

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 09-182
)	
Promoting Diversification of Ownership In the Broadcasting Services)	MB Docket No. 07-294
)	

COMMENTS OF

OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.

MEDIA ALLIANCE

NATIONAL ORGANIZATION FOR WOMEN FOUNDATION

COMMUNICATIONS WORKERS OF AMERICA

COMMON CAUSE

BENTON FOUNDATION

MEDIA COUNCIL HAWAII

PROMETHEUS RADIO PROJECT

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Summary

The Media Bureau's Broadcast Ownership Report confirms that women and people of color control only a tiny fraction of broadcast stations of all types. Moreover, for some categories, the number of stations controlled has declined over time.

This Report does not satisfy the Court's mandate in *Prometheus II*. The Court directed that in the 2010 Quadrennial Review, the Commission should consider the impact of retaining or modifying its ownership rules on station ownership by women and people of color and should adopt a definition of "eligible entities" that would further the goal of increasing ownership by women and people of color. It further told the Commission that it would not accept lack of data as an excuse for failing to do so.

Nonetheless, in the December 2011 Notice of Proposed Rulemaking, the FCC indicated that it still lacked the necessary data to comply with the court's mandate. This new Report tabulates information from the Ownership Form 323 for 2009 and 2011. Unfortunately, the data in the Report may not be sufficiently complete to allow meaningful comparisons over time. The data are also not available to the public in a form that can be easily searched, aggregated and cross-referenced.

Significantly, the Report provides no analysis of how relaxing the rules would affect already low levels of ownership by minorities and women of color. Nor does it support retaining the small business definition of eligible entity that the court found arbitrary and capricious. The Report does not even attempt to use the data to analyze the effectiveness of the FCC's existing or past policies designed to promote diverse ownership. A review of these efforts is necessary to determine the effectiveness of race-neutral policies and whether race-based policies are needed and can withstand strict scrutiny.

To comply with the Court’s mandate, the Commission must also assess the impact of incentive spectrum auctions on ownership diversity. Spectrum auctions will almost surely result in a decrease in the number full power and low power television stations controlled by women and people of color. If the Commission continues to “put its head in the sand” and ignore findings and predictions it has made in other dockets, the 2010 Quadrennial Order will be found arbitrary and capricious for failing to consider an important aspect of the problem and for being based on a record that the Commission knows to be counter to the facts.

Finally, we are concerned that the Commission may lack a clear understanding of the Constitution’s requirement of equal protection under the law. While we have not seen the draft order, statements made by some FCC staff suggest that they are concerned that not relaxing the above rules would somehow trigger strict scrutiny, which the Commission would not be able to meet based on the current record. However, the cross-ownership rules are race- and gender-neutral rules. A decision to retain them to foster the diversity of programming and to better serve local needs is therefore subject only to rational basis scrutiny.

Table of Contents

Summary	i
Table of Contents	iii
I. The Data Clearly Establish that Women and People of Color Control Only a Tiny Fraction of Broadcast Stations of All Types.....	1
II. The Issuance of the Report Does Not Satisfy the Prometheus II Mandate.....	4
A. In Both <i>Prometheus I</i> and <i>II</i> , the Court Reversed the FCC’s Order for Failing to Address Ownership by Women and People of Color	4
B. The FCC Inexcusably Claims that it Lacks the Data to Conduct the Analysis Required by the Court in the 2010 Quadrennial Review.....	8
C. The Report Is Insufficient to Meet the Court’s Mandate	10
1. The Data May Not Be Sufficiently Complete to Allow for Comparisons.....	11
2. The Data Is Not Available to the Public in a Form that Can Be Easily Searched, Aggregated and Cross-Referenced	13
3. The Report Does Not Use the Data to Analyze the Effectiveness of the FCC’s Existing or Past Policies Designed to Diversity Ownership	14
III. The Commission Should Not Close its Eyes in the 2010 Quadrennial Review to How the Newly-Authorized Spectrum Auctions Will Negatively Impact Ownership Diversity.....	16
A. The Spectrum Auctions Will Increase Consolidation and Reduce Ownership Diversity.....	18
B. The Incentive Auction Is Already Having a Negative Impact on Diversity of Television Station Ownership.....	20
C. Spectrum Auctions Will Result in the Loss of Diverse Low Power TV Stations	21
D. The Commission Must Consider the Impact of Spectrum Auctions in the 2010 Quadrennial Review.....	22
IV. Strict Scrutiny Would Apply Only to Actions that Involve Classification by Race.....	24
Conclusion	26
Appendix A: Charts Comparing Broadcast Ownership by Women and People of Color to Corresponding Percentage of U.S. Population	A-1
Appendix B: Ownership by Service	B-1
Appendix C: Ownership by Group	C-1

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The Office of Communication of the United Church of Christ, Inc. (“UCC”), Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation,¹ Media Council Hawai’i, and Prometheus Radio Project (“UCC *et al.*”), by their attorneys, the Institute for Public Representation (“IPR”), file these comments in response to the Public Notice, Commission Seeks Comment on Broadcast Ownership Report, released on December 3, 2012.

I. The Data Clearly Establish that Women and People of Color Control Only a Tiny Fraction of Broadcast Stations of All Types

On November 14, 2012, the FCC’s Bureau released a *Report on Ownership of Commercial Broadcast Stations* (“Report”).² The Report summarizes data from the broadcast ownership forms known as FCC Form 323. The Form 323 provides information about

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These reply comments reflect the institutional view of the Foundation, and unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

² *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd 13,814 (2012) [hereinafter Report].

attributable ownership interests as of November 1, 2009, and October 1, 2011. The Report summarizes this data separately for full-power commercial television stations, class A television stations, low power television stations, FM commercial radio stations and AM commercial radio stations.

We agree with the Commission’s characterization of the Report in the Public Notice that the report “confirms that minority and female ownership numbers remain low.” We organized the data from the report into tables that make it easier to understand. The tables—attached to these comments in Appendix B—show the numbers and percentages of stations in each type of broadcast service controlled by minorities and/or women, and whether the percentages those stations represent of all stations reporting increased or decreased between 2009 and 2011. For example, the percentage of stations owned by African-Americans decreased from approximately 1.0% in 2009 to 0.7% in 2011, while the percentage of stations owned by Hispanics/Latinos increased from approximately 2.5% to 2.9% during the same time period.³ The tables in Appendix C show the same information as in Appendix B organized differently: by race, gender and/or ethnicity instead of by class of service.

The graphs in Appendix A plot the percentages of stations owned by each gender, ethnicity, and/or race over time and compare those percentages to the corresponding percentage of the national population that each group represents as reported by the U.S. Census Bureau. In addition to showing ownership data from 2009 and 2011, we used other data sources where

³ We focus on percentages of all stations reporting, rather than on raw numbers, because a large number of stations either failed to report at all or failed to report sufficient data in both 2009 and 2011, thus making it impossible to compare the datasets based on raw numbers alone. We discuss this problem in greater depth *infra* in Section II(C)(1).

available from earlier time periods.⁴ For example, we used older minority ownership data collected by the NTIA and women's ownership data collected by the FCC.

The graphs show that the percentage of stations owned by women and people of color do not even approach the corresponding percentage of national population that these groups represent. For example, the first graph shows that even though the number of TV and FM stations owned by women has increased, women still control less than 10% of stations in any category, even though they constitute slightly more than 50% of the population.⁵ The second graph shows that even as Hispanic/Latinos have increased as a percentage of the US population from about 9% in 1992 to more than 16% in 2011, station ownership by Hispanics/Latinos during the same period has increased from less than one percent of the total in 1992 to 2.9% of full-power TV, 7.6% Class A TV, 9.6% LPTV, 4.5% AM and 2.7% FM in 2011.⁶ While the percentage of stations owned by Hispanic/Latinos has increased, it is still relatively small in comparison to the corresponding percentage of the population.

Moreover, we find that for some categories in some classes, the percentage of stations controlled by women or by racial/ethnic minorities has declined over time. For example, African-Americans owned only 0.7% of full power television stations in 2011, compared to 1.7%

⁴ FCC, *Female Ownership of Broadcast Stations* (1982), available at <http://transition.fcc.gov/ownership/materials/already-released/female050082.pdf>; National Telecommunications and Information Administration, *A Comparative Analysis of Minority Owned Commercial Broadcast Stations Licensed in the United States in 1992, 1993 & 1994*, <http://www.ntia.doc.gov/legacy/opadhome/mtdpweb/minchth.htm>; National Telecommunications and Information Administration, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* (2001), available at <http://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf>.

⁵ Women do control slightly more, approximately 15% of LPTV. See Appendix B at B-3.

⁶ Appendix A; National Telecommunications and Information Administration, *A Comparative Analysis of Minority Owned Commercial Broadcast Stations Licensed in the United States in 1992, 1993 & 1994*, <http://www.ntia.doc.gov/legacy/opadhome/mtdpweb/minchth.htm>.

in 1992.⁷ This represents a decline of 59% over the last 20 years. Similarly, the Report indicates that women owned only 5.8% of commercial FM radio stations in 2011, while in 1982 women were majority owners of 9% of commercial FM stations.⁸ This represents a 36% decline in women's ownership of FM radio stations over the last 30 years. In the same period, women have surpassed men in gaining bachelor's and advanced college degrees, become the majority of the workforce, and almost doubled their employment in managerial and professional jobs.⁹

II. The Issuance of the Report Does Not Satisfy the Prometheus II Mandate

The Commission has already been reversed two times because of its failure to address ownership opportunities for women and people of color. Unless the Commission conducts the analysis required by the Court in the 2010 Quadrennial Review, it will surely be reversed again. Unfortunately, the Report does not provide the analysis required.

A. In Both *Prometheus I* and *II*, the Court Reversed the FCC's Order for Failing to Address Ownership by Women and People of Color

In *Prometheus I*, the Court reversed and remanded the 2002 Biennial Review Order relaxing the ownership limits because the Commission acted arbitrarily and capriciously in failing to address an important aspect of the rulemaking.¹⁰ It remanded for the Commission to consider "proposals for enhancing ownership opportunities for women and minorities which the Commission had deferred for future consideration."¹¹ The Court specifically told the

⁷ National Telecommunications and Information Administration, *A Comparative Analysis of Minority Owned Commercial Broadcast Stations Licensed in the United States in 1992, 1993 & 1994*, <http://www.ntia.doc.gov/legacy/opadhome/mtdpweb/minchth.htm>.

