Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2010 Quadrennial 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. 09-182
	)	
Promoting Diversification of Ownership In the Broadcasting Services	))	MB Docket No. 07-294

REPLY COMMENTS OF FREE PRESS

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Summary

Free Press respectfully submits these reply comments in response to the Federal Communications Commission (FCC or Commission) Notice of Proposed Rulemaking released on December 22, 2011.

In this Reply, Free Press responds to the flawed arguments of a number of industry commenters who erroneously suggest that marketplace changes have rendered the FCC's media ownership rules unnecessary to protect the public's access to diverse and competing sources of local news and information. These arguments find little basis in the realities of the marketplace or in consumers' media consumption habits. What is more, were the FCC to adopt the policy proposals of the majority of industry commenters, it would jeopardize the public's access to competitive, independent and diverse viewpoints and coverage. It would also adversely impact the Commission's longstanding goal of encouraging competition and diversity through media ownership by new entrants, including women and people of color.

Contrary to industry arguments that the media landscape has undergone a "seismic shift" as consequence of Internet technologies, in truth, the only "seismic shift" that has occurred is that local newspapers and TV stations now dominate the online market for the production and provision of local news, as well as the offline market for local news which they have dominated for decades. The FCC's own research confirms that, when it comes to local news and information, the incumbent media companies now occupy the virtual world with the same supremacy as they do the real world. Thus, while it may be comforting for some (and expedient for others) to suppose that the Internet has already eradicated the diversity and competition problems that the media ownership rules are designed to correct, this presumption is inconsistent with the realities of the marketplace. To base actual policy on this faulty assumption, would be

folly, as well as a dereliction of the Commission's duty to protect and promote localism, diversity and competition.

Free Press urges the Commission to abandon its proposal to relax its newspaper/broadcast cross-ownership (NBCO) rule. A nearly identical relaxation of this rule adopted in 2007 (and vacated by the Third Circuit on notice grounds) was roundly rejected by the public and policy makers. Industry reliance on flawed research notwithstanding, evidence in the record confirms that the NBCO rule remains necessary to promote access to independent and diverse local news sources, and that allowing more cross-ownership will lead to a curtailment of local news at the market-level. Nor is cross-ownership necessary to "save" the newspaper industry. To the extent that the newspaper industry does face challenges to its entrenched business model, those challenges will not be resolved by cross-ownership. If anything, much of the consolidation that has occurred in recent years has put newspapers in a worse financial position as consequence of over-leveraged debt. To service this debt, these companies have cut jobs and reporting; and many of the cost savings generated by these so-called efficiencies have been used to enhance profits, not to finance more or better local news coverage or reporting. The FCC should not reward these bad business decisions by allowing these companies to consolidate even more, thereby continuing the cycle of debt service, layoffs and news cuts.

Indeed, many companies are re-thinking, if not outright abandoning, the flawed cross-ownership model. In a rare moment of candor, Tribune Co. (which must file as a "Debtor-In-Possession" as a consequence of ongoing bankruptcy proceedings) admits that it does not know if the eliminating the NBCO rule will "save" the newspaper business. Likewise, Media General, one of the most vociferous opponents of NBCO rule, did not bother to file comments in response to the NPRM. Instead, press reports suggest that the company is actively pursuing the option of selling its entire newspaper division. As a consequence, the operative question is not whether and how the Commission should relax the NBCO rule – but, rather, why would it even consider doing so when it will not benefit the public and when companies are already abandoning the model.

Similarly, Free Press urges the FCC to approach with caution its proposal to repeal the radio/television cross-ownership rule. Evidence suggests that consolidation disproportionately affects opportunities for women and people of color to become and remain broadcast station owners. Free Press is concerned that repealing this rule could adversely impact the diversity of local radio ownership by diminishing opportunities for entry by entrepreneurs, including women and people of color. Before the FCC moves to further increase local market concentration by abandoning the radio/television cross-ownership rule, it should carefully consider the potential harms this shift in policy will bring to the underrepresented communities.

We also urge the Commission to reject baseless industry arguments that increased consolidation of local TV markets through relaxation of the duopoly rule or covertly through shared services agreements will result in any tangible benefits to the public, or is otherwise necessary to preserve the provision of local news and information. Shared services agreements in particular undermine the competition-promoting benefits of the local duopoly rule. To this end, we urge the Commission to adopt an attribution policy that prohibits the "covert consolidation" by local TV stations entering into resource sharing arrangements such as shared services agreements, news sharing and joint ventures. While outright media consolidation in local TV markets adversely impacts competition and diversity, covert consolidation achieves a more insidious yet equally undesirable effect. In many communities, the end result is a TV dial where most of the news on one channel is essentially duplicative – or even an exact copy – of what airs on a putatively competing station. The corrosive effects that these practices have on editorial independence and journalistic integrity should concern the public, regulators and industry professionals.

Unfortunately, in the absence of more proactive attention by the Commission to the problems raised by such arrangements, stations are entering into these deals with increasing alacrity. The FCC can no longer tacitly approve such practices through inaction. If it walks like a duopoly and talks like a duopoly, then the Commission should treat an arrangement as a duopoly for the purpose of the local television ownership rule. The FCC must change its attribution policies to address the anti-competitive effects of resource sharing agreements and it must do so promptly. Furthermore, the FCC should not grandfather existing arrangements that do not comply with a new attribution policy, but should require broadcasters to come into compliance with rule changes within a reasonable period of time.

Finally, we reiterate that the FCC must complete the diversity measures required by the Third Circuit in on remand before it concludes the 2010 Review. To accomplish this the FCC must do the following:

> (1) Assess the market structures that are more likely to foster ownership by women and people of color, and evaluate the potential impact of media ownership rule changes on ownership opportunities for such owners;
>
> (2) Conduct the research required to support targeted measures to promote ownership of broadcast stations by underrepresented groups, while guarding against further erosion of media ownership among these groups that could occur if the FCC were to prematurely relax existing media ownership limits.

Unfortunately, in terms of responding to the court's mandate, the NPRM has set the Commission off to a bad start. The NPRM fails offer specific proposals to address, or data in response to, the Third Circuit's remand of the eligible entity definition. Despite a clear mandate from the court in both *Prometheus I* and *II*, the Commission appears to once again ignore the court's instruction to address diversity issues concurrent with the present quadrennial review by postponing the required diversity measures until the 2014 Quadrennial Review. If the FCC continues down the path laid out in the NPRM, it will – *for a second time* – have disregarded the court's explicit instruction. The court is not likely to look favorably on the result should the Commission do so.

Finally, industry commenters should stop wasting time and paper re-litigating issues long settled by the courts. Specifically, they erroneously assert that section 202(h) requires the FCC to take only deregulatory actions in this proceeding. The courts of appeals have already spoken on this issue and determined that section 202(h) is not a one-way ratchet in favor of deregulation. That interpretation is bound by the doctrine of *res judicata*. The Commission may tighten, relax or maintain existing media ownership rules so long as it demonstrates that the decision will benefit the public and is supported by evidence and reasoned analysis.

Industry commenters also assert that the FCC's media ownership rules are unconstitutional, in spite of Supreme Court case law holding precisely the opposite. While some industry parties have petitioned the Supreme Court to reconsider this precedent, the fact remains that until the Supreme Court decides to reverse its longstanding precedent upholding the constitutionality of media ownership limits, the Commission and the industry remain bound by it.

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REPLY COMMENTS OF FREE PRESS

Free Press respectfully submits these reply comments in response to the Federal Communications Commission (FCC or Commission) Notice of Proposed Rulemaking in the above referenced dockets, which was released on December 22, 2011.[1]

Free Press has already submitted extensive initial comments in this proceeding explaining that the FCC's media ownership rules remain necessary to promote diversity, competition and localism in local media markets, and if anything the record evidence indicates the FCC should maintain or strengthen its rules.[2] In this Reply, Free Press responds to the flawed arguments of a number of industry commenters who erroneously suggest that marketplace changes have

[1] *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, MB Dkt No. 09-182, FCC 11-186 (Dec. 22, 2011) ("2011 NPRM").

[2] Comments of Free Press, filed MB Dkts 09-182; 07-294 (Mar. 5, 2012) ("Free Press Comments").

rendered the FCC's media ownership rules unnecessary to protect the public's access to diverse and competing source of local news and information.

As we demonstrate below, these arguments find little basis in the realities of the marketplace or in consumers' media consumption habits. What is more, were the FCC to adopt the policy proposals of the majority of industry commenters, it would jeopardize the public's access to competitive, independent and diverse viewpoints and coverage. It would also adversely impact the Commission's longstanding goal of encouraging competition and diversity through media ownership by new entrants, including women and people of color.

I. The FCC's Media Ownership Rules Are Necessary To Protect Public Access To Diverse And Competing Sources Of Local News And Information

> *The press in our free country is reliable and useful not because of its good character but because of its great diversity. As long as there are many owners, each pursuing his own brand of truth, we the people have the opportunity to arrive at the truth and to dwell in the light. The multiplicity of ownership is crucial.* It's only when there are a few owners, or, as in a government-controlled press, one owner, that the truth becomes elusive and the light fails.
>
> ~ E.B. White[3]

The Commission's media ownership limits protect and promote competition, diversity, and localism among the sources of local news and information that public relies on most – local newspapers and broadcast stations. Consequently, the Commission's media ownership rules remain one of the few viable and reasonable means to promote the government's substantial interest in competition and viewpoint diversity in local news and information and, what is more, they do so in a targeted, structurally-focused and content-neutral way.

[3] Letter From E.B. White to W. B. Jones, Director of Communications for the Xerox Corporation (Jan. 30, 1976).

Broadcasting and newspaper conglomerates argue that a "radically changed" media landscape nullifies the need for media ownership restrictions.[4] But, the unassailable fact is that local daily newspapers and local broadcast stations remain, by far, the most dominant original sources of local news both offline and online. The emergence of new media businesses and platforms, including cable, satellite television and the Internet, is of little moment to the application and goals of the media ownership rules if such businesses do little to increase the diversity and independence of, and competition among, original sources of local news content. Thus, contrary to the self-serving arguments of industry commenters in this proceeding, the media ownership rules remain a critical guarantee of public access to a multiplicity of viewpoints and sources for local news and information, regardless of which platform members of the public ultimately use to access such content.

As Free Press pointed out in its initial comments "[w]hile the Internet is an amazing platform with seemingly boundless potential for innovation, to date, it has not significantly increased the number of independent outlets engaged in regular, reliable and sustainable local journalism. Nor is it clear that it will do so in the foreseeable future."[5] New media technologies can offer supplemental platforms for accessing news and information, but they have not come close to replacing the local news and information programming function performed by broadcast television, radio, and newspapers.

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[4] *See, e.g.*, Comments of Tribune Company, Debtor-In-Possession, filed MB Dkts 09-182, 07-192 (Mar. 5, 2012) at 9 ("Tribune, Debtor-In-Possession, Comments"); Comments of the National Association of Broadcasters, filed MB Dkts 09-182, 07-192 (Mar. 5, 2012) at 12 ("NAB Comments"); Comments of the Cox Media Group, filed MB Dkts 09-182, 07-192 (Mar. 5, 2012) at 6 ("Cox Comments"); Comments of the Newspaper Association of America, filed MB Dkts 09-182, 07-192 (Mar. 5, 2012) at 4 ("NAA Comments").

[5] Free Press Comments at 24.

Not only do local newspapers and broadcasters remain the most popular sources for local news online, they are by and large the *only original* sources for local news online. Case in point, one study by Pew reviewed the number of news outlets available in the city of Baltimore. Researchers determined that while more than 53 different outlets were available in that market, 95 percent of the content originated from only a handful of sources: the local newspaper, broadcast TV and radio stations.[6] Indeed, when it comes to local news and information, the Internet platform may give the illusion of abundance, when in fact the number of diverse and independent producers of local news has remained stagnant or even shrunk in some communities.

