO is conducted on a company or firm basis rather than an establishment basis.” U.S. Census Bureau, *2002 Economic Census: Survey of Business Owners Methodology*, available at <http://www.census.gov/econ/census02/text/sbo/sbomethodology.htm>.

<sup>512</sup> See *Out of the Picture* at 25; See *Off the Dial* at 6.

<sup>513</sup> *Study #7* at 5.

resource, like the broadcast spectrum, from which women and minorities were initially excluded. Nor are they charged with a statutory mandate to serve the public interest. Secondly, even assuming that such comparisons are appropriate, the authors fail to explain how they arrived at the 17.74% figure, given that the SBO found that in 2002, “women-owned firms accounted for 28.2 percent of all nonfarm businesses in the United States.”<sup>514</sup> Thus, their finding that women’s ownership of 14.01% of radio stations and 13.67% of TV stations is broadly in line with other businesses seems to be based on an incorrect premise.

Even using 17.74% as the benchmark, women’s broadcast ownership levels are still below their overall representation in other businesses. Male ownership numbers, on the other hand, are way above average. According to Study #7, while men own 68.41% of all non-farm businesses, they own 76.88% of radio stations and 79.18% of TV stations.<sup>515</sup> In fact, the only businesses that have higher percentages of male ownership are construction, in which men own 79.84% of businesses,<sup>516</sup> and “management of companies & enterprises,” in which men own 79.80% of businesses.<sup>517</sup> Thus, despite the authors’ conclusions to the contrary, Study #7 actually shows that broadcast ownership is very male dominated and that women are even more underrepresented in broadcasting than in most other industries.

NOW et al. also take issue with Beresteanu and Ellickson’s suggestion that instead of addressing the problem of underrepresentation of women, the FCC should “rethink the problem.” Essentially, they suggest that increasing minority and female ownership may not offer much in

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<sup>514</sup> U.S. Census Bureau, *Survey of Business Owners: Women Owned Firms* (2002, revised Sept. 2006), available at <http://www.census.gov/csd/sbo/womensummaryoffindings.htm>.

<sup>515</sup> *Study #7* at 6.

<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

the way of benefits.<sup>518</sup> This completely ignores the FCC’s statutory and Court-ordered obligations.<sup>519</sup> Furthermore, there are numerous public interest benefits to increasing women’s ownership levels, including an increase in program diversity, a break down of stereotypes, better service for underserved segments of the population, increased civic participation, and remedying past discrimination.<sup>520</sup> Indeed, there is evidence to this effect in this record. For example, Study #3 finds that women-owned stations provide more public affairs and religious programming.<sup>521</sup> Moreover, one of the Section 257 studies, conducted in 2000, found that that “increasing the number of female-owned stations would be effective at increasing minority-oriented programming.”<sup>522</sup>

In sum, while the studies use different data, both find that women are underrepresented in broadcast station ownership, and Study #2 finds that the percentage of stations owned by women has decreased. While the FCC must improve its data collection and analysis, it need not wait for this new data to know that women’s ownership levels are low and that it needs to act quickly to remedy the problem.

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<sup>518</sup> *Id.* at 12.

<sup>519</sup> 47 U.S.C. § 257; 47 U.S.C. § 309(j); *Prometheus Radio Project*, 373 F.3d 372.

<sup>520</sup> *See Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and Benton Foundation*, (filed in MB Dkt. 06-121, Oct. 23, 2006) (“UCC et al. 2006 Comments”).

<sup>521</sup> Gregory S. Crawford, *Television Station Ownership Structure and the Quantity and Quality of TV Programming*, at 23-24 (July 23, 2007) (“Study #3”).

<sup>522</sup> *See Ivy Planning Group LLC, Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present*, at 3 (December 2000) (“Historical Study”) (concluding that “the declining participation of small, women- and minority-owned businesses in this industry has resulted in diminished community service and diversity of viewpoints.”); *see also* Jeff Dubin and Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (May 1995) (concluding that increasing the number of female-owned stations would be effective at increasing minority-oriented programming).