⁸ FCC, *Female Ownership of Broadcast Stations* ii (1982).

⁹ *In a First, Women Surpass Men in College Degrees*, CBS News (Apr. 26, 2011), available at http://www.cbsnews.com/2100-201_162-20057608.html; Hanna Rosin, *The End of Men*, *The Atlantic* (July/Aug 2010), available at <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135>.

¹⁰ *Prometheus Radio Project v. FCC* ("*Prometheus I*"), 373 F.3d 372 (3d Cir. 2004).

¹¹ *Id.* at 435, n.82.

Commission to consider the proposals “at the same time” it addressed other questions on remand.¹²

The *Prometheus I* Court upheld the FCC’s decision to define “eligible entities”—that is, the class of entities that could obtain waivers or other preferences intended to increase opportunities for minorities and women—using the Small Business Administration’s revenue-based definition of “small business.” However, it expected that the Commission would “reevaluate whether a [Socially Disadvantaged Business]-based waiver will better promote the Commission’s diversity objectives” in the next review.¹³

In the next review—the 2006 Quadrennial Review—the Commission failed to seek comment on specific proposals to address minority and women ownership in its Notice of Proposed Rulemaking.¹⁴ After objections were raised, the Commission issued a *Second Further Notice* seeking comment on proposals to increase minority and female ownership opportunities,¹⁵ and many comments were filed.

Still, in the *2008 Order*¹⁶ and in the *Diversity Order*,¹⁷ which were both adopted at a meeting on December 18, 2007, the Commission failed to analyze the impact of the rule changes it made on ownership opportunities for women and minorities. In the *Diversity Order*, the FCC

¹² *Id.* at 421, n.59.

¹³ *Id.* at 428 n.70. SDB stands for socially and economically disadvantaged businesses.

¹⁴ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006).

¹⁵ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 2d FNPRM, 22 FCC Rcd 14215, 14216 (2007).

¹⁶ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, 23 FCC Rcd 2010 (2008).

¹⁷ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and 3d FNPRM, 23 FCC Rcd 5922 (2008).

adopted some proposals for increasing minority and female ownership, rejected some, and deferred decisions on others including whether to utilize preferences for socially and economically disadvantaged businesses (“SDBs”).

The Court reviewed both orders in *Prometheus II* and again reversed and remanded. It found that defining “eligible entities” as small businesses was arbitrary and capricious because the Commission had “not demonstrated that the eligible entity definition in the *Diversity Order* is based on ‘reasoned analysis supported by the evidence before the Commission.’”¹⁸ First, the Court noted that the agency did not

explain how the eligible entity definition adopted would increase broadcast ownership by minorities and women. In the two paragraphs that discuss the definition adopted, the Commission refers only to “small businesses,” and occasionally “new entrants,” as expected beneficiaries. *Diversity Order* ¶¶ 6–7. The remaining two paragraphs of the FCC’s discussion (1) challenge the contention that ownership by minorities and women might be diminished by the chosen eligible entity definition, and (2) seek comment on taking action that would “increase the ownership of broadcast stations by minorities and women specifically.” *Id.* at ¶¶ 8–9. Nowhere in its discussion does the FCC support its conclusion that this definition “will be effective in creating new opportunities for broadcast ownership by . . . women and minorities.” *Id.* at ¶ 9.¹⁹

Second, the Court observed that

it is hard to understand how measures using this definition would achieve the stated goal. For example, by the Commission’s own calculations, minorities comprise 8.5% of commercial radio station owners that qualify as small businesses, but 7.78% of the commercial radio industry as a whole—a difference of less than

¹⁸ *Prometheus Radio Project v. FCC* (“*Prometheus II*”), 652 F.3d 431, 469–70 (3d Cir. 2011), citing *Ass’n of Public-Safety Comm’n Officials-Int’l, Inc. v. FCC*, 76 F.3d 395, 398 (DC Cir. 1996).

¹⁹ *Id.* at 470 (footnote omitted).

1%. Thus, these measures cannot be expected to have much effect on minority ownership.²⁰

Third, the Court pointed out that “the Commission referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women.”²¹ The Court explained that this “is because, as the Commission has since conceded, it has no accurate data to cite.” The Court noted that the FCC had adopted an Order in May 2009 to improve its data collection processes.²²

Thus, the Court “conclude[d] 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.”²³ The Court warned:

Stating that the task is difficult in light of *Adarand* does not constitute “considering” proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor. We 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.²⁴

In addition to filing to adopt a workable definition of an SDB, the Court found that

[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, . . . the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against

²⁰ *Id.* (citations omitted).

²¹ *Id.*

²² *Id.* at 470.

²³ *Id.* at 471.

²⁴ *Id.* at 471 n. 42.

discrimination are no doubt positive, the Commission has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the Commission relied on the *Diversity Order* to justify side-stepping, for the most part, that goal in its *2008 Order*.²⁵

The Court recognized that the Commission faced significant challenges, but expressed concern that “Commission appears yet to have gathered the information required to address these challenges, which it needs to do in the course of its review already underway. As ownership diversity is an important aspect of the overall media ownership regulatory framework, we re-emphasize that the actions required on remand should be completed within the course of the Commission's 2010 Quadrennial Review of its media ownership rules.”²⁶

Thus, the Court directed the Commission to (1) adopt a new definition of eligible entity that would promote ownership opportunities for women and minorities and (2) assess the effects of retaining, modifying or repealing its existing ownership limits on station ownership by minorities and women.

B. The FCC Inexcusably Claims that it Lacks the Data to Conduct the Analysis Required by the Court in the 2010 Quadrennial Review

Despite these clear directives, the Notice of Proposed Rulemaking released in December 2011 proposes to postpone all meaningful diversity-related action until 2014. It explained 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

²⁵ *Id.* at 471-72.

²⁶ *Id.* at 472 (citation omitted).

believe that making legally sound proposals would not be possible based on the record before us at this time.”²⁷

The NPRM described how “the Commission actively has sought to improve the broadcast ownership information available to it,” noting that in “2009, the Commission implemented a number of changes to its Form 323 ownership reports to further its goal that the data reported in the form, including data regarding minority and female broadcast ownership, are reliable, accurate, searchable, and aggregable.”²⁸ It further stated that on February 28, 2011, the Commission released to the public a data set compiling all of the 2009 ownership reports, and that this “data set represents the first ‘snapshot’ of broadcast ownership data in a series of planned biennial reviews that collectively should provide a reliable basis for analyzing ownership trends in the industry, including ownership by minorities and women.”²⁹

What the *2010 QR NPRM* failed to report was that the FCC released the data only after it received a letter from major civil rights, media reform organizations, public policy institutes, labor organizations, academics, and other organizations and individuals. The letter expressed concern that it had been 14 months since the revised Form 323s were due to be filed, more than 6 months since the revised Form 323s were actually filed, and more than 4 years since the problems with the earlier filing process were brought to the FCC’s attention; and yet, the public

²⁷ *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (“*QR 2010 NPRM*”).

²⁸ *Id.* at ¶154 (citing *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Fourth FNPRM, 24 FCC Rcd 5896 (2009) (“*323 Order*” and “*Diversity Fourth FNPRM*”), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 (2009) (“*323 MO&O*” and “*Diversity Fifth FNPRM*”).

²⁹ *Id.* at ¶155, n. 355 (citing *Media Bureau Announces Availability of 2009 Biennial Ownership Data Set For Commercial Broadcast Licensees*, MB Docket No. 07-294, Public Notice, 26 FCC Rcd 2024 (Med. Bur. 2011)).

still lacked meaningful access to the data in a searchable, aggregated, and cross-referenced format.³⁰

Moreover, after the Commission released the data, counsel for UCC *et al.* worked closely with researchers at Howard University and UCLA School of Law to analyze the data, but were unable to put it into any usable form. We met with members of the Media Bureau on two different occasions and learned that Bureau was also having problems analyzing the data and that the data sets were incomplete and unreliable. We concluded that until the problems were fixed, spending additional time trying to analyze the data would be worthless.³¹

C. The Report Is Insufficient to Meet the Court's Mandate

Nearly two years after the release of the 2009 data sets, the Media Bureau has finally issued a Report on Form 323 data. This Report does little more than report numbers and percentages of stations. It does not identify which stations are owned by minorities and women, where those stations are located, or any information about their market rank (except for broad categories) or rankings within a market.

Moreover, the Report has not fulfilled its intended purpose. As the Commission noted in revising the data collection process, the Commission had collected race and gender information as part of its Form 323 since 1998 for four purposes:

- (1) allow the Commission to determine accurately the current state of minority and female ownership of broadcast facilities, (2) determine the need for measures designed to promote ownership by minorities and women, (3) chart the success of any such measures that we may adopt, and (4) fulfill our statutory mandate under Section 257 of the Telecommunications Act of 1996 (“1996

³⁰ Letter to Chairman Genachowski and Commissioners from UCC *et al.*, Dockets 07-294 and 09-182, Feb. 2, 2011.

³¹ In fact, the Media Bureau did not provide any aggregated data until the 2010 QR NPRM which was released in December 2011. The entire analysis consisted of one paragraph that was limited to minority ownership of full power television stations. 26 FCC Rcd at 17,548 (¶156).

Telecom Act”) and Section 309(j) of the Communications Act of 1934 (“the Act”) to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry.³²

However, because the data was not collected in a way that provided the Commission with “reliable data on the precise status of minority and female ownership—data that we will need to establish and maintain effective policies over time and that the courts will insist upon if the Commission chooses to pursue more race- or gender-based approaches,”³³ the FCC revised its collection process. Among other things, the Commission directed the staff to “revise the electronic interface so that the ownership data is incorporated into the database, is searchable, and can be aggregated and cross-referenced” and to “build additional checks into Form 323 to perform verification and review functions and to preclude the filing of incomplete or inaccurate data.” It established that the data would be filed every two years on a uniform date to permit “the first snapshot to be complete and provide a baseline of comparison for later filings every two years.”³⁴ Unfortunately, the Report falls short of meeting these goals.