And while some industry commenters argue that the media landscape has undergone a "seismic shift" as consequence of Internet technologies, in truth, the only "seismic shift" that has occurred is that local newspapers and TV stations now dominate the online market for the production and provision of local news, as well as the offline market for local news which they have dominated for decades.[7] The argument that the internet has somehow replaced traditional and incumbent media sources advanced by these commenters is at odds with market and consumer practices. The FCC's own research confirms that, when it comes to local news and information, the incumbent media companies now occupy the virtual world with the same supremacy as they do the real world. The FCC's own media ownership study demonstrates that the vast majority of local news available via the Internet originates from a local newspaper or broadcast station – over 98 percent of websites that provide any local news are affiliated with

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[6] PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, HOW NEWS HAPPENS: A STUDY OF THE NEWS ECOSYSTEM OF ONE AMERICAN CITY (Jan 11, 2010).

[7] Tribune, Debtor-In-Possession, Comments at 28. *See also* Comments of A.H. Belo Corp., filed MB Dkts 09-182, 07-192 (Mar. 5, 2012) at 5 ("A.H. Belo Comments").

print or broadcast media.[8] Only 17 out 1074 websites offering local news were so-called "web natives." [9]

In sum, while it may be comforting for some (and expedient for others) to suppose that the Internet has already eradicated the diversity and competition problems that the media ownership rules are designed to correct, this presumption is inconsistent with the realities of the marketplace. To base actual policy on this faulty assumption, would be folly. It would also be a dereliction of the Commission's duty to protect and promote localism, diversity and competition. Rather, the Commission's media ownership rules must account for the public's demonstrated reliance on broadcasters and newspapers as the primary sources for information that individuals need in order to learn about their local communities and to effectively participate effectively in local affairs, including democratic processes.

A. Relaxing The NBCO Rule Will Adversely Impact Access To Diverse And Independent News And Information Sources

Free Press opposes the FCC's proposal to eliminate existing prohibition against common ownership of a daily local newspaper and broadcast station in the same market in lieu of a rule allowing in the top 20 media markets the combination of a daily local newspaper and radio station, or of a daily local newspaper and a full power television station that is not ranked among the top four stations in the DMA.[10] In its initial comments, Free Press explained at-length why contours of the proposed relaxed rule, including the "Four Factor Test" and the "Local News

[8] Matthew Hindman, *Study #6: Less of the Same: The Lack of Local News On The Internet* (2010) ("Study #6") at 10.
[9] *Id.*
[10] *2011 NPRM* at ¶102.

Exception," are vague, unenforceable and would have the effect of creating exceptions that would swallow the rule entirely.[11]

Indeed, Free Press questions the Commission's basis for proposing to relax the NBCO rule at all. Evidence in the record confirms that the NBCO rule remains necessary to promote access to independent and diverse local news sources, and that allowing cross-ownership leads to a curtailment of local news at the market-level. It is also likely to result in fewer independent sources of local news available to consumers via the Internet.

Nor is allowing more cross-ownership going to "save" the newspaper industry. The vast majority of newspaper companies maintain solid profits. In any case, to the extent that the newspaper industry faces challenges to an entrenched business model, those challenges will not be resolved by cross-ownership. If anything, much of the consolidation that has occurred in recent years has put newspapers in a worse financial position as consequence of over-leveraged debt. To service this debt, these companies have cut jobs and reporting, and many of the cost savings generated by these so-called efficiencies have been used to enhance profits, not to generate more or better local news coverage. The FCC should not reward these bad business decisions by allowing these companies to consolidate even more, thereby continuing the cycle of debt service, layoffs and news cuts.

1. The Majority Of Credible Research Suggests That Cross-Ownership Results In Fewer Sources Of Local News And Less Local News Overall

As Free Press explained in its initial comments the vast majority of evidence in the record suggests that common ownership of local newspaper and television stations leads to fewer

[11] Free Press Comments at 40-44.

independent sources of local news and decreases the amount of local news at the market-level. These findings provide strong evidence in favor of maintaining the existing NBCO limits.

Nevertheless, a number of commenters representing the newspaper industry urge the Commission to rely on discredited research or flawed findings as grounds to eliminate the NBCO rule. For example, the Newspaper Association of America (NAA) and Tribune, Debtor-In-Possession, persist in repeating the defective claim that newspaper/broadcast cross-ownership increases local news.[12] In doing so they rely on a number of studies commissioned by the FCC during the 2006 media ownership review to show that cross-owned TV stations air more local news.[13] These studies have since been discredited by peer reviewers of the studies and by subsequent research.

A critical flaw in these industry cited studies is that the researchers mistakenly focused exclusively on what impact these rules had on news production at the station-level, rather than local news production at the market-level. To correct this problem, and using the FCC's own data, Free Press looked at output at the market-level which showed that the presence of a cross-owned TV station in a market leads to a collective curtailment in local news output by the other TV stations in the market.[14] The market-level models suggest that the presence of a cross-owned station leads other stations in a market to collectively cut back on their news output by about 25

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[12] NAA Comments at 15; Tribune, Debtor-In-Possession, Comments at 13, 18.

[13] *FCC Seeks Comments On Research Studies On Media Ownership*, Public Notice, DA 07-3470 (Jul. 31, 2007). NAA and Tribune, Debtor-In-Possession, rely specifically on two studies from the 2006 Quadrennial Review: Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, (2007) ("Study 4"); and Jeffrey Milyo, *Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*,(2007) ("Study 6").

[14] *See* Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, Federal Communications, filed MB Dkt Nos. 06-121, *et al*., (Nov. 14, 2007).

percent.[15] This result supports a "crowding-out" hypothesis. In other words, in markets without cross-ownership, local TV news stations generally take their cues from the local newspaper. Since these papers are independently owned, all the local TV news departments have reasonably equal access to the newspaper's reporters and editors. However, this mutually beneficial relationship is destroyed in markets with cross-ownership. Cross-owned TV stations are able to use their exclusive access to the local newspaper to shut out competitors from the stories that those competitors would normally report. This leads these stations to curtail their local news operations, which leads to an overall decline in the amount of local news produced in the market as well as a decline in the independent producers of local news in the market.

Contrary to the NAA's assertion, FCC Study #4, commissioned for the current review, does not support the contention that cross-ownership leads to more local news in local media markets.[16] If anything, it confirms the opposite. Study #4, *Local Information Programming and the Structure of Television Markets* by Jack Erb analyzes the statistical relationship between the amount of local news and local public affairs programming on local broadcast television at both the station and market-level as functions of various measures of market structure, including cross-ownership of a local television station and local newspaper in the same market.[17]

The study finds that at the station-level "newspaper cross-ownership has a positive correlation with local news."[18] However, notably, and consistent with Free Press's own findings in the 2006 Review, the author notes that even where there is a station-level increase in the amount of local news the increase "does not spill over to the market-level, [which] may be

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[15] *Id.*

[16] NAA Comments at 15.

[17] Jack Erb, *Media Ownership Study #4: Local Information Programming and the Structure of Television Markets* (2010) ("Local Information Programming").

[18] *Id.* at 48.

evidence that cross-owned stations are 'crowding out' the news of non-cross-owned stations."[19] This negative correlation and the lack of spill over of station-level news increase into the market, coupled with previous research showing that the presence of a cross-owned station in a market leads to a collective curtailment in local news output by the other stations in the market confirms that the newspaper/broadcast cross-ownership rule continues to have an important and beneficial effect on the amount of news in local markets. As importantly, it also preserves the diversity and independence of local news sources by ensuring that the local newspapers and TV stations – the dominant sources of local news – do not become consolidated under the control of a single owner.

Moreover, studies suggesting station-level increases in local news from cross-owned combinations should be treated with caution. First, many of the studies showing such outcomes suffer from endogeneity problems resulting from a model that mistakenly treats an independent variable as "random" when it is in fact the product of "choice." Secondly, a researcher's choice of methodology in measuring the amount of local news produced can profoundly impact the station-level results of the study. This suggests that studies demonstrating station-level news increases are dubiously inconsistent at best.

To the issue of endogeneity, there are two very different categories of newspaper/television cross-ownership: (1) grandfathered combinations and (2) combinations with waivers. In the context of cross-ownership impact analysis, this distinction is an important one. In measuring minutes of local news (a dependent variable) and investigating the impact of cross-ownership (an independent variable), cross-ownership's effect can be attributed to a "choice" if one considers that waived stations were bought by a newspaper (or vice versa) as

[19] *Id.*

opposed to a grandfathered combination that has existed since the 1950s.[20] Whether a combination falls into one category or the other can significantly impact the amount of news production at the station-level.

The majority of cross-owned properties with waivers are the product of the recent formation of a TV-newspaper combination (i.e., within the last dozen years or so). The newspaper owner did not create the TV station's news operation; *it bought the station's news operation*. To claim that the behavior of the acquired station reflects the effects of cross-ownership is incorrect. Rather, it is an error that results from confusing correlation with causation. In other words, the new cross-ownership did not generate the larger amount of local news observed at the station-level. It is more likely that the station's existing market incentive and capacity to engage in higher levels of news production is what made it an attractive acquisition for the newspaper owner in the first place.

This logic is borne out by facts observed in the marketplace. The waived cross-ownership situations have been created recently and primarily by the merger of highly rated TV stations in large, competitive markets with dominant newspapers. The acquired stations produced more news than other stations before they merged with the newspaper but, lacking time series data, the

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[20] *See* Stefano Della Vigna, UC Berkeley, *Peer Review of Newspaper/Television Cross-Ownership and Local News and Public Affairs Programming on Television: An Empirical Analysis by Michael Yan, available at* http://transition.fcc.gov/mb/peer_review/docs/prtpdvigna.pdf. "Cross-ownership is not randomly assigned across stations. Ownership decisions are made by profit-maximizing companies....To keep things simple, consider Area A where there is very little demand for local news, and the television stations do not provide much local news. In Area B, instead, there is more demand for local news and the televisions indeed provide such news. Now assume that we will allow cross-ownership. The newspaper owners are more likely to buy stations in area B rather than in area A, since doing so provides more of an outlet for the news already gathered by the newspaper, allowing for cost-saving. However, the station that is now cross-owned would have provided more news even *absent* the cross-ownership! Hence it is not the cross-ownership that is causing the local news programming, but rather the opposite." *Id.* at 2-3

FCC's 2007 media ownership studies misattributed as "benefits" of cross-ownership observed effects that merely reflected a newspaper owner's decision to purchase a TV station that was already doing more news prior to purchase.

Unlike combinations with waivers, the grandfathered situations have been in place for a long period of time, making it much more reasonable to assume that the behavior of the TV stations in those combinations reflects the long-term effect of cross-ownership. Following the suggestions of the peer reviewers of several of the 2007 studies, Free Press re-specified models accounting for this endogeneity problem.[21] These adjusted models show that the grandfathered stations actually produce *less* news than the waived stations, suggesting that long term, cross-ownership does not yield increased local news benefits for communities. Thus, contrary to the claims of NAA, Tribune, Debtor-in-Possession, and other industry commenters, once the model is corrected, there is no evidence from the 2007 FCC-commissioned studies to suggest that allowing more cross-ownership will result in more local news at either station or the market-level.

Secondly, these studies can yield opposite station-level results depending on whether they count local news minutes by employing a methodology that uses more in-depth content analysis versus one that counts minutes of local news based on the shallower measure provided by program guides. For example, there were three studies commissioned for the 2006 Review that examined cross-ownership and local news.[22] Only Study 6 examined the actual content of news

[21] Comments of Free Press *et al.*, filed MB Dkt 06-121 (Oct. 22, 2007) (findings summarized at 11-12).