### **C. Studies Find That Concentration Is A Barrier To Entry For Women Broadcast Owners**

In addition to determining the extent of minority and female ownership, the studies were supposed to examine obstacles to female ownership. As NOW and others noted in previously filed comments, “industry consolidation impedes the ability of minorities and women to obtain and keep broadcast stations.”<sup>523</sup> The studies confirm this, finding that capital access, stemming from high levels of concentration in the broadcast industry, is a barrier to entry for women.

Study #8, “The Impact of the FCC’s TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006,” by Allen Hammond, finds that the FCC’s existing ownership rules are barriers to entry for women. Hammond finds that the change to the TV duopoly rule in 1999 had a negative impact on the number of women-owned broadcast stations. The study finds that no women were able to create or sustain duopolies during the studied time period and, in fact, women’s ownership levels declined. Female owned stations were more likely to be found in non-duopoly markets, and 36% of women-owned stations that were operating in duopoly markets were sold to non-women, non-minority owners.<sup>524</sup> Hammond also finds that the largest twenty-five television broadcast station owners were the “major beneficiaries” of ownership rule relaxation.<sup>525</sup>

The findings of Study #8 show that consolidation hurts female ownership levels. Hammond points out that relaxing the ownership limits “tend[s] to drive up the valuation and hence the purchase price of many broadcast stations.”<sup>526</sup> As a result, small businesses and

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<sup>523</sup> *UCC et al. 2006 Comments* at 26.

<sup>524</sup> *Study #8* at 54.

<sup>525</sup> *Id.* at 3, 54.

<sup>526</sup> *Id.* at 27.

broadcasters, including women and minorities, have been unable to stay in the market,<sup>527</sup> and instead, women’s ownership levels have dropped even lower. Hammond concludes that since “the relaxation of the TV [duopoly rules] did not appear to have a positive impact on minority and female ownership of television stations,” further relaxing the ownership rules would only exacerbate the problem.<sup>528</sup>

Study #2 also supports the conclusion that consolidation is hurting, rather than helping, female ownership levels. Duwadi, Roberts and Wise conclude that “in the TV industry, the data reveal a slight increase in the number of stations and slight decrease in the number of owners” and in the “radio industry, the number of stations increased moderately [and] the number of owners decreased....”<sup>529</sup> At the same time, they find that women’s ownership levels fell in both radio and TV station ownership.<sup>530</sup>

The authors of Study #7 find that “the concentration ratios... in Radio and TV broadcasting are very high,” which they say “is indicative of high barriers to entry, most likely in the form of capital requirements.”<sup>531</sup> Beresteanu and Ellickson conclude that “access to capital is indeed the primary factor driving the asymmetries of ownership among” minorities,<sup>532</sup> but they can only hypothesize that “access to wealth [] also explain[s] the disparities [] observe[d] across gender” because they “d[id] not have data on the difference in access to capital by gender.”<sup>533</sup> While Beresteanu and Ellickson were unable to directly conclude that access to capital affects women’s ownership levels, a study done by the U.S. Small Business

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<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 3, 57.

<sup>529</sup> *Study #2* at 2-3.

<sup>530</sup> *Id.*

<sup>531</sup> *Study #7* at 8-9.

<sup>532</sup> *Id.* at 10.

<sup>533</sup> *Id.*

Administration (SBA) found that “1) business ownership is related positively to income and negatively to poverty; 2) these correlations are stronger for women-owned firms than for all firms.”<sup>534</sup>

The notion that consolidation hurts female broadcast ownership is not new. One of the 257 studies found that “the relaxation of ownership caps has significantly decreased the number of small, women- and minority-owned businesses in this industry.”<sup>535</sup> Women’s ownership levels are significantly low. Relaxing the ownership rules to allow further consolidation will not solve the problem; it will make it worse.

### **CONCLUSION**

The FCC must remedy the serious underrepresentation of women in broadcasting. Increased consolidation exacerbates already low levels of women’s broadcast ownership. Furthermore, the FCC has an obligation to implement proposals designed to ensure that both minorities and *women* are given meaningful opportunities to own broadcast stations. NOW et al. urge the Commission to focus more attention on the lack of women’s broadcast ownership and to develop rules and policies designed to remedy the growing problem.

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<sup>534</sup> Ying Lowrey, *Women in Business: A Demographic Review of Women’s Business Ownership*, at 29 (August 2006).

<sup>535</sup> *Historical Study* at 3.

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Dated: October 22, 2007

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