1. The Data May Not Be Sufficiently Complete to Allow for Comparisons

It is not clear whether the 2009 data published in the Report provides an accurate “snapshot” for later comparison. The Report acknowledges in a footnote that the data from the two time periods may not be comparable:

While this section and the tables provide a basis for trend analysis over the biennial reporting periods from 2009 to 2011, several factors counsel caution in such analysis. First, while 85 percent of all full power commercial television stations filed biennial ownership reports as required in 2009, fifteen percent of stations

³² Promoting Diversification of Ownership in the Broadcasting Services, 24 FCC Rcd 5896, 5903-5910 (2009).

³³ *Id.* at ¶1.

³⁴ *Id.* at ¶15.

either submitted insufficient data to identify ownership or failed to file. . . . By the 2011 biennial filing period, only three percent of full power commercial television stations submitted insufficient data to identify ownership or failed to file. Most of the 204 stations for which the Commission lacked usable ownership data in 2009 . . . were identified as either female or male majority owned stations in 2011.³⁵

Indeed, the fact that over 204 stations (15%) are missing from the 2009 full power television ownership data calls into doubt whether the apparent increases in station ownership by Hispanic/Latinos and American Indian/Alaska Natives are real.³⁶ Nor is the problem with missing data limited to full power television. As shown in the table below, filings were missing in all categories, with as many as 58.3% missing for LPTV in 2009.

	2009		2011	
Full Power TV	204 missing out of 1394	14.6%	39 missing out of 1387	2.8%
Class A TV	146 missing out of 545	26.8%	86 missing out of 495	17.4%
LPTV	1443 missing out of 2477	58.3%	817 missing out of 2070	39.5%
Commercial AM	969 missing out of 4789	20.2%	933 missing out of 4763	19.6%
Commercial FM	1200 missing out of 6472	18.5%	919 missing out of 6530	14.1%

Thus, whatever modest increases in women/minority ownership the data might suggest, it may be that these “increases” stem from incomplete data rather than real change.

³⁵ Report at 13,818 n. 10.

³⁶ *Id.* at 13,818–19.

2. The Data Is Not Available to the Public in a Form that Can Be Easily Searched, Aggregated and Cross-Referenced

As we did in our Reply Comments, we had hoped to conduct a more granular analysis of the data.³⁷ However, we were not able to do so because the Commission failed to make the data available to the public in a form that we can easily search, aggregate, and cross-reference.

The raw data the Commission made publicly available in 30 spreadsheets on its website looks like this:

Female Nationally	Male Nationally	Joint F_M Nationally	No Majority Interest Nationally	Insufficient Data Nationally	Not Filed Nationally	Arbitron 1-100	Arbitron 101-282	Outside Metro
199	89	141	86	169	457	117	86	91
214	91	178	109	659	458	133	89	123
221	106	669	111	672	704	141	106	124
362	110	1196	365	863	834	163	109	136
435	117	2761	432	1061	858	228	110	137
642	119	6683	641	1073	1306	318	111	173

The numbers in each column are facility ID numbers that we were able to use to identify call signs for each station by using another spreadsheet made publicly available that looks like this:

Call Sign	FCC ID
KFMZ	2
WCLG	3
KIXW	4
WEBY	64

Our ability to discover additional details of each station beyond that, however, was limited.³⁸ We asked the Media Bureau for more specific information about the Arbitron market (or, in the case of TV stations, DMA) that each station belonged to. However, we were told that

³⁷ UCC *et al.* Reply Comments, MB Docket No. 09-182 at 19-35 (April 17, 2012)(analyzing ownership of full power television stations controlled by people of color).

³⁸ For purposes of the Reply Comments, we were able use the facility identification numbers to identify call signs and use the call signs to look up the stations in the 2009 Broadcast and Cable Yearbook to determine the DMA and licensee name. However, the Broadcast and Cable Yearbook ceased publication with its 2010 edition.

the Bureau could not provide that information because it was obtained from BIA and is proprietary.

We next tried to match the names of the licensees with the stations they controlled to determine which minority or women licensees controlled more than one station. When we asked Commission staff for assistance, we were directed to the Media Bureau CDBS Public Database Files available for download on the FCC's website. There we found one table containing licensees' names, but that table contained neither facility ID nor call sign, and was thus impossible to link directly to the minority ownership data. When we then asked if the FCC could provide us with a table containing both facility ID numbers and licensee names, we were told,

[N]o, there is no one table from the FCC that contains both facility ID and licensee name in the same record. . . . [T]he best way to get this info is to download the facility table and the party table. The facility table has the FAC ID and the party table has the licensee name. The tables are linked but it takes some "sql" language to link and output the data. Someone familiar with computer languages should be able to do this.³⁹

We believe we could perform the requisite steps to associate a licensee name with each of the facilities that appears in the raw data on minority and woman ownership if we had more time to do so. Alternatively, the Commission could and should itself have taken the time and effort necessary to make the data available to the public in a format that is complete and user-friendly to the average person, not just to someone "familiar with computer languages" such as SQL.

3. The Report Does Not Use the Data to Analyze the Effectiveness of the FCC's Existing or Past Policies Designed to Diversity Ownership

As noted above, one of the purposes of the Form 323 data collection was to chart the success of any such measures that the Commission adopted to promote ownership by minorities and women. In prior comments, UCC *et al.* has emphasized the need for the FCC to demonstrate

³⁹ Email from Media Bureau to Laura Moy, December 21, 2012.

that it has tried all reasonably available race-neutral alternatives before employing race or gender-based policies.⁴⁰ We also identified questions that should be asked to needed to assess the effectiveness of the existing race neutral policies. These included:

- whether the new entrant bidding credit, which was adopted by the Commission in 1998 to help women and minorities acquire licenses in broadcast auctions, had been successful;⁴¹
- whether the relaxation of the TV duopoly rules affected the number of television stations owned by minorities and women;⁴²
- whether the relaxation of the radio rules (both generally and by counting noncommercial stations in the numerical limits) affected the number of stations owned or controlled by minorities and women;⁴³
- whether the decision in the 2002 Biennial Review to permit the transfer of grandfathered combinations of radio stations to eligible small businesses had resulted in any increase in stations owned by women or minorities,⁴⁴
- whether the re-implementation of the failing station rule was working as intended to promote opportunities for minorities and women to obtain broadcast stations.⁴⁵

We also suggested additional data that should be collected. Because it is difficult to assess how well broadcast stations are serving their communities without knowing something about their programming, we urged the Commission to complete pending proceedings on the

⁴⁰ Comments of UCC *et al.*, MB Docket No. 07-294 (July 30, 2008). This filing included as attachments three prior comments addressing these issues. The Comments cited data showing that women and minorities are more likely to own broadcast stations in competitive, un-concentrated markets; as markets consolidate, ownership by underrepresented groups decreases. They also explained how limiting station ownership to current or even stricter levels would also enhance opportunities for minorities and women to own broadcast stations by freeing up additional stations for purchase and by making it easier for them to obtain the capital needed to finance such purchases.

⁴¹ Comments of UCC *et al.*, MB Docket No. 06-121, at 7-11 (Oct. 1, 2007).

⁴² Comments of UCC *et al.*, MB Docket No. 09-182, at 2 (July 7, 2010). These comments were filed in response the Public Notice, DA 10-1084, Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding (June 13, 2010).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* See also Comments of UCC *et al.*, MB Docket No. 09-182, at 8 (July 12, 2010).

public interest obligations of digital television stations, enhanced disclosure, and localism so that it could correlate program data with ownership data.⁴⁶

We also asked the Commission to collect information about television stations “shared services arrangements” and “local news services” and other forms of joint ventures between local broadcast stations.⁴⁷ We expressed concern that these agreements were being used to circumvent the local television rule and/or undermine the goal of ensuring diverse and competitive sources of local news. We also pointed out that SSAs also may reduce opportunities for minority and women entrants by allowing struggling stations to avoid having to seek an out of market buyer by entering into a sharing arrangement with another station in the same market.⁴⁸

The Report does not do any of these things. Nor, to our knowledge, has the FCC undertaken any of these studies or data collections. If the FCC proceeds to issue an Order in the 2010 Quadrennial Review without adopting a new definition of eligible entity that would promote ownership opportunities for women and minorities and without assessing the effects of retaining, modifying or repealing its existing ownership limits on station ownership by minorities and women, it will not comply with the Court’s mandate.

III. The Commission Should Not Close its Eyes in the 2010 Quadrennial Review to How the Newly-Authorized Spectrum Auctions Will Negatively Impact Ownership Diversity

To comply with its procedural obligations and the Third Circuit mandate, the Commission must assess the impact of the new incentive spectrum auction, spectrum sharing and repacking on its ownership rules. In February 2012, Congress passed the Middle Class Tax

⁴⁶ Comments of UCC *et al.*, MB Docket No. 09-182, at 3-5 (July 12, 2010).

⁴⁷ *Id.* at 8.

⁴⁸ UCC *et al.* Comments, MB Docket No. 09-182, at 14 (Mar. 5, 2012).

Relief and Job Creation Act,⁴⁹ which adopted the Commission’s recommendations to conduct incentive auctions as described in the National Broadband Plan. In short, the incentive auctions will encourage existing television broadcasters to give up their spectrum in exchange for some of the financial proceeds that accrue to the government when the Commission auctions newly-available spectrum to new licensees.

As explained in more detail below, the FCC must assess the impact of incentive spectrum auctions, spectrum sharing and repacking on its ownership rules because spectrum auctions will almost surely result in a decrease in the number of women and people of color who own television stations. Failure to do so will not only violate basic administrative procedure, but also the Third Circuit mandate. Although Congress had not adopted the incentive spectrum auctions provision when the Third Circuit ruled on the Commission’s last attempt at relaxing media ownership rules, the Court made clear that it expected the Commission to take into account the entire media ownership landscape with respect to ownership diversity because “ownership diversity is an important aspect of the overall media ownership regulatory framework.”⁵⁰ The Third Circuit has understandably shown significant impatience with the Commission for professing to maintain a goal of promoting ownership diversity while at the same time taking no action to improve or ameliorate the problem, and simultaneously failing completely in its attempt to understand its causes or remedies. Moreover, failure to consider the impact of a major initiative such as the incentive auction, which will likely remove many women owners and owners of color from the airwaves, will clearly fall short of its obligation under the

⁴⁹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (Spectrum Act).