[22] The three studies were Gregory S. Crawford, *Television Station Ownership Structure and the Quantity and Quality of TV Programming* (2007) (" Study 3"); Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, (2007) ("Study 4"); and Jeffrey Milyo, *Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*,(2007) ("Study 6").

broadcasts, while the other two only looked at program listings. When Free Press examined the "grandfathered-versus-waived" question using the data from Study 6, the data showed that waived stations outperformed the grandfathered combinations, supporting the hypothesis we had advanced.[23]

However, when we explored the same questions using the data provided in Study 4 (which measured news minutes based on blocks of time provided by TV listings) the result was the opposite.[24] Further probing of this result made it apparent that WGN (a grandfathered station long cross-owned with the Chicago Tribune) was an outlier driving the result. WGN is not only one of the oldest television stations in the country, it is also a "super station," (a broadcast station and pseudo-cable network) that is carried even by cable systems outside of WGN's local market. The fact WGN alone was responsible for the station-level increase in local news led Free Press to the conclusion that this "outlier is likely not an indicator of the effect of cross-ownership. Simply stated, there is no evidence from Study 4 that suggests cross-ownership increases the amount of news aired by a station."[25]

Similarly, the FCC 2010 media ownership Study #4, *Local Information Programming* by Jack Erb determined that cross-ownership does not lead to a market-level increase in local news, but does find a station-level increase.[26] That study, like the 2006 media ownership review Study 4, also relies on programming guides and likewise produces a station-level result driven in part by WGN. Thus, for the reasons explained above, the station-level increase observed in the Erb study should also be taken with a grain of salt. The more precise methodology that measures

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[23] Comments of Free Press et al, filed MB Dkt 06-121 (Oct. 22, 2007) at 190.
[24] *Id.* at 208.
[25] *Id.*
[26] *Local Information Programming* at 48.

actual content, and not merely programming blocks, supports Free Press's hypothesis about the inherent differences between waived and grandfathered stations.[27]

In conclusion, all this serves to suggest that the station-level results are highly dependent on model specification, and in no way amount to enough evidence to offset the clear market-level reductions seen in our earlier work and confirmed by Erb in *Local Information Programming*. Evidence that cross-ownership is strongly associated with less market-level output of local news programming provides a strong case for maintenance of the cross-ownership restriction. The loss of a diverse local voice provides no tangible public interest benefits, but brings palpable harms to localism and diversity.

2. Industry Commenters Admit That Relaxing The NBCO Rule Will Not Cure What Ails The Newspaper Industry

The record in these proceedings supports only one conclusion: relaxing the newspaper/broadcast cross-ownership rule will diminish the number of diverse and independent sources of local news and information available both on and offline, and will, if anything, reduce the overall amount of local news available to local communities.

The complete and utter lack of public interest benefits from such combinations is a more than sufficient reason for the Commission to abandon its proposal to relax the NBCO rule. Indeed, the public's interest is the only factor that the Commission may legitimately consider in this rulemaking proceeding. However, it is worth noting newspaper conglomerates are finally

[27] It makes sense that the data provided by program guide services would be a far less exact method of counting local news minutes and would yield less precise results than a method that examines and counts actual local news minutes. For one, the programming blocks provided in programming guides do not distinguish between minutes of program time and minutes of interstitial commercials aired during such programs. They are counted equally. Nor do program guides distinguish between bona fide local news content aired during a local newscast versus national content or "filler" material frequently included in such newscasts.

admitting – both in their comments and by their actions – precisely what Free Press and other public and consumer interest groups have been pointing out for the last decade: cross-ownership will not cure what ails the newspaper industry. To the extent that newspaper owners are seeking a solution to problems caused by their own entrenched business models and failure to innovate, that solution will not be found in this proceeding, or even within the jurisdiction of the Federal Communications Commission.

In its comments, the Cox acknowledges that new media businesses by and large do not contribute to the diversity of the local news sources available to a local community. Cox states that "many of these new media voices lack the resources or the desire to produce local news that could substitute for that provided by traditional media. Thus, new media often takes audience share and its accompanying revenue from traditional media without producing local news and information content that would benefit the public."[28] While Cox admits that online media are not substantively contributing to the diversity of local news and information, the company nonetheless asks the Commission to relax is NBCO rule in a way that would further diminish the number of independent sources of local news. It argues the Commission has "confuse[d] newspapers' important role in local newsgathering with an economic market power and print audience reach that newspaper no longer possess."[29] It further argues that elimination of the NBCO rule is "the only option for giving local media companies the tools they need to develop economically sustainable models for continuing to serve their communities with diverse local news and information."[30]

[28] Cox Comments at 6.
[29] *Id*. at 8.
[30] *Id*.

Cox's arguments are both inaccurate and contradictory. As the FCC itself observes in the NPRM, even though print circulation has declined, newspaper websites rank among the most popular news websites and "from a traffic perspective, newspapers have come to dominate the Internet on the local level."[31] And contrary to Cox's argument that cross-ownership is required to sustain service to local communities, there is little or no evidence to suggest that cross-ownership will improve the finances of newspaper companies. Nor is there evidence to suggest that cross-ownership results in greater and more diverse news and information programming at the market-level. Indeed, all credible evidence points to the opposite conclusion.[32] In fact, consolidation appears to be part of the problem – not part of the solution. Newspaper companies have touted cross-ownership as a way to maintain the high profit margins they have garnered historically. But consolidation seems to exacerbate the problem of declining news output by loading companies with additional debt. The short-term benefit of mergers is an increase in revenue and market share. The long-term consequence is a substantial debt load.

For example, Tribune Co., by far the largest owner of cross-owned newspaper/television combinations is also one of the most financially troubled newspaper companies and filed for bankruptcy protection in December 2008.[33] As a consequence, the company must file comments in this proceeding on behalf of its interests as a "Debtor-in-Possession" of the company – ironically enough, to advocate for loosening of the cross-ownership rule.

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[31] *2011 NPRM* at ¶97 (citing Steven Waldman, et al., *The Information Needs of Communities: The changing media landscape in a broadband age*, Federal Communications Commission Staff Report (2011), at 76 and 55-56 ("INC Report")).

[32] *See* discussion *infra* at I(A)(1).

[33] Michael Liedtke, "Tribune Co.'s bankruptcy reorganization plan still faces opposition from unhappy lenders," ASSOCIATED PRESS (Apr. 12, 2010).

In a moment of unusual candor, Tribune, Debtor-In-Possession, states that "no one can promise that [Tribune's own view of] the appropriate course for the NBCO rule, total and complete elimination, will be the saving grace for newspapers."[34] This begs the question: if cross-ownership has not helped save Tribune why should the FCC or the public expect it to yield financial benefits to other newspaper companies? More importantly, if Tribute itself no longer believes that unfettered cross-ownership will save newspapers going forward, why should the FCC or the public risk the palpable injury to the public's access to independently produced local news and diverse information by relaxing the rule at all?

Tribune, Debtor-In-Possession, would appear to be the poster child for why companies should think better of pursuing cross-ownership as a business model. And, in fact, many companies are re-thinking, if not outright abandoning, this flawed business model. When they are not admitting in comments in this proceeding that cross-ownership does not and will not work, newspaper owners are tacitly admitting that cross-ownership is a failed business model as more and more companies decide to sever their newspaper and broadcast properties.

Notably, Media General, one of the most vociferous opponents of the cross-ownership rule, did not even bother to file comments in response to this NPRM. Instead, press reports suggest that the company is actively pursuing the option of selling its entire newspaper division.[35] The New York Times Co. recently sold all of its TV stations.[36] Belo Corp. spun off its

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[34] Tribune, Debtor-In-Possession, Comments at 11.

[35] Sarah Barry James, "Media General Exploring Sale of Newspapers," *SNL Kagan* (Feb. 22, 2012).

TV stations and its newspaper business separately.[37] In the three years since it was spun off from its broadcasting parent, A.H. Belo Corp., the now independent newspaper company has slowly improved its operating margins.[38]

Given this evidence, the pertinent question is not whether and how the Commission should relax the cross-ownership rule, but rather, why it would even consider relaxing the rule simply to allow combinations that will not benefit the public and which companies are already abandoning of their own volition? It is not the FCC's duty to bail out a few conglomerates that mismanaged their businesses. It certainly should not bail out companies who themselves no longer believe in the cross-owned model themselves.

Consolidating local newspapers and television stations is not the answer to solving the business mismanagement of some newspaper companies. There is very little evidence that this strategy will succeed financially in the long run, and it is not worth the democratic costs in terms of the loss of diverse and antagonistic news sources. These enterprises need to adapt and take advantage of the opportunities in cyberspace. To allow them to consolidate now will only stifle viewpoint diversity and competition in the future.

B. The Local TV Ownership Limits Remain Necessary To Preserve The Public's Access To Competing and Independent Sources Of Local News

In the NPRM the FCC proposes to retain the local television ownership rule,[39] including the eight-voices test and prohibition against mergers among the top-four-rated stations.[40] The

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(footnote continued)

36 Louise Story, "Times Co. Agrees to Sell TV Stations to Equity Firm, N.Y. TIMES (Jan. 5, 2007).

37 "Belo Board of Directors Approves Spin-off Details That Will Create Separate Television and Newspaper Businesses," Belo Press Release (Jan. 11, 2008).

38 Company 10-K SEC filings.

NPRM properly concludes that the rule remains necessary in light of competition considerations, and seeks comment on whether the rule "also is necessary to promote our localism and viewpoint diversity goals."[41]

The public overwhelmingly depends on local television stations to report on local issues.[42] Local television is an important journalistic player, accounting for about a third of all original news content.[43] On "a typical day," 78 percent of Americans say they get news from their local TV station – more than from newspapers, the Internet, or the radio. In addition, local TV news sites rank among the most popular news websites.[44] Because local television stations continue to dominate local news markets, it remains critical that the FCC's media ownership rules continue to preserve competition and independence among local stations.

1. Tightening The Local TV Ownership Limits Would Promote Competition, Localism And More Efficient Use Of Public Spectrum

Free Press strongly supports the Commission's decision not to relax the local television rules and rejects relaxation of waiver criteria to permit increased duopoly ownership. Marketplace evidence suggests that the Commission's decision in 1999 to permit television duopolies in some markets[45] has not served the public well, and Free Press encourages the

(footnote continued)

[39] The FCC proposes to eliminate the Grade B contour approach to implementing the local television ownership and relying solely on Nielsen DMAs. Free Press has no objection to this proposed change. *2011 NPRM* at ¶37.

[40] *Id.* at ¶26, 27.

[41] *Id.* at ¶26.

[42] PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS: PRESS ACCURACY RATING HITS TWO DECADE LOW (Sept. 13, 2009).

[43] PROJECT FOR EXCELLENCE IN JOURNALISM: HOW NEWS HAPPENS (Jan. 11, 2010).

[44] *INC Report* at 76.

[45] *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903 (1999).

Commission to return to its previous one-to-a market rule. In the NPRM, the Commission states that it does "not believe that the record in the proceeding supports limiting ownership to a single station in all local television markets,"[46] but provides no further explanation for drawing that conclusion.

There is substantial justification for returning to the single license rule. For one, the programming benefits that were predicted when the FCC relaxed the local TV ownership rule in 1999 have not materialized. Evidence suggests that consolidation of local TV markets does not increase the provision of local news programming. Research by Free Press, Consumers Union, and Consumer Federation of America shows that television duopolies do not exhibit statistically significant increases in either market share or hours of news.[47] Similarly, a 2009 study by Dr. Danilo Yanich found that independently owned television stations broadcast more local content during their newscasts than those stations that are part of a local duopoly.[48]

A single license rule would promote competition in larger markets where duopoly ownership is currently permitted. Tightening the duopoly rule also has the potential to promote ownership diversity by freeing up stations for purchase by new entrants.

Many industry commenters argue that the Commission should further relax the local TV ownership caps because multiple station ownership results in efficiencies that will allow TV

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[46] *2011 NPRM* at ¶51.

[47] Reply Comments of Consumers Union, Consumer Federation of American and Free Press, filed MB Dkt. 06-121 (Jan. 16, 2007) at 95.

[48] Danilo Yanich,Paper presented at the annual meeting of the International Communication Association: *Ownership Matters: Localism, Local Television News, and the FCC* (May 20, 2009).

stations to better compete and provide the public with enhanced service.[49] However, these commenters fail to recognize that technological advancements in multicasting resulting from the digital television transition also allow broadcasters to spread costs and personnel and provide the public with additional in content and programming streams, but without the competition-diminishing effects of consolidation.

In the 2006 Review the Commission declined to tighten the local TV ownership rule finding that "owning a second in-market station can result in substantial savings in overhead and management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a larger number of operating units."[50] However, the Commission did not address arguments that these very same benefits can also be attained through broadcasters' digital multicasting capabilities – minus the negative effects that consolidation has on competition.

Because of the digital transition, which was completed in mid-2009, stations can now program multiple streams using the same amount of spectrum. This undercuts broadcast arguments that they require a second or even third station to provide additional programming to the public. Moreover, multicasting also allows stations to take advantages of efficiencies by distributing overhead and management costs over a larger number of programming units, without acquiring another station. Predictably, broadcasters such as Belo Corp. reject this argument, claiming that multicasting does not generate the same "synergies or cost savings that are

[49] *See, e.g.*, NAB Comments at 11; Comments of Nexstar Broadcasting, filed MB Dkts 09-182, 07-294 (Mar. 5, 2012) at 22 ("Nexstar Comments"); Comments of Belo Corp., filed MB Dkts 09-182, 07-294 (Mar. 5, 2012) at 3 ("Belo Corp. Comments").

[50] *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2064-65 (2008) ("2006 Review Order").

produced by joint ownership."[51] But it is unclear why multicasting would not provide similar benefits. The only significant difference between the efficiencies of multicasting and duopoly ownership is that the latter diminishes competition in local television markets. Thus, Belo's argument only makes sense if the "synergies" it seeks are really just the elimination of an in-market competitor via acquisition. Of course, the FCC is statutorily charged with promoting competition in local broadcast markets – not reducing it.

Additionally, returning to a single license restriction would encourage more efficient use of broadcast spectrum. Indeed, permitting broadcasters to own multiple licenses may reduce their future economic incentives to innovate and to use the digital spectrum efficiently, which is contrary to the Commission's long-standing policy goal in favor of efficient and non-duplicative use of the spectrum.

In support of this theory, a study commissioned by the FCC for this proceeding suggests that the local television ownership limits may incentivize broadcasters to utilize their multicasting capacity. [52] This study examined the impact of the broadcast TV rules on "innovation" as measured by deployment and use of multicasting. With the appropriate caveats for a small sample size and limited years of observation, the study found that, if anything, local TV ownership limits have a "positive effect" on multicasting in local markets.[53] The author also notes that that multicasting intensity "increases as market concentration decreases, or as the number of station owners approaches the number of stations, adjusting for unobserved market characteristics. This could be interpreted as indicating that FCC regulations support innovation

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[51] Belo Corp. Comments at 11.
[52] Andrew S. Wise, *Broadcast Ownership Rules and Innovation* (2010) (Study #10).
[53] *Id*. at 54.

since the regulations limit consolidation."[54] Similarly, the author determines that consolidation does not increase multicast innovation by local broadcast TV stations and that the data observed "do not provide support for the idea that allowing additional consolidation in this manner would increase [multicasting] innovation."[55]

In sum, there is significant record support for the contention that the duopoly ownership of local television not provided any cognizable benefits to the public, and that such consolidation has had significant adverse effects on localism, competition and innovation.

2. Further Consolidation Is Not Necessary To Ensure The Viability Of Local Television Markets

Broadcaster arguments that consolidation is necessary to sustain local television stations in light of declining revenues are unpersuasive[56] – largely because TV stations revenues are not declining. While it may be convenient to plead poverty in Commission rulemakings, such claims are not borne out in the real world. Most local TV stations are highly profitable. As FCC Chairman Julius Genachowski observed in a recent speech at the National Association of Broadcasters annual conference, broadcast television is making more money than ever. The Chairman reported that TV ad revenue is up 12 percent since 2009 and analysts project another 14 percent increase in ad revenue in 2012."[57]

Furthermore, broadcasters cannot continue to argue with a straight face that they confront enduring financial hardships because station revenues temporarily dip every odd calendar year.[58]

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[54] *Id*. at 44-5.

[55] *Id*. at 48.

[56] *See* Comments of Newvision Broadcasting, filed MB Dkts, 09-182, 07-294 (Mar. 5, 2012) at 7-8 ("Newvision Comments"); NAB Comments at 17.

[57] Alex Ben Block, "NAB 2012: FCC Chairman Does Hard Sell to Broadcasters on Spectrum Auction," HOLLYWOOD REPORTER (Apr. 16, 2012).

[58] Newvision Comments at 7; NAB Comments 16.

No one is actually fooled by such claims. Rather, it is common knowledge that national and local elections take place in even years, at which time most broadcasters rake-in substantial revenues generated by lucrative political advertising.

To that end, the economic forecast is looking exceptionally rosy for local television stations. This year the presidential election, coupled with an influx of third party ads stemming form the Supreme Court's 2010 decision in *Citizens United,* is unleashing a surge of political ad spending, with the vast majority projected to flow to local television stations.[59] Estimates suggest that candidates, political parties and independent groups will spend up to $3.3 billion to buy TV ads during the 2012 election season.[60] One former broadcast executive wrote "[i]f you happen to operate a television station in a presidential battleground state that also has a key U.S. Senate race, it will be like winning the lottery."[61] Another former TV news executive stated that "[i]n late 2011 and early 2012, the Iowa caucus cycle produced 24/7 campaign ads, and some reports indicate that local television broadcasters in the state earned $18 million in campaign advertising."[62] The greatest beneficiaries of this political advertising surge are companies that own stations in states where elections will be hotly contested; this includes companies such as Belo Corp., CBS Corp., E.W. Scripps, Gannett Co., Inc., Media General, News Corp. and Sinclair Broadcast Group.[63]

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[59] Paul Thomasch and Lisa Richwine, "TV Broadcasters Enjoy Spoils of Political Wars," REUTERS (Jan. 7, 2012).

[60] *See* Julia Boorstin, "Record Political Ad Spending Powered by Special Interests," CNBC (Nov. 8, 2011).

[61] Bill Wheatley, "What Should TV Stations Do with All That Negative Ad Money?" Nieman Watchdog (Dec. 18, 2011).

[62] Susan King, "Stations Need Transparency In Political Ads," TVNEWSCHECK (Feb. 23, 2012).

[63] *See* Boorstin, "Record Political Ad Spending." Things are not just improving for individual TV stations. The broadcast networks with which they are affiliated are also seeing an advertising

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TV broadcasters are clearly not wanting for cash of late, but even so, as with broadcasters' so-called "efficiency" claims there is no guarantee that stations' increasing bottom lines will result in more news. Notably, the FCC's INC Report found that instead of using "the additional money that poured into local TV stations from the historic levels of political advertising in the 2010 election season to increase the pool of reporters who could cover their communities and more effectively monitor institutions and government agencies, many stations have opted to let those dollars simply flow to the bottom line."[64] Given this evidence, broadcasters' arguments that consolidation is necessary to provide communities with news and information programming are unpersuasive.

Some broadcasters and the Commission, suggest that some media markets may not be able to support a multiplicity of independent TV news operations.[65] For example, the FCC notes that "there is some evidence to suggest that markets with six or fewer stations may be less able to support four local television news operations."[66] Industry commenters and the FCC appear to suggest that this justifies relaxing ownership rules or relaxing waiver standards to provide for additional common ownership in smaller markets.[67] In such cases allowing more consolidation would be precisely the wrong approach. It would not promote competition or preserve an

(footnote continued)
boom. In August 2011, Reuters reported that "after plunging with the economy in 2008, ad money is now flowing to broadcast and cable television networks" and that media companies "are set to report quarterly revenue gains on the back of a booming advertising market that shows little sign of retreating." Lisa Richwine, "Big media rings up sales as advertisers keep coming," REUTERS (Aug. 1, 2011).

[64] *INC Report* at 114.

[65] *See* NAB Comments at 29; Nexstar Comments 29.

[66] *2011 NPRM* at ¶53 (citing internal staff research suggesting that "four or more stations each provide at least 30 minutes of local news per day in 89.3 percent of markets with seven or more stations, as compared to only 22.5 percent of markets with six or fewer stations." *Id*. at fn.117).

[67] *Id.* at ¶53-5.

independent news voice. Nor is carbon copy local programming consistent with the Commission's "long-standing policy goal in favor of efficient and non-duplicative use of the spectrum."[68] If a broadcaster cannot support itself or serve its community with independently produced local news, or if a market cannot support the current number of TV stations, it would be preferable as a matter of public policy for that broadcaster to go out of business and sell its spectrum to a new entrant in the market, or to relinquish its spectrum so that it may be put to a better use in the community.[69]

It is not the Commission's job to protect industry profit margins or too bail out stations that cannot hack it in the market place. Nor is it consonant with good spectrum policy to allow broadcasters that are incapable or unwilling to serve communities with independent local news to continue to waste valuable public property. Rather, the Commission must promulgate and enforce rules designed to promote competition, diversity and localism so that the public interest, convenience and necessity are served.

3. Any Further Consolidation From Relaxing Local Television Ownership Rules Would Be Compounded By The Likely Reduction in Broadcast Ownership Opportunities Following Voluntary Broadcast Incentive Auctions

Free Press urges the Commission to avoid relaxation of the local TV ownership rules, either outright or by waiver, given that the composition of local television markets may shift as a consequence of the recent legislation authorizing the FCC to conduct voluntary incentive

[68] *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).

[69] Moreover, if the station is truly failing, it can apply for a failing station waiver which would allow for common ownership of two stations that would otherwise violate the rules. 47 C.F.R. § 73.3555, Note 7.

auctions of broadcast television spectrum for the deployment of next generation wireless networks.[70] Broadcasters that choose to participate in the auction will receive a portion of the auction proceeds.

As a consequence of broadcasters voluntarily opting to vacate some spectrum or even surrender their licenses, the overall number of television stations in a given media market could contract. Thus, were the FCC to allow further consolidation in local TV markets at this time or in the near future, the negative impacts of market concentration would be compounded should other stations and independent owners decide exit the market. The Commission should resist broadcasters' entreaties to further consolidate local television markets until it can properly assess how these incentive auctions will impact competition.

4. The FCC Should Not Allow The Public Interest Benefits Of The Local Television Ownership Rule To Be Evaded And Undermined By Broadcaster Resource Sharing Arrangements

Free Press agrees with the Commission that local television ownership rules remain “necessary in the public interest as a result of competition.”[71] This is all the more reason for FCC to ensure that TV broadcasters’ increasing reliance on resource sharing arrangements does not undermine the competition-promoting benefits of the local television ownership limits. While outright media consolidation in local TV markets adversely impacts competition and diversity, increasingly we are witnessing a more covert and insidious form of consolidation at the local level through news and resource sharing agreements. In many communities the end result is a TV dial where most of the news is essentially a duplicate of what is aired on another local broadcast

[70] Middle Class Tax Relief and Job Creation Act of 2012, Pub.L. No. 112-96, § 6403 (2012).
[71] *2011 NPRM* at ¶26.

channel. The corrosive effects that these practices are having on editorial independence and journalistic integrity should alarm the public, regulators, and industry professionals.

In the NPRM the Commission seeks comment on the impact of shared services agreements (SSAs) and other sharing arrangements and asks whether and how the agency should address attribution of such arrangements in its ownership rules.[72] As reliance on these joint ventures increases, local news competition is being reduced and the quality and quantity of independently reported and produced local news is declining.[73] What is more, the FCC's existing rules do not account for and do not adequately protect the public from the anti-competitive effects of these ventures. A lack of governing standards over such arrangements increases the potential that these agreements will continue to be abused to the detriment of the public's access to local news and information that should be provided by diverse, independent and competing sources.

a. TV Station Sharing Arrangements Diminish The Amount And Availability Of Competing, Independent And Diverse Local News Sources

The FCC's media ownership rules are designed to preserve competition and diversity by preventing local media markets from being "cornered" by a few owners and interests. But many broadcasters appear to be using resource sharing agreements to get around these rules. When they are unable to formally consolidate station ownership, these deals allow stations to consolidate their core local news operations – producing effects that are expressly contrary to the Commission's localism, competition and diversity goals.