⁵⁰ *Prometheus II*, 652 at 472 (citing *Prometheus I* at 420–21).

Administrative Procedure Act because it will “fail[] to consider an important aspect of the problem.”⁵¹

A. The Spectrum Auctions Will Increase Consolidation and Reduce Ownership Diversity

During an incentive auction, some stations will cease broadcasting and exit the television market, creating a significant change in the present system. As UCC *et al.* explained in Reply Comments filed in April 2012:

the recent passage of the Spectrum Act provides another reason to not further relax any existing ownership limits. As the Commission told the Supreme Court [in *Fox II*], that law has the potential to alter the television marketplace in significant ways. And as UCC *et al.* explained in prior comments, allowing broadcast television stations to return spectrum for a share in the auction proceeds and/or to share spectrum is likely to result in less spectrum being available for broadcasting and thus greater consolidation. Having in place policies to ensure opportunities for minorities and women to own broadcast stations therefore takes on even greater force.⁵²

Beyond radically restructuring the marketplace, the spectrum auctions are likely to lure away the lowest performing broadcasters, which are more likely to be stations owned by women and people of color. While the Commission certainly cannot and should not prevent stations owned by women and people of color from exiting the market, it cannot ignore the impact of such changes on its diversity goals.

The Commission has acknowledged that less financially successful stations are more likely to participate in the auction and stop broadcasting over-the-air. The Commission has

⁵¹ *State Farm*, 463 U.S. 29, 43 (1983). Notably, each of the current Commissioners affirmed recently that they were not satisfied with present low levels of TV ownership by people of color at a hearing discussion the new auction. Hearing on “Keeping the New Broadband Spectrum Law on Track” House Subcommittee on Communications and Technology, Committee on Energy and Commerce (December 21, 2012) (testimony of Chairman Genachowski, Commissioners McDowell, Clyburn, Rosenworcel and Pai in response to questions by Representative Rush).

⁵² UCC *et al.* Reply Comments, MB Docket No. 09-182 at i (April 17, 2012).

engaged in significant outreach toward broadcast television stations to encourage them to consider participating in the incentive auction and to educate the broadcast bar about upcoming rules. The Commission's outreach efforts have acknowledged that it is most likely that the lower-performing stations will choose to exit the broadcast industry as part of the spectrum auction.⁵³ In addition, the Commission's National Broadband Plan (which was the premise for Congress' decision to authorize an incentive auction) laid out valuations of spectrum that indicated spectrum auctioned for mobile use would be more valuable than the lower-performing television stations.⁵⁴

Existing data shows that stations owned by women and people of color are likely to be less financially successful. UCC *et al.*'s analysis of TV station ownership data for 2009 found that only a small number of television stations are controlled by minorities, that most of them are not ranked among the top-4 stations, and that many are on the periphery of a metropolitan area.⁵⁵ These characteristics make minority-owned stations the likely targets of acquisitions if the newspaper-television cross-ownership rule is relaxed.⁵⁶ The very same characteristics also make these stations more likely to participate in incentive auctions.

NHMC also pointed out in its comments

⁵³ FCC Channel Sharing Workshop, May 1, 2012, Remarks of John Hane of Pillsbury Winthrop (indicating that niche programming and foreign language programming might be the most likely to participate), video available at <http://www.fcc.gov/events/channel-sharing-workshop>; Bill Lake, Chief, Media Bureau, remarks, Federal Communications Bar Association, CLE, Getting from Here to There: The Road Ahead for Spectrum Auctions (June 6, 2012) (indicating large-market financially successful stations unlikely to participate in auction).

⁵⁴ National Broadband Plan, Chapter 5, recommendation 5.8.5 (estimating broadcast spectrum is valued at \$0.15 per megahertz-pop while mobile wireless spectrum is worth \$1.28 per megahertz-pop where megahertz pop is dollars of value per megahertz of spectrum, per person reached (\$ per megahertz-pop)).

⁵⁵ UCC *et al.* Reply Comments, MB Docket No. 09-182, at 19-35 (April 17, 2012). These Reply Comments did not analyze the extent to which women own full power television stations at the time because the FCC did not provide any data on women's ownership at that time.

⁵⁶ *Id.* at 20–21.

the recently passed legislation authorizing the Commission to conduct voluntary auctions of UHF spectrum could exacerbate the already substantial deficit in broadcast ownership by women and people of color. A number of large broadcast station ownership groups—such as NBC Universal, CBS Corporation, and Sinclair Broadcasting Group—have already indicated that they would not sell any of their substantial spectrum holdings at auction. According to a spokesperson for the National Association of Broadcasters, the stations that are likely to sell will be “the ones that offer truly niche programming serving a melting pot of immigrant populations.” These “niche” stations are currently some of the only stations owned by owners of color. While targeting an underserved audience that is often more reliant on over-the-air broadcast than the general population, these stations can and do find an audience in their communities. However, these stations also often lack the substantial financial resources of increasingly consolidated media conglomerates. If these owners should decide to sell en masse, the number of broadcast stations owned by people of color in this country would drop precipitously.⁵⁷

B. The Incentive Auction Is Already Having a Negative Impact on Diversity of Television Station Ownership

While the auction is planned to occur before the end of 2014,⁵⁸ it is already having an impact on the market. Television stations owned by smaller owners are already being purchased by private equity firms that hope to exchange spectrum for revenue. As a result, some stations are already exiting the market.⁵⁹ For example, media have reported that a large number of television stations that air Asian-oriented programming have been acquired only to be “flipped” for a profit

⁵⁷ Comments of National Hispanic Media Coalition *et al.*, MB Docket No. 09-182 (Mar. 5, 2012) at 34–35 (footnotes omitted).

⁵⁸ Statement of Chairman Julius Genachowski Hearing on “Keeping the New Broadband Spectrum Law on Track” House Subcommittee on Communications and Technology, Committee on Energy and Commerce (December 21, 2012) available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Genachowski-CAT-Spectrum-2012-12-12.pdf>.

⁵⁹ See Chris Nolter, *Investors Circle TV Stations with Spectrum to Sell*, (July 18, 2012), <http://www.thedeal.com/content/tmt/investors-circle-tv-stations-with-spectrum-to-sell.php>.

during the incentive auctions.⁶⁰ At least one small station was acquired before the auction provisions became law.⁶¹

Because these changes have occurred since the 2011 data collection, it would be arbitrary for the Commission to rely solely on the 2011 data for making predictions about the impact of relaxing its existing limits on competition and diversity.

C. Spectrum Auctions Will Result in the Loss of Diverse Low Power TV Stations

The incentive auctions will also result in a loss of low power television (LPTV) stations. The LPTV service was created for the purpose of promoting opportunities for minorities and women.⁶² Yet, until the recent changes in the Form 323 filing, the FCC had never collected ownership data for LPTV. The Report reveals that women and people of color are more highly represented in LPTV than other types of broadcast stations, albeit still at levels well below their percentages in the U.S. population.⁶³

⁶⁰ Harry A. Jessell, *NRJ TV Snags WGCB Harrisburg For \$9M*, (Sep. 20, 2012), <http://www.tvnewscheck.com/article/62316/nrj-tv-snags-wgcb-harrisburg-for-9m> (“NRJ . . . has been buying TV stations in or near major markets in hopes of flipping them at a profit in the FCC’s planned ‘incentive auction’ of TV spectrum.”); *see also* *NRJ TV To Acquire Asian-Language KSCI* (Mar. 27, 2012), <http://www.tvnewscheck.com/article/58343/nrj-tv-to-acquire-asianlanguage-ksci?ref=search>.

⁶¹ Michael Malone, *Newport TV Selling Seattle Independent, Broadcasting & Cable* (Dec. 2, 2011), *available at* http://www.broadcastingcable.com/article/477408-Newport_TV_Selling_Seattle_Independent.php (Michael Dell acquiring spectrum in advance of FCC auction).

⁶² *See An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 Fed. Reg. 21468, ¶80 (1982); LPTV was considered “a rich, if distant, opportunity to promote diversity of ownership generally and to widen opportunities for minority ownership in particular. . . .” *Id.* (Separate Statement of Commissioner Henry M. Rivera).

⁶³ As of October 2011, women owned 14.8 percent of LPTV stations, Latinos 9.6 percent, African-Americans 1.3 percent, Native Americans 0.3 percent, and Asians 2.2 percent. While these numbers are not high, they are higher than ownership rates for full power television stations for each demographic group except Native Americans. *Report on Ownership of Commercial Broadcast Stations*, DA 12-1667, at 9 and Table C(1a) and C(1b) (rel. Nov. 14, 2012); *see* Appendix A.

It is likely that because of the spectrum auction, many low power television stations will be forced off the air. As the Commission has explained:

low power television and translator stations will be impacted by the broadcast television spectrum incentive auction. Because low power television and translator facilities have only secondary interference protection, we propose . . . that full power and Class A television stations will be assigned new channels in the broadcast television spectrum reorganization without regard to whether such channel assignments, or the modified facilities required to implement service on them, would interfere with existing low power television and translator facilities. Where such interference exists, or where an existing low power television or translator station would cause interference to a repacked “primary” status station, *the low power television or translator station will be “displaced” and will either have to relocate to a new channel that does not cause interference or else discontinue operations altogether. Only a limited number of available channels may exist following the repacking process, limiting the relocation options available to displaced low power television.*⁶⁴

In other words, at least some LPTV stations will be forced off the air.

Thus, the Commission itself has proposed implementing the new statute in a manner that will negatively impact a service that was specifically created in order to facilitate new entrants and minority and female broadcast ownership. The Commission must take account of this loss of diversity in assessing the impact of any further relaxation of the broadcast ownership rules.