[72] *Id.* at ¶195.

[73] Hilary Atkin, "As Local Sharing Progresses, New Concerns Emerge," TVWEEK (Aug. 5, 2009).

In the absence of much needed FCC oversight, reliance on these arrangements is increasing. According to the INC Report, "[n]early one-third of TV stations say they are running news produced by another station."[74] Additionally, Free Press and other public interest groups have been documenting how the use of these types of agreements adversely impacts the amount and quality of independently produced broadcast news programming available to local residents. Free Press has identified almost 80 television markets where these types of deals are in place, involving more than 200 stations in total.[75] We have compiled video clips showing how these agreements result in the airing of carbon-copy local newscasts on multiple, supposedly "competing" local TV stations.[76]

In the NPRM the FCC determines that "local broadcast television stations compete directly with each other, particularly during the parts of the day in which these stations do not transmit the programming of affiliated broadcast networks."[77] The FCC acknowledges a critical factor about competition in local television markets: while stations may air programming from a variety of sources (including network and affiliated programming), they primarily compete on the production and airing of programming about their local communities, *i.e.* local news. But stations involved in covert consolidation arrangements do not compete for local programming because the local news comes from a single source. Their own newscasts make this abundantly clear.

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[74] *INC Report* at 96.

[75] *See* "Change the Channels" at http://www.savethenews.org/changethechannels. *Change the Channels* is a project launched by Free Press in 2011 to map the use of resource sharing arrangements by television broadcasters across the country.

[76] *See* "Change the Channels - Stop Newsroom Consolidation Now," http://www.youtube.com/watch?v=E9bIgcrWd1o&feature=relmfu.

[77] *2011 NPRM* at ¶33.

In Honolulu, Raycom Media laid off more than 60 people upon entering into a shared services agreement with MCG Capital in 2009.[78] As a consequence of the arrangement, all operations for three TV stations in Honolulu – channels 5, 7, and 9 – are now based out of the same building and the three stations air identical news coverage on all three stations.[79] A Honolulu resident captured video of this triplicate news phenomenon during Hawaii's 2010 gubernatorial election. When she tuned-in to Channels 5, 7, and 9 for coverage of the contested race, she found the same reporter conducting same interview simultaneously on all three channels.[80]

The arrangement is clearly at odds with the purpose of the local television rules. Honolulu viewers are not getting more news – they are getting more of the exact same news from stations that are no longer competing against one another for viewers. It also has led to an overall decrease in the amount of independently produced local news, which defeats the Commission's diversity and localism goals. Finally, because all of the local news and information programming produced by these stations is identical, the arrangement results in an inefficient and duplicative use of valuable public spectrum.

The Commission has acknowledged that such arrangements may contravene the goals of the media ownership rules. In 2009, a local citizens' group, Media Council Hawai'i, filed an

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[78] Erika Engle, "TV Stations' pact draws fire," STAR BULLETIN (Aug. 19, 2009); *see also* Gordon Y.K. Pang, "Shocked Journalist Worried About Jobs," HONOLULU ADVERTISER (Aug. 19, 2009).

[79] Dan Nakaso, "Consolidation biggest on-air change since '95," HONOLULU ADVERTISER (Aug. 19, 2009).

[80] *See* "Different Channels, Same Election Coverage" http://www.youtube.com/watch?v=7M_0jo-XR_A.

FCC complaint regarding the Honolulu SSA.[81] In November 2011, the Media Bureau released an order determining that under existing FCC policy the stations did not technically engage in a violation of the local television ownership rule – but it found that the "net effect" of some types of sharing agreements is "clearly at odds with the purpose and intent of duopoly rule."[82] The Commission stated that it would take up "the duopoly rule issues that [the Media Council Hawai'i Complaint] and similar cases raise" in the 2010 Media Ownership Review.[83]

In addition to the virtual triopoly that it runs in Honolulu, Raycom Media has taken control of three local television stations (KMSB, KOLD and KTTU) in Tucson, AZ. Raycom's station, KOLD, produces all of the news for the three stations, which are now co-branded as "Tucson News Now" and operate out of the same studio, minus the 40 employees that were laid off when the deal was announced.[84] The Maynard Institute, which promotes diversity in journalism, noted in an article about the deal that one-third of the news staff at KMSB-TV (the station impacted by layoffs) was black or Latino.[85]

Similarly, in the summer and fall of 2011, Media Reform South Carolina (MRSC), a group comprising local media activists, began studying the consolidation of newscasts by two local television stations in Charleston, SC. They found that the local FOX affiliate airs its newscast at 10 p.m. Then one hour later, the CBS affiliate broadcasts the same news. MRSC

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[81] *See Media Council Hawai'i Complaint and Request for Emergency Relief Regarding Shared Services Agreement between Raycom Media and MCG Capital for Joint Operation of Television Stations KHNL, KFVE, and KGMB, Honolulu, Hawai`i* (Oct. 7, 2009).

[82] *In the Matter of KHNL/KMGB License Subsidiary, LLC and HITV Subsidiary Inc*., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087, 16095 (Nov. 25, 2011) ("KNHL/KMGB Order").

[83] *Id.*

[84] Michael Malone, "Belo's KMSB Tucson Outsourcing News; Raycom's KOLD to take over news for Belo's Fox in shared services pact," BROADCASTING & CABLE (Nov. 15, 2011).

[85] "Anchor's Report: We're All Losing Our Jobs, In Tucson, Station Turns Over News Shows to Competitor," THE MAYNARD INSTITUTE (Nov. 16, 2011).

recorded excerpts of these newscasts, which Free Press then compiled into a video showing that these stations are not only sharing anchors and newsroom staff, their newscasts feature virtually identical news content and scripts.[86]

A recent study by Dr. Danilo Yanich confirms what on a daily basis many local communities observe first hand. That study, which conducted content analyses of eight markets where these types of agreements are in operation, confirms that these arrangements are widespread and that they have a "profound effect on the local news broadcasts in the markets in which they operate"[87] and that their "obvious and unambiguous result was a reduction in the number of separate news voices in the market."[88]

Stations that participate in sharing arrangements are quick to tout what they see as the efficiency benefits of these arrangements. For example, in earlier comments to the FCC in this proceeding, Nexstar Broadcasting argues that if it "were not for the combined news operations [through shared services agreements] in several of its markets, local news programming on at least one of the stations in these markets also would be discontinued due to the high costs required to provide local news programming."[89] In its most recent comments to the FCC Nexstar argues that "[u]ntil the Commission provides duopoly relief in all markets, the Commission must allow television broadcast stations to continue operating under local service agreements."[90]

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[86] Libby Reinish, "The Great Local News Heist," *SavetheNews.Org* (Oct. 20, 2011) http://www.savethenews.org/blog/11/10/20/great-local-news-heist (video embedded and also available at http://www.youtube.com/watch?v=0ZXqAl-acic&feature=relmfu.)

[87] Yanich, Danilo, *Local TV News & Service Agreements: A Critical Look*, University of Delaware (2011) at 98.

[88] *Id.* at 100.

[89] Comments of Nexstar Broadcasting, filed MB Dkt 09-182 (July 7, 2010) at 18.

[90] Nexstar Comments at 27.

The fact that broadcasters like Nexstar are using control exerted via sharing arrangements as a proxy for common ownership should be evidence enough that these agreements are being used as end runs around the duopoly rule. In any event, more often than not, the "efficiencies" that Nexstar touts are really plain, old-fashioned lay-offs. Time and again, the announcement of a shared services arrangement is followed by the complete liquidation of one station's news staff, eliminating that station's ability to produce original content. In Nexstar's case, its own shared services agreement with Mission Broadcasting in Scranton, Pennsylvania, led to a rapid deterioration in local news. In the agreement, Nexstar's WBRE began to produce newscasts of Mission's WYOU in the same studio. While Nexstar initially aired both newscasts, it later took WYOU's newscast off of the air. It fired all but two of it staff at WYOU. When it canceled WYOU's newscast, a Mission executive told Broadcasting & Cable that in spite of ending all WYOU local news production in Scranton, Mission remained committed to providing local news.[91] Mission's WYOU started broadcasting "Judge Joe Brown" and "Access Hollywood" in the place of the original local news broadcast.[92]

A reduction in independent journalism and journalism jobs is par for the course with these practices. In March 2009, Granite Broadcasting and Barrington Broadcasting entered into a joint venture in Syracuse, whereby Barrington Broadcasting's station, WSTM, took over production of local news at Granite Broadcasting's station, WTVH. Under this shared services and joint sales agreement, WTVH laid off at least 40 employees and started broadcasting out of

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[91] Michael Malone, "WYOU's Disbanded News Operation May Be The First of Many," BROADCASTING & CABLE (April 13, 2009).

[92] Andrew M. Seder**, "**WYOU ceasing news broadcasts**,"** THE TIMES LEADER (April 3, 2009).

WSTM's studio.[93] "They came in and said basically, 'We're closed. You're all out of work,'" according to Bill Murray a local member of the Communications Workers of America.[94] "They emptied the building, and the newscasts are identical at this point. It's the same people. It's the same crew. It's the same reporters. It has to be, because Granite has literally no news employees."[95]

In Peoria, the two companies swapped roles, and Granite began producing all the news for the local Barrington station with similar results. Steve Tarter, a local newspaper journalist in Peoria, said the agreement has had a detrimental impact on the local television industry in Peoria.[96] When Granite's WEEK took over the operations of Barrington's WHOI, the local newspaper estimated that upwards of 30 people were laid off.[97] "In fact, the [news production] has really been reduced," Tarter said. "The weekend news is virtually the same. [WHOI] does not have a recognizable presence anymore."[98]

Even more recently, investigative reporting by the *Toledo Blade* revealed that the local FOX affiliate, WUPW-TV, intends to lay off 63 of the station's employees on the heels of entering into a shared services agreement with the WTOL-TV, the local CBS affiliate.[99] The agreement will allow the two stations "to share news staff and broadcasts. In addition to news,

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[93] Michelle Breindenbach, "Syracuse's Channel 5 shuts down its newsroom," THE POST STANDARD (Mar. 2, 2009).

[94] Free Press, *Outsourcing the News: How covert consolidation is destroying newsrooms and circumventing media ownership rules* (2011) at 10.

[95] *Id.*

[96] *Id.*

[97] Steve Tarter, "WEEK-TV taking over WHOI operations," PJSTAR.COM (Mar. 2, 2009).

[98] *Outsourcing the News* at 10.

[99] Kris Turner, "Channel 36's owner plans to lay off 63," THE TOLEDO BLADE (Mar. 1, 2012).

WUPW and WTOL would share access to studios, master control, technical facilities, maintenance, and promotional efforts."[100]

In *Prometheus II*, the court upheld the FCC's decision to retain its existing local television ownership limits as necessary to protect competition in local markets because competition for viewers "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers."[101] The evidence above strongly indicates that SSAs and similar agreements do not increase competition between local TV stations nor do they lead to more or better independent local programming. These practices are not those of a station acting independently and competitively in the marketplace. As Free Press stated in a recent joint letter, "[a]truly independently owned and operated station does not outsource its rights and obligations to its competitors."[102]

Not only are these arrangements bad for jobs and local journalism, they are not necessary to preserve stations experiencing genuine financial distress. Notwithstanding, the fact that the local TV industry as a whole is doing quite well, stations frequently suggest that such agreements are required to maintain news production, as well as the continued financial viability of the stations themselves.

Ironically, despite broadcast executives' supposed concern for preserving affected stations, these agreements often result in the virtual shuttering of the stations, which is the very outcome broadcasters argue that these deals are designed to avoid. With little or no newsroom or

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[100] *Id*.

[101] *Prometheus II*, 652 F.3d at 459 (citing the *2006 Review* Order and Order on Reconsideration, 23 FCC Rcd. 2010).

[102] Joint Letter from the American Cable Association, DISH Network, Free Press, National Association of Broadcast Employees and Technicians-Communications Workers of America, The Newspaper Guild-Communications Workers of America, and Time Warner Cable, filed MB Dkt 09-182 (Nov. 14, 2011).

operating staff, many of the stations that remain on the air as a result of such an agreement are simply operating on autopilot. The resulting news product is merely a re-run of content produced by another station and does not increase product diversity in terms of viewpoints, substance or coverage of different issues.

b. The FCC Must Make Broadcaster News And Resource Sharing Practices Transparent And Attributable Under The Media Ownership Rules

In the absence of more proactive attention by the Commission to the problems raised by SSAs and similar practices, stations are entering into these deals with increasing and alarming alacrity. The FCC can no longer tacitly approve such practices through its own inaction. First the FCC should require disclosure of such agreements in stations' public inspection files. Such disclosure will enable the public and the Commission to monitor broadcasters' use of said agreements. Second, the FCC must change its attribution policies to better address the anti-competitive effects of resource sharing agreements and it must do so promptly.

Nearly every broadcast commenter in this proceeding opposes attribution of local sharing arrangements. The Commission should reject these arguments. Indeed, given the many harms to jobs, journalism and competition in local communities demonstrated above, the FCC can no longer ignore the systematic circumvention of its rules through such agreements.

A critical first step is to bring these agreements out into the open. Public file disclosure of SSAs and other resource sharing agreements is long overdue. For sometime now public interest and local citizens groups have been seeking greater transparency for SSAs on the grounds that the use of these types of agreements may be adversely impacting the amount and quality of independently produced broadcast news programming available to local residents.

Furthermore, the FCC should adopt a set of criteria that identifies aspects of sharing agreements, which if met, would render such agreements attributable for the purpose of the FCC's media ownership limits. The Commission should identify the qualities of such arrangements which, on their own or in conjunction with other factors, demonstrate that a station is exerting substantial influence or control over the programming and operations of another in-market station. In other words, if it walks like a duopoly and talks like a duopoly, then the Commission should attribute it like a duopoly under the local television ownership rule. Furthermore, the FCC should not grandfather existing SSAs and other arrangements that are not in compliance with the new policy we propose, but should require broadcasters to come into compliance with rule changes within a reasonable period of time.

To this end, Free Press supports the proposal advanced by the Georgetown Institute for Public Representation in its comments filed on behalf of The Office of Communication of the United Church of Christ, Inc., Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, and Media Council Hawai'i (collectively "UCC et al."). Those comments propose a bright line, multifactor test for assessing the level of control that one station exercises over another via a sharing agreement, such that attribution of that agreement would be deemed necessary to account for its effect on the localism, diversity, and competition goals of the FCC media ownership limits. Specifically, UCC et al. propose that an agreement would be automatically attributed if <u>one</u> of the following factors is met:

> 1) The servicing broadcaster provides all or significantly all local news programming for the licensee's station;
>
> 2) The servicing broadcaster sells 15 percent or more of the licensee's weekly advertising time;

3) The stations share management personnel;

4) The licensee maintains no separate facilities;

5) The servicing broadcaster reports to the securities and exchange commission that it owns, controls or operates the licensee's station;

6) Fifty percent or more of the licensee's total revenues go to the servicing broadcaster; or

7) The parties to a Sharing Agreement jointly negotiate retransmission consent.[103]

Acknowledging that in some circumstances it is the confluence of multiple factors, rather than a single aspect of an agreement, that raise attribution concerns, UCC et al. propose an additional and alternative test. Under this test an agreement would trigger attribution if at least three of the following factors are satisfied: (1) the servicing broadcaster provides between 8% and 15% of the licensee's programming; (2) the number of employees at the servicing broadcaster significantly outnumber those at the licensee station; (3) the stations share some physical facilities; (4) the stations engage in joint promotional activities; (5) the stations share financial risk and reward; (6) there is a Local News Service agreement in the local market; and (7) the servicing broadcaster maintains an option to purchase the licensee's station.[104]

Free Press believes that the two tests proposed by UCC et al. identify many of the qualities of a resource sharing agreement which, either on their own or compounded by other factors, would contravene the FCC's localism, competition, and diversity goals. These bright-line tests provide objective and measurable criteria that will allow the FCC to make sure such arrangements are consistent with the public interest without unduly constraining the activities of

[103] Comments of UCC et al., filed MB Dkt 09-182 (Mar. 5, 2012) at section I(C)(1).
[104] *Id.* at section I(C)(2).

the stations involved. We urge the FCC to consider this or similar proposals as a means of addressing the increasing problem of covert consolidation.

II. Until The FCC Attends To The Diversity Issues Remanded By The Third Circuit It Cannot Move Forward With Any Proposed Rule Relaxation

Free Press has already commented at length on the Commission's duty to respond to the Third Circuit's instruction to address media ownership diversity issues concurrent with the present quadrennial review and direct the Commission's attention to the thorough discussion of this issue in our initial comments.[105] In these reply comments we reiterate that relaxing media ownership limits is inadvisable generally because of the adverse impact of consolidation on competition, diversity and localism. In any event, the Commission certainly cannot move forward with its proposed relaxation of the rules until it has attended to the court's directive on remand. The Third Circuit ordered the Commission to:

- "[S]ynthesize and release existing data [on female and minority ownership] such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review."[106]
- "[C]onsider the effect of its rules on minority and female ownership"[107]
- Consider alternative proposals and definitions for the now-vacated revenue-based eligible entity definition (such as a socially disadvantaged business (SDB) definition) "before it completes its 2010 Quadrennial Review"[108]

As of the date of the reply comments, the Commission has not completed, and in some cases has not even undertaken, any of these tasks.

A. The FCC Should Provide A Complete And Up To Date Census Of Female and Minority Ownership Levels And Assess How

[105] Free Press Comments at 8-23.

[106] *Prometheus II,* 652 F.3d at 471 n.42.

[107] *Id.* at 471.

[108] *Id.* at 438, 471.

Market Structure Promotes Or Impedes Ownership By Underrepresented Groups

First and foremost, the Commission has yet to produce a complete and updated assessment of minority and female ownership levels or provided any examination of possible changes in these levels. While the NPRM did synthesize 2009 data on minority ownership levels for full power television stations,[109] the Commission has not provided a new, accurate statistical analysis of radio ownership levels and has provided no analysis of any broadcast ownership by women.[110] As importantly, the Commission has not provided any analysis of the types of market and ownership structures that are more or less likely to support entry or sustain successful broadcast business ownership by women, people of color and other underrepresented groups.

We impress upon the Commission the importance of conducting such assessments. Free Press and myriad other groups have made this point repeatedly since the commencement of the 2006 Review. Unfortunately, the Commission has continually and consistently ignored our concerns – to the detriment of the quality of its overall decision-making, as well the ability of those decisions to withstand appellate review.[111]

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[109] *See 2011 NPRM* at ¶156.

[110] Nor has the FCC provided any analysis of the only figures it does offer. For example, combining the new TV ownership statistics of "minority" and Latino/Hispanic owners yields a total of 4.7 percent of full-power, commercial TV stations that are controlled by such owners. 2011 NPRM at ¶156. Free Press's study, *Out of the Picture 2007* found minority ownership levels of 3.2 percent. *See* S. Derek Turner, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (2007) ("Out of the Picture"). However, it is not yet known if there was an actual improvement in the level of minority ownership between 2007 and 2011, or if the recent figures simply represent the more complete accounting of ownership status afforded by the 2009 revisions to Form 323.

[111] *See* Free Press Comments at 2-7 (detailing the extensive appellate history and repeated judicial admonitions of the FCC's failure to meaningfully address ownership diversity issues in fulfillment of the agency's statutory mandate to promote ownership by new entrants and underrepresented groups, including women and people of color.)

The Commission must remedy this paucity of basic fact finding. First, without a complete and up to date understanding of the state minority and female ownership, the Commission cannot begin to assess or monitor the impact of any policy changes it may consider and ultimately adopt in this proceeding. More importantly, a better understanding of the market structures that sustain ownership diversity should be a basic component of any decision to maintain, modify or repeal the Commission's media ownership rules consistent with the Commission's statutory duty to promote competition, localism and diversity, and to expand opportunities for minorities and women to participate in the broadcast industry.[112]

The Commission presently should have all the data needed to complete such assessments, yet is has not provided a full census of female and minority ownership or conducted any research on media ownership diversity. Free Press is perplexed and concerned by this continued data lapse. A year ago in a supplemental brief to the Third Circuit, the Commission argued that it had remedied the ownership data collection deficiencies identified by Free Press in the 2006 Review. Moreover, it claimed that because of the

> substantial improvements to its process for collecting broadcast station ownership data, [the Commission] will be in a better position to evaluate the effectiveness of its current policies for promoting diversity of ownership. With more comprehensive and more accurate data, the agency will be better able to assess any need for further reforms to its media ownership rules and diversity policies in future quadrennial review proceedings.[113]

The Third Circuit ultimately disagreed with the FCC that reforms to ownership data collection alone were a sufficient step to promote ownership of broadcast stations by women and people of color, though it recognized that such reforms were necessary to attend to the court's

[112] *See 2011 NPRM* at ¶ 148.

[113] Supplemental Brief of the Federal Communications Commission, consolidated Dkt No. 08-3078 at 4. (Feb. 16, 2011)

instruction to consider the impact of changes in its media ownership rules on minority ownership because "[w]ithout accurate data on minority (and female) ownership, it is impossible to perform such analysis."[114] The court concluded that "[w]e are encouraged that the FCC has taken steps in this direction and we anticipate that it will act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review."[115]

While the court has every right to anticipate that an agency would respond to its directive, it may have been too sanguine in its expectations. With a two full comment cycles coming to a close, no ownership diversity studies have been conducted or are anticipated to be forthcoming for the 2010 Review.[116] And the FCC has yet even to provide a full and accurate picture of minority and female ownership across radio and television stations. The Commission can and should be remedy this oversight. If the FCC's new ownership reporting database is so flawed as to prohibit easy aggregation and cross referencing of this information, then the Commission should do what Free Press did in 2006 and 2007 when confronted with the Commission's minority and female ownership data accounting defects: hand review each Form 323 and construct a complete and accurate census of broadcast television and radio ownership by women and people of color.

Finally, Free Press emphasizes that analyses of ownership diversity and market structure can help to inform race and gender neutral policies that can nonetheless promote ownership

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[114] *Prometheus II*, 652 F.3d at 468 (citing a report of the Congressional Research Service).

[115] *Id.* at 471.

[116] In addition to seeking comments in response to the NPRM, the FCC also sought comments in response to a Notice of Inquiry issues in 2010. *2010 Quadrennial Review – Review of the Commission's Broadcast ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086 (2010).

diversity, and that such assessments are themselves race and gender neutral. Many of initiatives the Commission may need to undertake to address the persistently low levels of representation by women and people of color in broadcast ownership could implicate constitutional questions by employing race or gender based criteria. However, in the NPRM the Commission states that the "data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission."[117] Whether or not that is the case, analysis of minority ownership level and assessing the types of market structures that are more likely to support new entrants and ownership by underrepresented groups – and furthermore, tailoring Commission policy to encourage or replicate those structures – does not implicate equal protection issues, thus there is no constitutional impediment to engaging in such assessments or decision making.

For example, Free Press research has shown that that media consolidation makes it harder for new entrants and members of underrepresented groups to become – and remain – successful broadcast media owners and that minority owners do better in less consolidated media markets.[118] These findings strongly caution against further relaxation of media ownership limits, but the FCC decision to maintain or strengthen its media ownership limits to promote diversity is not itself a race or gender based policy because it does not award preferences based on race or gender. Therefore, regardless of whether the FCC ultimately is able to support and adopt race and gender based measures to remedy the persistent deficiency of ownership by women and people of color, the Commission should at the very least be making informed decisions to ensure that its policies do not produce market structures that would reduce ownership diversity, or that

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[117] *2011 NPRM* at ¶ 158.