D. The Commission Must Consider the Impact of Spectrum Auctions in the 2010 Quadrennial Review

The Commission has either ignored or deferred consideration of the interaction of the 2010 Quadrennial Review and spectrum auctions despite repeated requests and comments highlighting the interaction. If the Commission continues to “put its head in the sand” and ignore

⁶⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12,357, 12,475 at ¶358 (2012) (emphasis added) (“*Spectrum NPRM*”).

findings and predictions it has made in other dockets, its decision in the 2010 Quadrennial will be based on a record that the Commission knows to be counter to the facts.

UCC *et al.* previously expressed concern that incentive auctions would “exacerbate[] a long-standing problem—the lack of station ownership by minorities and women.”⁶⁵ UCC *et al.* explained that repurposing and channel sharing could reduce opportunities for minorities and women—and the resulting diversity of viewpoints—in several ways:

- Opportunities for new entrants to obtain licenses through auctions would be eliminated because the Commission would be unlikely to license any new television stations;
- Limiting channel sharing to existing television licensees would at best maintain the existing low levels of ownership by minorities and women and could reduce minority and female ownership; and
- Minorities and/or women would be at a disadvantage in negotiating sharing arrangements because they typically operate with less capital and advertising dollars than other stations.⁶⁶

However, in the order released in April 2012, the Commission declined to address UCC’s concerns. It found that these issues were “beyond the scope” necessary for “setting the stage of the incentive auction process,” and that the Commission “will have to address them in a future proceeding.”⁶⁷

UCC and NHMC asked the Commission to consider these issues in the Spectrum NPRM.⁶⁸ The Spectrum NPRM recognizes that the incentive auctions “may impact broadcasters’ ongoing compliance with the Commission’s multiple ownership rules by, for example, reducing

⁶⁵ Comments of UCC *et al.*, *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-244, at 4 (Mar. 18, 2011).

⁶⁶ *Id.* at 4-6.

⁶⁷ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Report & Order, 27 FCC Rcd 4616, at ¶22 (2012) (“*Innovation R&O*”).

⁶⁸ Letter from Earl Williams, UCC OC Inc. and Alex Nogales, NHMC to FCC Chair Julius Genachowski, *et al.*, ET Docket No. 10-235 (Sept. 21, 2012).

the number of stations in a given area.”⁶⁹ But rather than recognize that reducing the number of broadcast stations will increase concentration and potentially dilute minority ownership, the Commission proposes to “grandfather” existing ownership arrangements. The Spectrum NPRM also defers consideration of “any other implications that the broadcast television spectrum incentive auction may have for our multiple ownership rules [to] *future* quadrennial regulatory reviews of those rules.”⁷⁰

In sum, all available evidence demonstrates that the recently authorized spectrum auctions will have a negative impact ownership diversity. The Commission must therefore to take the impact into account when it renders its decision in the 2010 Quadrennial Review or, at a minimum, maintain the existing ownership rules until the impact of incentive auctions can be assessed

IV. Strict Scrutiny Would Apply Only to Actions that Involve Classification by Race

Finally, we are concerned that the Commission may lack a clear understanding of the Constitution’s requirement of equal protection under the law. We agree that were the Commission to adopt a definition of eligible entity that utilized racial classifications or adopted some other preferences based on race, it would need to have a record sufficient to meet strict scrutiny. However, a decision to maintain or even tighten up the ownership limits would be subject only to rational basis review.

Statements made by some FCC staff about the draft order suggest that they believe that not relaxing the ownership limits would somehow trigger strict scrutiny, which the Commission would not be able to meet on the current record. We believe that this view misunderstands the

⁶⁹ *Spectrum NPRM*, 27 FCC Rcd at 12474, ¶356. For example, under the current local television rule, duopolies are permitted only so long as at least eight independent television voices remain. However, if one or more television stations in a market opt to turn in its license, the number of independent voices could fall below eight.

⁷⁰ *Id.* (emphasis added).

law of Equal Protection. In short, the Supreme Court applies strict scrutiny to government actions that allocate burdens or benefits according to race.⁷¹ Indeed, the holding of *Adarand* is that “all *racial classifications*, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”⁷²

Racial classifications have been involved in all cases where the Court has applied strict scrutiny. For example, in *Grutter v. Bollinger* and *Gratz v. Bollinger*, which involved the admissions policies at the University of Michigan’s Law School and College of Literature, Science and the Arts, and which were decided on the same day, the Court applied strict scrutiny because both admissions policies took race into account as a factor.⁷³ Similarly, the two high school admission plans at issue in *Parents Involved in Community Schools v. Seattle School District No. 1* employed a racial classification as one of several factors when assigning students to schools.⁷⁴ And in *Fisher v. University of Texas*,⁷⁵ which is currently pending in the Supreme Court, both sides agree that the University of Texas’s admission program took race into account as one factor in determining which applicants to meet.⁷⁵ Similarly, the Supreme Court has employed strict scrutiny in cases involving remediation of past discrimination where the relief involved consideration of race. For example, in *Richmond v. J.A. Croson, Company*, the Court

⁷¹ See, e.g., *Johnson v. California*, 543 U.S. 499, 505–506 (2005).

⁷² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added).

⁷³ Compare *Grutter*, 539 U.S. 306, 326-27 (2003) with *Gratz*, 539 U.S. 244, 270 (2003). The Court reached different results because it found that the Law School’s program was narrowly tailored while the College’s program was not. For an analysis of how the *Grutter* decision supports a finding that racial and gender diversity in broadcast ownership is a compelling governmental interest, see Reply Comments of UCC *et al.*, *Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Docket No. 04-228 (Nov. 8, 2004).

⁷⁴ 551 U.S. 701, 709 (2007).

⁷⁵ Compare Brief of Petitioner at 8, with Brief of Respondent at 1-2, *Fisher v. University of Texas*, No. 11-345.

found that the City of Richmond’s contracting plan “denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.”⁷⁶

In contrast, the FCC’s ownership rules are race-neutral. They do not use racial classifications. Nor do they benefit or burden existing or would-be broadcasters based on race. Instead, they affect the number and types of media outlets that may be commonly controlled by a single owner, regardless of race or gender. Moreover, the rules are intended to promote the race-neutral goals of program diversity, competition and providing service responsive to local community needs. That fact that retaining rules prohibiting radio-television cross ownership and newspaper-broadcast cross-ownership would make it easier for existing minority-owned stations to remain in the market or for new minority-controlled companies to enter a market, does not turn the otherwise race-neutral rules into “race-based” rules. Thus, the FCC’s decision whether to relax or retain cross-ownership rules is therefore subject only to rational basis scrutiny.

Should the Commission retain any doubt about whether retaining the existing rule might violate guarantees of equal protection, we urge that the Commission consult with agencies that have expertise in this area, such as the Civil Rights Division of the U.S. Department of Justice. Such consultation could also ensure that the Commission does not unwittingly take positions that would be contrary to the views of the United States.

Conclusion

Although many problems remain with the FCC’s data collection, the Report shows that women and people of color remain vastly underrepresented in commercial broadcast station ownership. Moreover, the number and percentage of stations owned by minorities and people of

⁷⁶ *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1988). The Court further explained that strict scrutiny was necessary because “[c]lassifications based on race carry a danger of stigmatic harm.” *Id.* See also *Wygant v. Jackson Board of Education*, 478 U.S. 267, 277 (1986) (school board’s policy of extending preferential protection against layoffs to some employees because of their race violated equal protection).

color have remained low—and even, in some instances, fallen—over a significant period of time. This has occurred despite Congress’ mandate to the FCC to increase the diversity of broadcast station ownership and reduce entry barriers, and despite having at least some FCC policies intended to increase opportunities for minorities and women.

Thus, we urge the FCC to use its newly released data to conduct the studies necessary to adopt policies that will increase station ownership by women and people of color if necessary to meet the demands of strict scrutiny. The Commission should also assess the impact of market changes that are resulting from spectrum auctions. It should both *before* deciding whether to further relax the existing ownership limits.

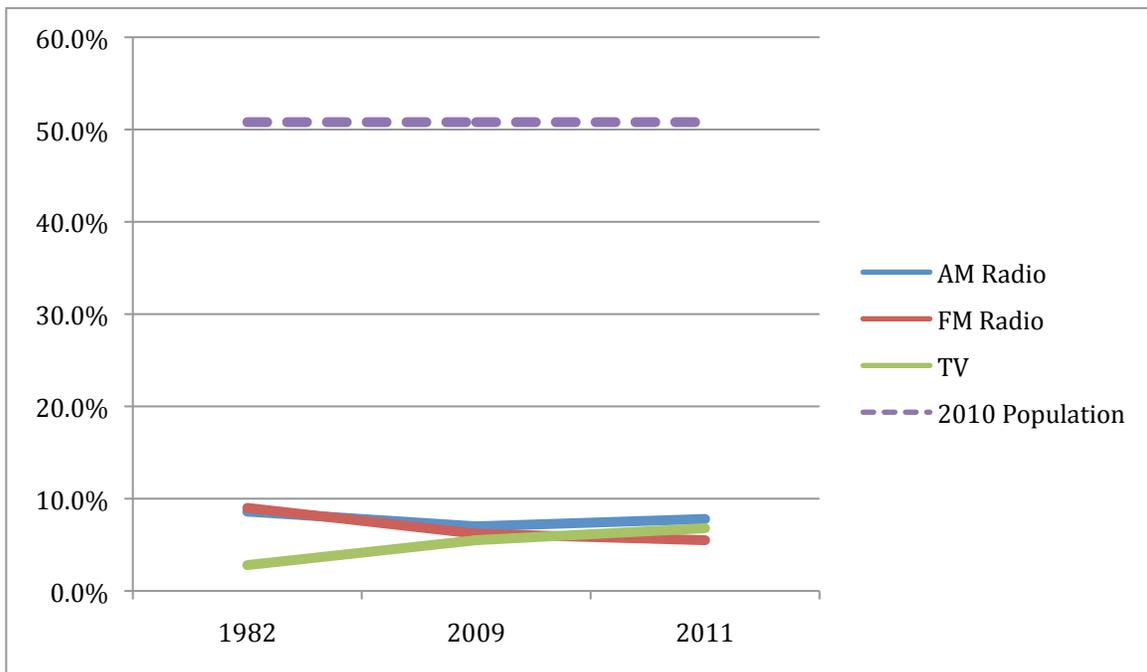
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December 26, 2012

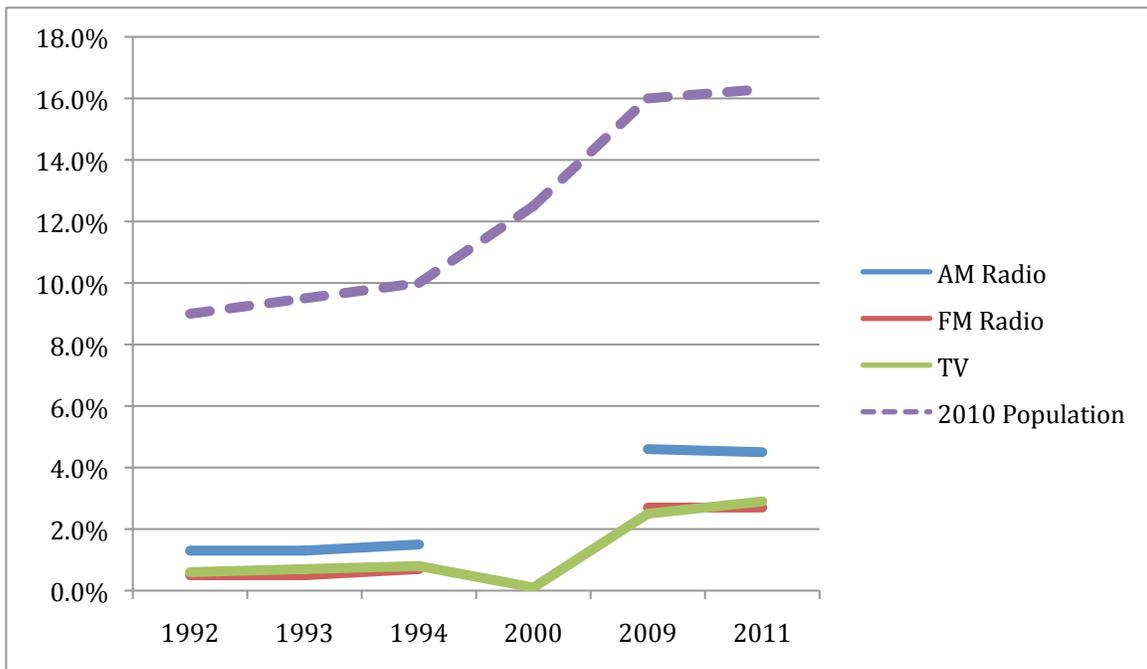
Counsel for United Church of Christ, et al.

Appendix A: Charts Comparing Broadcast Ownership by Women and People of Color to Corresponding Percentage of U.S. Population

Broadcast Ownership by Women 1982–Present Compared to Percentage of U.S. Population

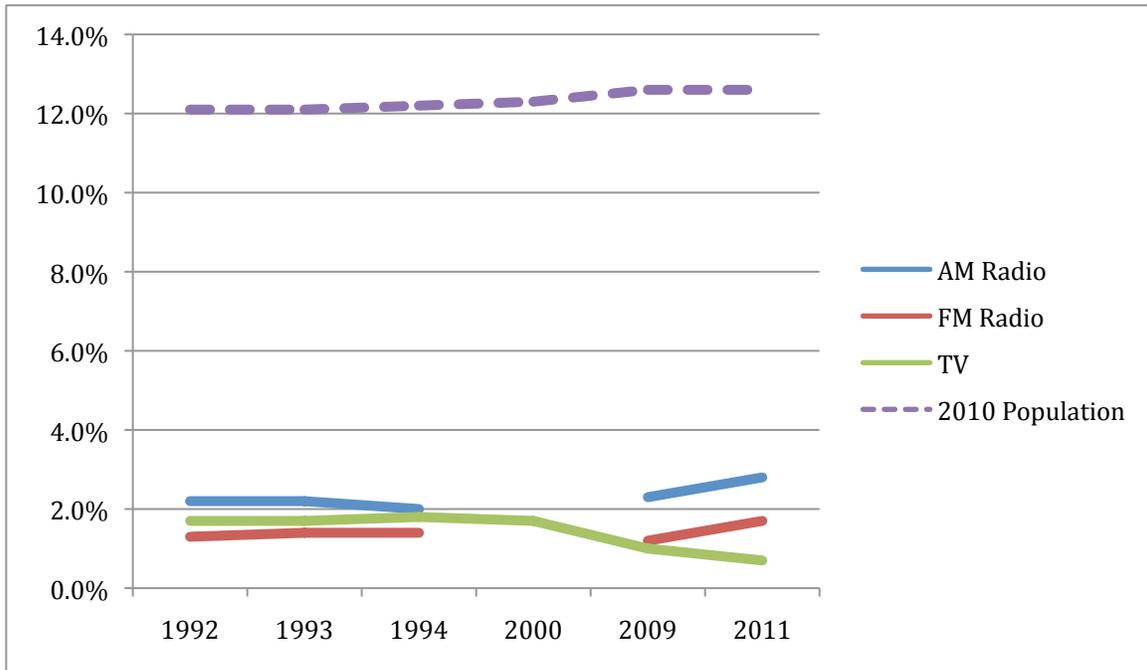


Broadcast Ownership by Hispanic/Latinos 1992–Present Compared to Percentage of U.S. Population

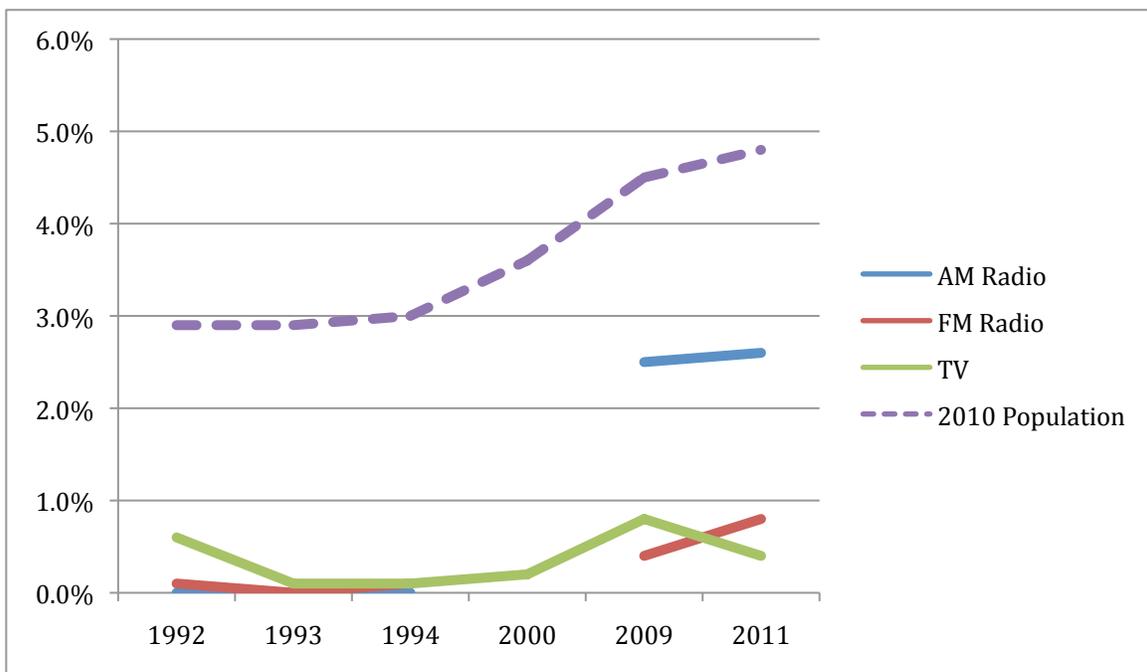


Appendix A: Charts Comparing Broadcast Ownership by Women and People of Color to Corresponding Percentage of U.S. Population

Broadcast Ownership by African-Americans 1992–Present Compared to Percentage of U.S. Population

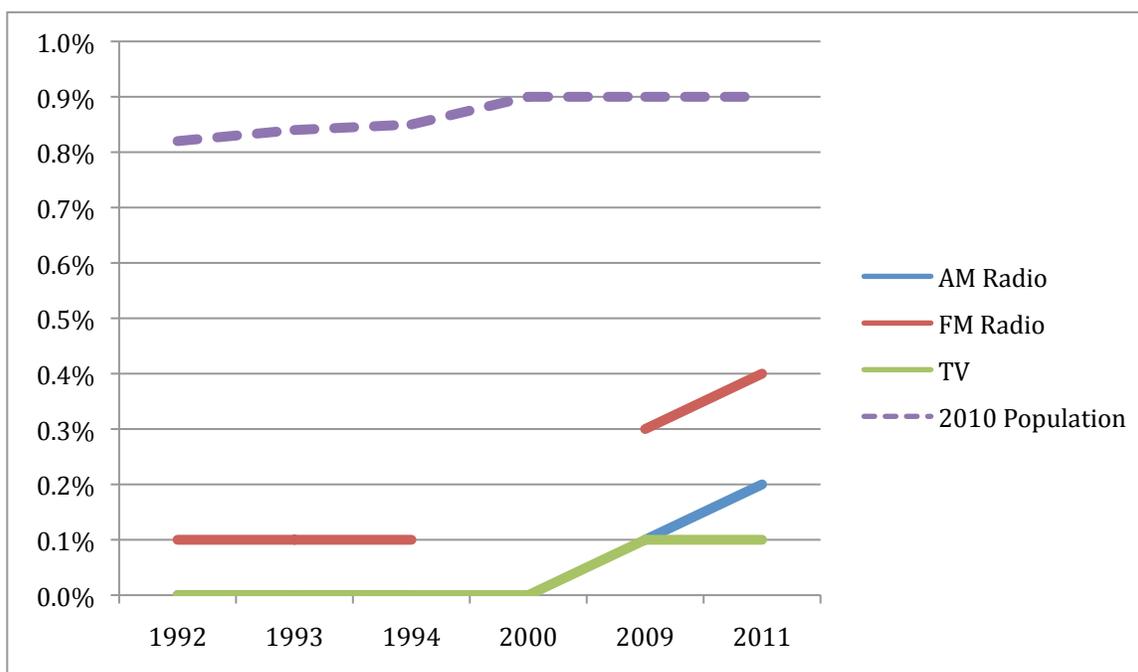


Broadcast Ownership by Asians 1992–Present Compared to Percentage of U.S. Population



Appendix A: Charts Comparing Broadcast Ownership by Women and People of Color to Corresponding Percentage of U.S. Population

**Broadcast Ownership by Native Americans 1992–Present
Compared to Percentage of U.S. Population**



Sources:

1. 1980, 1990, 2000, and 2010 U.S. Census Data
2. FCC, *Female Ownership of Broadcast Stations* (1982), available at <http://transition.fcc.gov/ownership/materials/already-released/female050082.pdf>.
3. National Telecommunications and Information Administration, *A Comparative Analysis of Minority Owned Commercial Broadcast Stations Licensed in the United States in 1992, 1993 & 1994*, <http://www.ntia.doc.gov/legacy/opadhome/mtdpweb/minchth.htm>.
4. National Telecommunications and Information Administration, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* (2001), available at <http://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf>.
5. FCC, *Report on Ownership of Commercial Broadcast Stations* (2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1667A1.pdf.