[118] *See Out of the Picture*; *see also* S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (2007) ("Off the Dial").

would undercut the potential benefits of more targeted race and gender-based measures by allowing greater consolidation of broadcast outlets.

B. The Commission Should Conduct The Requisite Eligible Entity Research As Part Of The 2010 Review As Instructed By The Third Circuit

Free Press supports the Commission's consideration of alternatives to the eligible entity criteria, including "socially and economically disadvantaged businesses" (SDB) a definition employing race and gender based classifications that has been used by the small business administration.[119] But, as a threshold matter, if the Commission intends to promote ownership diversity, it cannot accomplish this goal while simultaneously enacting policies that increase market concentration. Policies that allow increased market concentration in tandem with efforts to increase ownership by SDBs <u>will not work</u>. Any short-term gains from such policies in terms of the number of stations owned by women or people of color will be offset in the long term by a loss of unique SDB owners, a loss of SDB stations, and a loss of unique and independent media voices.

The FCC seeks comment on SDBs, but does not propose adoption of that standard or any race or gender based standard, stating that "[a]lthough we would prefer to be able to propose specific actions in response to the Third Circuit's remand of the measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time."[120] Free Press is cognizant of the high evidentiary threshold for supporting race based criteria under strict scrutiny review, though we believe that substantial evidence has been submitted in this record and related proceedings that

[119] *2011 NPRM* at ¶ 163.
[120] *Id.* at ¶158.

could support the adoption of policies premised on race and gender based criteria.[121] That said if the Commission does not believe it has the data it needs to adopt race and gender based criteria, it should conduct the research that will supply such evidence.

In any event, the proper course of action, both as a legal and policy matter, is to conduct such research in the context of the 2010 Review so that the findings may inform the Commission's decision herein. The Commission recently awarded a contract to the University of Southern California Annenberg School "to provide a literature review of research into the critical information needs of the American public and the barriers to participation in the communications industry that might limit the extent to which critical needs are met."[122] The Notice explains that "[t]his study is the first step, examining what prior research has been conducted with regard to how the public acquires critical information, how the media eco-system operates to provide critical information, and what barriers exist to participation."[123]

Free Press commends the Commission for taking this first step. we hope it will inform the future research necessary to develop and sustain policies to promote a fairer and more competitive media marketplace and to ensure sure that every person, regardless of color or gender, has a meaningful opportunity to serve the public and succeed in the broadcast industry. However, we are confused and concerned that having initiated such research, the FCC still does not plan to take into account any of its results in the present media ownership review. And even

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[121] *See, e.g.*, Comments of UCC et al, submitted MB Dkt. 06-121 (Oct. 22, 2006) at 2-40 (explaining how increasing the number of minority or women-owned stations would result in better service for underserved segments of the population as well as help to remedy the past discrimination against both women and minorities in which the Commission has a passive participant).

[122] *Federal Communications Commission Request for Quotation For a Study Examining The Critical American Information Needs Of The American Public*, Public Notice, DA 12-585 (rel. Feb. 6, 2012).

[123] *Id*.

though the Commission has proposed to relax and even eliminate portions of the cross-ownership rules which could adversely affect ownership by diverse groups, the FCC nonetheless states that it intends to shunt diversity research and analysis to 2014.[124]

This course of conduct is completely irrational. Rather than postpone a decision in this proceeding until it has accumulated the necessary evidence, the FCC is instead suggesting that it plans to issue a decision, but reserve consideration of the facts until a later date and proceeding. This is entirely backwards. Reasoned agency decision making requires consideration of facts prior to arriving at a conclusion. Not the other way around.

What is more, the court has twice criticized the Commission for evading its responsibility to address media ownership diversity issues in the media ownership proceeding by postponing such questions to future or ancillary proceedings. In *Prometheus I*, the court chastised the FCC for deferring consideration of proposals to address minority ownership to a future proceeding and instructed the Commission to consider such proposals as part of the remand of the 2002 Media Ownership Order.[125] Then again in *Prometheus II*, the panel rebuked the FCC for pushing diversity issues to a separate, secondary proceeding which it said the FCC used to "side step" the diversity goals of the 2006 media ownership review.[126]

The Commission should not repeat the mistakes of prior administration and ownership reviews. The *Prometheus II* order directs the FCC to collect the data and complete the diversity actions required on remand *prior to the completion* of the 2010 Review[127] – not to postpone until

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[124] *2011 NPRM* at ¶158.

[125] *Prometheus I*, 373 F. 3d. 375, fn 59 (2004)

[126] *Prometheus II*, 652 F.3d at 472

[127] "We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and *remand for it to do so before it completes its 2010 Quadrennial Review*." *Id.* at 471 (emphasis added).

the 2014 Review, as the Commission now proposes to do. This research is essential to the development of the record and to reasoned decision making in the present ownership review, yet the Commission appears once again poised to improperly defer consideration of any findings for a later date and a subsequent proceeding.

C. Allowing Further Consolidation Of Local Media Markets Will Jeopardize Efforts To Improve Ownership Diversity

Relaxing the media ownership rules will not improve ownership opportunities for underrepresented groups – it will diminish them. Moreover, any gains culled from proactive policies the Commission may adopt to redress low levels of diversity will be undermined allowing increased consolidation in local media markets.

Data gathered from 2000 257 Studies[128] and Free Press's *Out of the Picture* and *Off the Dial* reports indicate that the primary factors influencing female and minority broadcast ownership are media market concentration, access to capital and equity, and access to deals. As markets become more concentrated, the cost of stations become artificially inflated which drives away potential new entrants in favor of existing large chains. Concentration has the effect of diminishing the ability of smaller and single-station owners to compete for both advertising and programming contracts. This disadvantage, coupled with the inflated station values, creates

[128] Over a decade ago the FCC commissioned the so-called "Adarand Studies Series" which examined discrimination and barriers to entry for minorities across a host of communications industries. The following studies addressed discrimination and disparities in broadcast markets: Ivy Planning Group, *Whose Spectrum Is it Anyway?: Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing*, 14 (2000); s*ee also* KPMG, H*istory 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); William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* 27 (2000). All available at http://www.fcc.gov/opportunity/meb_study/.

immense pressure for the smaller owners to sell their station licenses to larger owners. This destructive cycle disproportionately impacts women and minority owners, as they are far more likely to own just a single station in comparison to their white-male and corporate counterparts.[129] Current owners are driven out of markets and discrimination in access to deals, capital and equity, combined with the higher barriers to entry created by consolidation shut out new female and minority owners from market entry.

Because media consolidation is a leading factor in reducing the potential for entry and success of minority owned businesses, Free Press strongly opposes the further relaxation of the media ownership limits, including proposals to allow broadcast station owners to "incubate" socially and economically disadvantaged businesses (SDBs) in exchange for allowing the incubating owner to accrue more stations than permitted under the media ownership rules.[130] Such a proposal would have the effect of taking one step forward, and two steps back in terms of gains in ownership diversity.

1. Relaxing Local Television Ownership Limits Will Raise Barriers To Entry For Underrepresented Groups

The FCC properly determined in the NPRM that the local television ownership rule remains necessary to protect competition and should not be relaxed.[131] Additionally, this rule also helps to preserve diversity of ownership in local markets and relaxing this rule would adversely impact minority ownership of TV stations.

Free Press research demonstrates that consolidation in television markets makes it harder for new entrants and members of underrepresented groups to become – and remain – successful

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[129] *Out of the Picture* at 29.

[130] *See* Supplemental Comments of the Minority Media and Telecommunications Council, filed MB Dkt, 09-182, 07-294 (Apr. 3, 2012) at 4 ("MMTC Comments").

[131] *2011 NPRM* at ¶26-7

owners. In *Out of the Picture*, Free Press compiled the first accurate census and analysis of commercial television broadcast ownership by women and people of color. In addition to assessing the low representation of women and minorities in television ownership, the study uncovered a distinct relationship between the FCC's relaxation of media ownership rules and the decline in ownership diversity. Free Press tracked the ownership of 40 stations that were minority owned as of 1998, and compared it to their ownership status in 2007 to determine the effects, if any, of two changes to the broadcast television ownership rules: (1) Congress's decision to increase the national television ownership cap from 25 percent to 35 percent in 1996;[132] and (2) the FCC's decision in 1999 to permit local television duopolies.[133] Free Press identified 17 minority-owned stations that were sold to non-minority owners after 1998, noting that "[n]ine of these seventeen sales would not have been permitted under the old national ownership cap and duopoly rules. . . . Had these stations not been sold, minority ownership would be 20 percent higher than the current level."[134] Noting that "[p]ro-consolidation policies enacted by the FCC in the late 1990s had a significant impact on minority ownership, indirectly or directly contributing to the loss of 40 percent of the stations that were minority-owned in 1998," Free Press posited that "further industry consolidation will diminish the number of minority- and female-owned stations. If just a handful of female and minority-owned stations were lost to consolidation, these already anemic numbers would fall precipitously."[135] Indeed, the econometric evidence strongly indicates that as markets become more concentrated, all things held equal, minority ownership will decline.

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[132] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
[133] *1999 TV Order*, 14 FCC Rcd 12903.
[134] *Out of the Picture* at 23.
[135] *Id.* at 4-5.

2. Increased Consolidation In The Radio Industry, Including Cross-Ownership Of Radio Licenses And Television Stations, Will Adversely Impact Ownership By Underrepresented Groups

In the NPRM, the Commission proposes to retain the local radio ownership caps, including the AM/FM subcaps, properly concluding that such rules remain necessary to promote competition and viewpoint diversity.[136] Additionally, these rules remain necessary to promote new entry particularly by small businesses, women, minorities, and entrepreneurs. However, the FCC has proposed to eliminate the radio/television cross-ownership rule, which it asserts may no longer be necessary to ensure competition.[137] Free Press is concerned that repealing this rule could adversely impact ownership diversity of local radio ownership by diminishing opportunities for entry by entrepreneurs, including women and people of color. Before the FCC moves to further increase local market concentration by abandoning longstanding radio/television cross-ownership rule, it should carefully consider the potential harms this shift in policy will bring to the underrepresented communities.

In *Off the Dial,* Free Press compiled the first *complete* assessment and analysis of female and minority ownership of full-power commercial broadcast radio stations operating in the United States. Assessment of minority ownership is particularly important in the radio field as radio is widely regarded as a critical entry point into the broadcast industry. The data reviewed by Free Press suggested that the level of consolidation in radio markets was closely correlated with the level of diverse ownership in those markets and that both female- and minority-owned stations thrive in markets that are less concentrated. These data also revealed that:

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[136] *2011 NPRM* at ¶61-2.
[137] *Id.* at ¶119.

- Markets with female and minority owners have fewer stations per owner on average than markets without them.[138]
- The level of market concentration is significantly lower in markets with female and minority owners. This holds true if the size of the market and the level of minority population in the market are held constant.[139]
- The probability that a particular station will be female or minority owned is *significantly lower* in more concentrated markets.[140]
- The probability that a particular market will contain a female- or minority-owned station is *significantly lower* in more concentrated markets.[141]

These results are especially significant because radio, with its comparatively lower barriers to entry and lower station prices, is considered an important entry point for new owners, including women and people of color. Because evidence suggests that consolidation disproportionately affects opportunities for women and people of color to become and remain broadcast stations owners, the FCC's proposal to repeal the radio/television broadcast rule could be detrimental to the already low levels of minority ownership reducing entry points for these groups in the radio industry.

Free Press agrees with the National Hispanic Media Coalition that, in proposing to eliminate the radio/television cross-ownership rule, the FCC "fails to provide sufficient data about radio ownership by women and people of color."[142] It would be irresponsible for the agency to eliminate a rule that could diminish opportunities for women and people of color while failing to provide analysis of the impact on such groups, or even a current tally of radio ownership levels by women and people of color. We further echo the comments of the Future of

[138] *Off the Dial* at 24.

[139] *Id. at* 29-31.

[140] *Id.* at 7.