Summary of Ownership by Service Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Full-Power Commercial TV							
Female	66	5.5%	91	6.8%	25	1.2%	INCREASE
Joint Female/Male	7	0.6%	7	0.5%	0	-0.1%	DECREASE
Hispanic/Latino	30	(3) 2.5%	39	(4) 2.9%	9	(1) 0.4%	INCREASE (INCREASE)
Asian	9	(5) 0.8%	6	(2) 0.4%	-3	-(3) -0.3%	DECREASE (DECREASE)
Black or African-American	12	(0) 1.0%	10	(0) 0.7%	-2	(0) -0.3%	DECREASE (SAME)
Native Hawaiian or Pacific Islander	1	(0) 0.1%	1	(0) 0.1%	0	(0) 0.0%	DECREASE (SAME)
American Indian or Alaska Native	8	(4) 0.7%	12	(8) 0.9%	4	(4) 0.2%	INCREASE (INCREASE)
Two or More Races	0	(0) 0.0%	1	(0) 0.1%	1	(0) 0.1%	INCREASE (SAME)
Minority	30	(9) 2.5%	30	(10) 2.2%	0	(1) -0.3%	DECREASE (DECREASE)
<hr/>							
Male	719	60.4%	873	64.8%	154	4.3%	INCREASE
Non-Hispanic/Latino	760	(62) 63.9%	930	(86) 69.0%	170	(24) 5.1%	INCREASE (INCREASE)
White	754	(53) 63.4%	935	(79) 69.4%	181	(26) 6.0%	INCREASE (INCREASE)
<hr/>							
No Majority Interest (Gender)	398	33.4%	377	28.0%	-21	-5.5%	
No Majority Interest (Ethnicity)	400	33.6%	379	28.1%	-21	-5.5%	
No Majority Interest (Race)	406	34.1%	383	28.4%	-23	-5.7%	
Insufficient Data	150		38		-112		
Stations Not Filed	54		1		-53		
<hr/>							
Total Stations	1190		1348		158		
All Licensed Stations	1394		1387		-7		

Summary of Ownership by Service Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Class A Television Stations							
Female	33	8.3%	35	8.6%	2	0.3%	INCREASE
Joint Female/Male	3	0.8%	4	1.0%	1	0.2%	INCREASE
Hispanic/Latino	25	(5) 6.3%	31	(7) 7.6%	6	(2) 1.3%	(0.5%) INCREASE (INCREASE)
Asian	8	(7) 2.0%	8	(7) 2.0%	0	(0) 0.0%	(0.0%) DECREASE (DECREASE)
Black or African-American	9	(0) 2.3%	6	(2) 1.5%	-3	(2) -0.8%	(0.5%) DECREASE (INCREASE)
Native Hawaiian or Pacific Islander	0	(0) 0.0%	0	(0) 0.0%	0	(0) 0.0%	(0.0%) SAME (SAME)
American Indian or Alaska Native	3	(3) 0.8%	4	(4) 1.0%	1	(1) 0.2%	(1.0%) INCREASE (INCREASE)
Two or More Races	5	(0) 1.3%	8	(1) 2.0%	3	(1) 0.7%	(0.2%) INCREASE (INCREASE)
Minority	25	(10) 6.3%	26	(14) 6.4%	1	(4) 0.1%	(0.9%) INCREASE (INCREASE)
Male							
Male	275	68.9%	282	68.9%	7	0.0%	INCREASE
Non-Hispanic/Latino	284	(27) 71.2%	290	(28) 70.9%	6	(1) -0.3%	(0.1%) DECREASE (INCREASE)
White	284	(22) 71.2%	294	(21) 71.9%	10	-(1) 0.7%	-(0.4%) INCREASE (DECREASE)
No Majority Interest (Gender)							
No Majority Interest (Gender)	88	22.1%	88	21.5%	0	-0.5%	
No Majority Interest (Ethnicity)	90	22.6%	88	21.5%	-2	-1.0%	
No Majority Interest (Race)	90	22.6%	89	21.8%	-1	-0.8%	
Insufficient Data	18		31		13		
Stations Not Filed	128		55		-73		
Total Stations							
Total Stations	399		409		10		
All Licensed Stations	545		495		-50		

Summary of Ownership by Service Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Low-Power TV Stations							
Female	156	15.1%	185	14.8%	29	-0.3%	DECREASE
Joint Female/Male	2	0.2%	3	0.2%	1	0.0%	INCREASE
Hispanic/Latino	85	8.2%	120	9.6%	35	(6) (0.3%)	INCREASE (INCREASE)
Asian	34	3.3%	28	2.2%	-6	(4) -1.1%	DECREASE (DECREASE)
Black or African-American	7	0.7%	16	1.3%	9	(1) 0.6%	INCREASE (DECREASE)
Native Hawaiian or Pacific Islander	3	0.3%	2	0.2%	-1	(0) -0.1%	DECREASE (SAME)
American Indian or Alaska Native	1	0.1%	4	0.3%	3	(1) 0.2%	INCREASE (INCREASE)
Two or More Races	10	1.0%	20	1.6%	10	(4) 0.6%	INCREASE (INCREASE)
Minority	55	5.3%	70	5.6%	15	(0) 0.3%	INCREASE (DECREASE)
<hr/>							
Male	644	62.3%	850	67.8%	206	5.6%	INCREASE
Non-Hispanic/Latino	700	67.7%	912	72.8%	212	(20) -0.9%	INCREASE (DECREASE)
White	725	70.1%	954	76.1%	229	(30) 6.0%	INCREASE (INCREASE)
<hr/>							
No Majority Interest (Gender)	232	22.4%	215	17.2%	-17	-5.3%	
No Majority Interest (Ethnicity)	249	24.1%	221	17.6%	-28	-6.4%	
No Majority Interest (Race)	254	24.6%	229	18.3%	-25	-6.3%	
Insufficient Data	111		131		20		
Stations Not Filed	1332		686		-646		
<hr/>							
Total Stations	1034		1253		219		
All Licensed Stations	2477		2070		-407		

Summary of Ownership by Service Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Commercial AM Radio							
Female	267	7.0%	300	7.8%	33	0.8%	INCREASE
Joint Female/Male	64	1.7%	64	1.7%	0	0.0%	DECREASE
Hispanic/Latino	174 (23)	4.6% (0.6%)	172 (32)	4.5% (0.8%)	-2 (9)	-0.1% (0.2%)	DECREASE (INCREASE)
Asian	97 (14)	2.5% (0.4%)	100 (15)	2.6% (0.4%)	3 (1)	0.1% (0.0%)	INCREASE (INCREASE)
Black or African-American	89 (6)	2.3% (0.2%)	106 (14)	2.8% (0.4%)	17 (8)	0.4% (0.2%)	INCREASE (INCREASE)
Native Hawaiian or Pacific Islander	4 (0)	0.1% (0.0%)	6 (2)	0.2% (0.1%)	2 (2)	0.1% (0.1%)	INCREASE (INCREASE)
American Indian or Alaska Native	7 (1)	0.2% (0.0%)	16 (1)	0.4% (0.0%)	9 (0)	0.2% (0.0%)	INCREASE (DECREASE)
Two or More Races	9 (2)	0.2% (0.1%)	9 (4)	0.2% (0.1%)	0 (2)	0.0% (0.1%)	DECREASE (INCREASE)
Minority	206 (23)	5.4% (0.6%)	237 (36)	6.2% (0.9%)	31 (13)	0.8% (0.3%)	INCREASE (INCREASE)
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Male	2882	75.4%	2841	74.2%	-41	-1.3%	DECREASE
Non-Hispanic/Latino	3014 (237)	78.9% (6.2%)	3020 (262)	78.9% (6.8%)	6 (25)	0.0% (0.6%)	DECREASE (INCREASE)
White	2999 (242)	78.5% (6.3%)	2960 (261)	77.3% (6.8%)	-39 (19)	-1.2% (0.5%)	DECREASE (INCREASE)
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No Majority Interest (Gender)	607	15.9%	232	6.1%	-375	-9.8%	
No Majority Interest (Ethnicity)	632	16.5%	638	16.7%	6	0.1%	
No Majority Interest (Race)	615	16.1%	633	16.5%	18	0.4%	
Insufficient Data	207		169		-38		
Stations Not Filed	762		764		2		
<hr/>							
Total Stations	3820		3830		10		
All Licensed Stations	4789		4763		-26		

Summary of Ownership by Service Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Commercial FM Radio							
Female	325	6.2%	323	5.8%	-2	-0.4%	DECREASE
Joint Female/Male	85	1.6%	68	1.2%	-17	-0.4%	DECREASE
Hispanic/Latino	141	(11) 2.7%	151	(15) 2.7%	10	(4) 0.0%	(0.1%) INCREASE (INCREASE)
Asian	20	(10) 0.4%	45	(9) 0.8%	25	(1) 0.4%	(0.0%) INCREASE (DECREASE)
Black or African-American	63	(4) 1.2%	93	(4) 1.7%	30	(0) 0.5%	(0.0%) INCREASE (DECREASE)
Native Hawaiian or Pacific Islander	15	(3) 0.3%	22	(9) 0.4%	7	(6) 0.1%	(0.1%) INCREASE (INCREASE)
American Indian or Alaska Native	16	(4) 0.3%	28	(4) 0.5%	12	(0) 0.2%	(0.0%) INCREASE (DECREASE)
Two or More Races	9	(0) 0.2%	8	(5) 0.1%	-1	(5) 0.0%	(0.1%) DECREASE (INCREASE)
Minority	123	(21) 2.3%	196	(31) 3.5%	73	(10) 1.2%	(0.2%) INCREASE (INCREASE)
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Male	3925	74.4%	4290	76.5%	365	2.0%	INCREASE
Non-Hispanic/Latino	4186	(314) 79.4%	4524	(308) 80.6%	338	(6) 1.2%	(-0.5%) INCREASE (DECREASE)
White	4203	(302) 79.7%	4467	(288) 79.6%	264	(-14) -0.1%	(-0.6%) DECREASE (DECREASE)
<hr/>							
No Majority Interest (Gender)	937	24.5%	930	16.6%	-7	-8.0%	
No Majority Interest (Ethnicity)	945	24.7%	936	16.7%	-9	-8.1%	
No Majority Interest (Race)		0.0%	948	16.9%	948	16.9%	
Insufficient Data	511		496		-15		
Stations Not Filed	689		423		-266		
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Total Stations	5272		5611		339		
All Licensed Stations	6472		6530		58		

Summary of Ownership by Group Where Voting Share Exceeds 50% Individually or Collectively

* women are represented by the numbers in parentheses

	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Female							
Full-Power Commercial TV	66	5.5%	91	6.8%	25	1.2%	INCREASE
Class A Television Stations	33	8.3%	35	8.6%	2	0.3%	INCREASE
Low-Power TV Stations	156	15.1%	185	14.8%	29	-0.3%	DECREASE
Commercial AM Radio	267	7.0%	300	7.8%	33	0.8%	INCREASE
Commercial FM Radio	325	6.2%	323	5.8%	-2	-0.4%	DECREASE
Male							
Full-Power Commercial TV	719	60.4%	873	64.8%	154	4.3%	INCREASE
Class A Television Stations	275	68.9%	282	68.9%	7	0.0%	INCREASE
Low-Power TV Stations	644	62.3%	850	67.8%	206	5.6%	INCREASE
Commercial AM Radio	2882	75.4%	2841	74.2%	-41	-1.3%	DECREASE
Commercial FM Radio	3925	74.4%	4290	76.5%	365	2.0%	INCREASE
Joint Female/Male							
Full-Power Commercial TV	7	0.6%	7	0.5%	0	-0.1%	DECREASE
Class A Television Stations	3	0.8%	4	1.0%	1	0.2%	INCREASE
Low-Power TV Stations	2	0.2%	3	0.2%	1	0.0%	INCREASE
Commercial AM Radio	64	1.7%	64	1.7%	0	0.0%	DECREASE
Commercial FM Radio	85	1.6%	68	1.2%	-17	-0.4%	DECREASE
Hispanic/Latino							
Full-Power Commercial TV	30	2.5%	39	2.9%	9	0.4%	INCREASE (INCREASE)
Class A Television Stations	25	6.3%	31	7.6%	6	1.3%	INCREASE (INCREASE)
Low-Power TV Stations	85	8.2%	120	9.6%	35	1.4%	INCREASE (INCREASE)
Commercial AM Radio	174	4.6%	172	4.5%	-2	-0.1%	DECREASE (INCREASE)
Commercial FM Radio	141	2.7%	151	2.7%	10	0.0%	INCREASE (INCREASE)
Non-Hispanic/Latino							
Full-Power Commercial TV	760	62.9%	930	69.0%	170	5.1%	INCREASE (INCREASE)
Class A Television Stations	284	27.1%	290	28.0%	6	-0.3%	DECREASE (INCREASE)
Low-Power TV Stations	700	14.8%	912	16.8%	212	5.1%	INCREASE (DECREASE)
Commercial AM Radio	3014	23.7%	3020	26.2%	6	0.0%	DECREASE (INCREASE)
Commercial FM Radio	4186	31.4%	4524	30.8%	338	-1.2%	INCREASE (DECREASE)

Summary of Ownership by Group Where Voting Share Exceeds 50% Individually or Collectively

* women are represented by the numbers in parentheses

	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Asian							
Full-Power Commercial TV	9	(5) 0.8%	6	(2) 0.4%	-3	(-3) -0.3%	(DECREASE) (DECREASE)
Class A Television Stations	8	(7) 2.0%	8	(7) 2.0%	0	(0) 0.0%	(DECREASE) (DECREASE)
Low-Power TV Stations	34	(27) 3.3%	28	(23) 2.2%	-6	(-4) -1.1%	(DECREASE) (DECREASE)
Commercial AM Radio	97	(14) 2.5%	100	(15) 2.6%	3	(1) 0.1%	(INCREASE) (INCREASE)
Commercial FM Radio	20	(10) 0.4%	45	(9) 0.8%	25	(-1) 0.4%	(INCREASE) (DECREASE)
Black or African-American							
Full-Power Commercial TV	12	(0) 1.0%	10	(0) 0.7%	-2	(0) -0.3%	(DECREASE) (SAME)
Class A Television Stations	9	(0) 2.3%	6	(2) 1.5%	-3	(2) -0.8%	(DECREASE) (INCREASE)
Low-Power TV Stations	7	(3) 0.7%	16	(2) 1.3%	9	(-1) 0.6%	(INCREASE) (DECREASE)
Commercial AM Radio	89	(6) 2.3%	106	(14) 2.8%	17	(8) 0.4%	(INCREASE) (INCREASE)
Commercial FM Radio	63	(4) 1.2%	93	(4) 1.7%	30	(0) 0.5%	(INCREASE) (DECREASE)
Native Hawaiian or Pacific Islander							
Full-Power Commercial TV	1	(0) 0.1%	1	(0) 0.1%	0	(0) 0.0%	(DECREASE) (SAME)
Class A Television Stations	0	(0) 0.0%	0	(0) 0.0%	0	(0) 0.0%	(SAME) (SAME)
Low-Power TV Stations	3	(0) 0.3%	2	(0) 0.2%	-1	(0) -0.1%	(DECREASE) (SAME)
Commercial AM Radio	4	(0) 0.1%	6	(2) 0.2%	2	(2) 0.1%	(INCREASE) (INCREASE)
Commercial FM Radio	15	(3) 0.3%	22	(9) 0.4%	7	(6) 0.1%	(INCREASE) (INCREASE)
American Indian or Alaska Native							
Full-Power Commercial TV	8	(4) 0.7%	12	(8) 0.9%	4	(4) 0.2%	(INCREASE) (INCREASE)
Class A Television Stations	3	(3) 0.8%	4	(4) 1.0%	1	(1) 0.2%	(INCREASE) (INCREASE)
Low-Power TV Stations	1	(0) 0.1%	4	(1) 0.3%	3	(1) 0.2%	(INCREASE) (INCREASE)
Commercial AM Radio	7	(1) 0.2%	16	(1) 0.4%	9	(0) 0.2%	(INCREASE) (DECREASE)
Commercial FM Radio	16	(4) 0.3%	28	(4) 0.5%	12	(0) 0.2%	(INCREASE) (DECREASE)
Two or More Races							
Full-Power Commercial TV	0	(0) 0.0%	1	(0) 0.1%	1	(0) 0.1%	(INCREASE) (SAME)
Class A Television Stations	5	(0) 1.3%	8	(1) 2.0%	3	(1) 0.7%	(INCREASE) (INCREASE)
Low-Power TV Stations	10	(1) 1.0%	20	(5) 1.6%	10	(4) 0.6%	(INCREASE) (INCREASE)
Commercial AM Radio	9	(2) 0.2%	9	(4) 0.2%	0	(2) 0.0%	(DECREASE) (INCREASE)
Commercial FM Radio	9	(0) 0.2%	8	(5) 0.1%	-1	(5) 0.0%	(DECREASE) (INCREASE)

Summary of Ownership by Group Where Voting Share Exceeds 50% Individually or Collectively							
* women are represented by the numbers in parentheses							
	2009		2011		Change		Trend in Percentage
	Number	%	Number	%	Number	%	
Minority							
Full-Power Commercial TV	30	(9) 2.5%	30	(10) 2.2%	0	(1) -0.3%	(0.0%) DECREASE (DECREASE)
Class A Television Stations	25	(10) 6.3%	26	(14) 6.4%	1	(4) 0.1%	(0.9%) INCREASE (INCREASE)
Low-Power TV Stations	55	(31) 5.3%	70	(31) 5.6%	15	(0) 0.3%	-(0.5%) INCREASE (DECREASE)
Commercial AM Radio	206	(23) 5.4%	237	(36) 6.2%	31	(13) 0.8%	(0.3%) INCREASE (INCREASE)
Commercial FM Radio	123	(21) 2.3%	196	(31) 3.5%	73	(10) 1.2%	(0.2%) INCREASE (INCREASE)
White							
Full-Power Commercial TV	754	(53) 63.4%	935	(79) 69.4%	181	(26) 6.0%	(1.4%) INCREASE (INCREASE)
Class A Television Stations	284	(22) 71.2%	294	(21) 71.9%	10	-(1) 0.7%	-(0.4%) INCREASE (DECREASE)
Low-Power TV Stations	725	(125) 70.1%	954	(155) 76.1%	229	(30) 6.0%	(0.3%) INCREASE (INCREASE)
Commercial AM Radio	2999	(242) 78.5%	2960	(261) 77.3%	-39	(19) -1.2%	(0.5%) DECREASE (INCREASE)
Commercial FM Radio	4203	(302) 79.7%	4467	(288) 79.6%	264	-(14) -0.1%	-(0.6%) DECREASE (DECREASE)