[141] *Id.*

[142] Comments of the National Hispanic Media Coalition, filed MB Dkts 09-182, 07-294 (Mar. 5, 2012) at 35.

Music Coalition, which state that "[r]adio is still the medium with the greatest potential for new entrants, including women and minorities. If the FCC eliminates the radio/television cross-ownership rule it will further limit radio's potential as one of the few entry points for these vital voices."[143]

Because eliminating the radio/television cross-ownership rule likely would result in more radio properties being locked up in the hands of fewer owners, Free Press urges the FCC to carefully assess and weigh the potential impact of doing so on opportunities for new entrants and underrepresented groups — as the Commission always should do with any ownership rule changes. At the very least it should not move forward with elimination of the rule until it demonstrates that the agency is capable of assessing and monitoring current radio ownership levels among women and people of color.

a. Proposals That Reward Incubation Of SDBs With Increased Consolidation May Be Well-Intentioned, But They Are Ultimately Counter Productive

Free Press opposes the adoption of the Minority Media and Telecommunications Council (MMTC) proposal to provide "structural waivers" of the local radio limits for stations that incubate SDBs.[144] As a threshold matter, the Commission claims that it presently lacks the requisite evidence to support a race or gender based SDB definition. Adopting such a proposal with a more dilute eligible entity definition would create enormous loopholes in the media ownership rules. However, even with a more targeted race-based SDB category, the incubator proposal would be counterproductive to the agency's diversity goals. Because consolidation creates barriers to entry for minority owners and, moreover, makes it harder for existing minority

[143] Comments of the Future of Music Coalition, filed MB Dkt 09-182 (Feb. 29, 2012) at 8-9.
[144] MMTC Comments at 4.

owners to sustain their business, the MMTC incubator proposal, however well-intentioned, would yield dubious benefits in the short term and in the long term would have the effect of taking one step forward, and two steps backward in ownership diversity gains.

MMTC mistakenly asserts that this incubator proposal has been unopposed since its origin in the Commission's Minority Ownership Advisory Committee in 1990.[145] Free Press and other public interest groups raised serious concerns about the benefits of this proposal during the 2006 Quadrennial Review. Comments filed by the Office of Communication of the United Church of Christ, the National Organization for Women Foundation, Media Alliance, Common Cause, and Benton Foundation expressed concerns that that such 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."[146] Likewise, Free Press has explained that while incubation of socially and economically disadvantaged business should be encouraged as a general matter, MMTC's proposal "unambiguously reduces ownership diversity with no actual measurable immediate improvement in the state of SDB broadcast ownership.[147] Free Press also questioned "how the Commission would or could monitor the design of these incubator programs or how their effectiveness would be measured and rewarded or punished."[148]

Free Press fears that the MMTC Incubator proposal would create a loophole that could permit increases in local market concentration to the point where there would be a marked decrease in the level of female and minority ownership that could not be offset by any such

[145] *See* MMTC Notice of Ex Parte, submitted MB Dkts 09-182, 07-294 (Mar.14, 2012) at 2.

[146] Comments of UCC et al., filed MB Dkts 06-121 (Oct. 16, 2007) at 7.

[147] Comments of Consumers Union, Consumer Federation of America and Free Press, filed MB Dkt. 06-121 (Oct. 1, 2007) at 34.

[148] *Id.*

benefits from incubator programs. Consequently, Free Press strongly opposes adoption of this proposal with or without race and gender based eligible entity definitions.

3. The Commission's Proposed Relaxation Of The NBCO Rule Would Disproportionately Diminish Broadcast Ownership By Diverse Groups

Free Press has also examined the potential effects on minority and female ownership of the FCC's proposed relaxation of the newspaper/broadcast cross-ownership rule – a proposal that is virtually identical to the one advanced by former Chairman Kevin Martin in 2007.[149] In *Devil In the Details*, Free Press addressed the numerous problems presented by the proposed rule (many of which are discussed in section II(B) of Free Press's initial comments), but also highlighted how this particular approach to relaxing the cross-ownership rule would disproportionately target minority owners' stations for purchase.[150] The proposed relaxed newspaper/broadcast cross-ownership rule would allow TV-newspaper combinations in the top 20 markets, so long as the combination only includes one television station that is ranked among the four top-rated channels in the market.[151]

Because stations ranked outside of the top four are generally smaller stations, it is unlikely that they would be in a position to acquire a major local daily newspaper. It is far more likely that the large and well-established owners of local daily newspapers will seek to acquire TV stations. The vast majority of cross-owned combinations in existence today are the product

[149] *See* Kevin J. Martin, "The Daily Show," NEW YORK TIMES (Nov. 13, 2007) ("The Daily Show"); "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," FCC News Release (Nov. 13, 2007).

[150] Free Press, *Devil in the Details: 10 Facts Kevin Martin Doesn't Want You to Know About His New Media Ownership Rules* (2007) at 13 ("Devil in the Details").

[151] *2011 NPRM* at ¶102.

of large and conglomerated news paper chain owners, such as Tribune or Media General, purchasing a local broadcast station.

By and large, people of color do not own major daily newspapers in the top 20 markets. However, nearly half of the television stations owned by people of color are in the top 20 markets, and none of these are among the top four stations in those markets.[152] This means that if the FCC relaxes its NBCO rules as currently proposed, stations owned by minorities would be disproportionately targeted for acquisition by newspaper owners seeking to purchase a station.

This potential diversity loss from the proposed relaxed NBCO rule would be further compounded because, as demonstrated above, increased consolidation raises barriers to entry for minority ownership. Thus, even as existing minority owners are bought out by larger media groups, opportunities for people of color to enter the market and purchase stations of their own will also be decreased.

In sum, allowing increased consolidation in local media markets will further diminish the already limited number of stations available for purchase, thus leaving women and people of color with fewer chances to become media owners and to promote diverse programming in local communities. Accordingly, Free Press cautions the FCC to avoid compounding low levels of ownership diversity by relaxing these important protections. It is not rational policymaking to assert that increasing diversity and broadcast ownership by women and people of color is an important goal, then to ignore the detrimental effects that other rule changes would have on that goal.

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[152] *Devil in the Details* at 13.

III. Industry Commenters Should Stop Wasting Time And Paper Re-Litigating Issues Long Settled By the Courts

A number of television and newspaper conglomerates filing in this proceeding have decided to waste time and comment space re-hashing legal arguments that have been rejected multiple times in court. Specifically, they erroneously assert that section 202(h), the Communications Act provision that requires the FCC to periodically review its media ownership rules, requires the FCC to take only deregulatory actions in this proceeding. They also continue to assert that the FCC's media ownership rules are unconstitutional, in spite of extant Supreme Court precedent holding precisely the opposite.

A. Section 202(h) Is Not A One-Way Deregulatory Ratchet

Industry commenters retread the same well-worn and wayward arguments that section 202(h) demands that the Commission repeal most or all of its media ownership protections. The NAB, for example, claims that 202(h) is essentially "deregulatory in nature" and carries a presumption in favor of modification or repeal of media ownership rules.[153] Lin Television erroneous claims that "Section 202(h) review does not contemplate adoption of new or more stringent ownership rules."[154] Sinclair argues that the provision "requires the Commission to repeal or relax its ownership rules."[155] But mere repetition of flawed arguments will not reverse nearly a decade of judicial precedent holding otherwise.

To the extent there was ever any question about the application of section 202(h), it has been resolved by the U.S. Courts of Appeals for both the District of Columbia and Third Circuits, which determined that in the context of the section, the term "necessary" means

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153 NAB Comments at FN 11

154 Comments of Lin Television at 8.

155 Comments of Sinclair Broadcasting, filed MB Dkts 09-182, 07-294 (Mar. 5, 2012) at 2.

"convenient," "useful," or "helpful," not "indispensable."[156] Furthermore, contrary to the faulty claims of commenters such as CBS, the NAB, and Lin Television, it is well-settled that section 202(h) is not a one-way ratchet in favor of deregulation. Eight years ago in *Prometheus I*, the U.S. Court of Appeals for the Third Circuit expressly rejected the broadcast industry's deregulatory interpretation of section 202(h):

> While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act . . . we do not accept that the "repeal or modify in the public interest" instruction must therefore operate only as a one-way ratchet, i.e., the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both "modify" and the requirement that the Commission act "in the public interest." What if the Commission reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.[157]

In its 2011 *Prometheus II* decision, the Third Circuit restated the applicable standard of review under 202(h):

> In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (*whether to make more or less stringent*)—it must do so in the public interest and support its decision with a reasoned analysis.[158]

Thus, regardless of any party's view (including the Commission's) of 202(h), it is well-settled that 202(h) is not *per se* deregulatory, and that interpretation is bound by the doctrine of *res judicata*. The Commission may tighten, relax or maintain existing media ownership rules so

[156] *Prometheus I*, 373 F.3d at 393–94 (citing Cellco P'ship v. FCC, 357 F.3d 88 (D.C.Cir.2004)).

[157] *Id.* at 394-5 (internal citation omitted).

[158] *Prometheus II*, 652 F.3d at 645 (emphasis added).

long as it demonstrates that the decision will benefit the public and is supported by evidence and reasoned analysis.

B. The Media Ownership Rules Are Constitutional Until The Supreme Court Says Otherwise

A number of industry commenters attack the application of the Commission's media ownership on constitutional grounds.[159] These arguments have been rejected by both the Commission and the courts, including the Supreme Court, on multiple occasions. [160]

Most recently, the Third Circuit in *Prometheus II* rejected the industry arguments that the media ownership rules violate the First Amendment or violate newspaper owners' right to equal protection under the Fifth Amendment, finding those arguments "lacking in merit."[161] Many of the industry commenters in this proceeding have since petitioned the United States Supreme Court to review the Third Circuit's 2011 decision in *Prometheus II.* These parties petitioned for *certiorari* on precisely the same grounds in response to the Third Circuit's 2004 decision in *Prometheus I.* The Supreme Court denied cert in *Prometheus I* and has not yet indicated whether it will take up review of *Prometheus II*.[162]

The fact that industry is seeking to overturn the Third Circuit's determination is of little immediate bearing on this proceeding – at least until the Court makes a determination one way or

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[159] *See, e.g.*, Cox Comments at 18-19; Tribune, Debtor-In-Possession, Comments at 4;

[160] *See FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 799, 801-2 (1978) (upholding the constitutionality of the 1975 newspaper/broadcast cross-ownership ban and finding that "[i]n setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."); *Prometheus I*, 373 F.3d at 401-2; *Sinclair Broadcast Group v. FCC,* 284 F.3d 148 (D.C. Cir. 2002).; *Prometheus II*, 652 F.3d at 464-5.

[161] *Id.* at 465.

[162] John Eggerton, "Supremes Mum on Media Ownership Case Review," BROADCASTING AND CABLE (Apr. 16, 2012).

the other. As the Third Circuit reminded industry petitioners in *Prometheus II* "it is the Supreme Court's prerogative to change its own precedent" and until such time"[w]e continue to decline Deregulatory Petitioners' invitation to disregard precedent."[163] In short, until the Supreme Court decides to reverse its longstanding precedent upholding the constitutionality of media ownership limits, the Commission and the industry remain bound by it.

Conclusion

The FCC's media ownership rules, when effectively enforced, ensure that the public is served by diverse and competing media sources. Free Press urges the Commission to promptly address the diversity issues remanded by the Third Circuit and in no event to conclude the 2010 Ownership Review until it has done so. The FCC should abandon its proposal to relax the cross-ownership rules. Instead, the Commission should maintain all of its existing media ownership rules which remain necessary to promote competition and diversity in local media markets. Finally, Free Press urges the Commission to adopt attribution policies that will ensure that "covert consolidation" of local television stations through broadcasters' use of resources sharing agreements do not continue to subvert the local television ownership rules and the public interest goals of localism, competition and diversity.

Respectfully Submitted,

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[163] *Prometheus II*, 652 F.3d at 464 (citing Prometheus I, 373 F.3d at 401).