MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
1025 connecticut ave. nw, suite 1110
washington, dc 20036
tel 202.265.1490
fax 202.265.1489

www.freepress.net

December 3, 2013

Chairman Thomas Wheeler
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: MB Docket No. 09-182, *2010 Quadrennial Regulatory Review*

Dear Chairman Wheeler:

As you are well aware, the U.S. broadcast television industry is in the midst of a wave of consolidation, which one longtime industry insider described as "the biggest wave...in the history of television."[1]

As Free Press demonstrated in a recent report,[2] a handful of companies are propelling this consolidation wave by exercising control of stations in direct violation of the Commission's television multiple ownership rule[3] and other cross-ownership rules.[4] Specifically, firms such as Gannett Company, Nexstar Broadcast Group, Raycom Media, Sinclair Broadcast Group, Tribune Company and others increasingly use so-called "outsourcing agreements" to exercise *de facto* control over broadcast TV stations in markets where such acquisitions would not otherwise be permissible under Commission rules.

Some in the broadcast industry portray these outsourcing arrangements, whether styled as Shared Services Agreements ("SSAs") or by some other name, as a legitimate and legal practice. Free Press submits that there is ample evidence to suggest otherwise. Specifically, there is substantial evidence to warrant a full investigation of these arrangements in the cases where a license-holding entity outsources all of its operations to one single company.

---

[1] Larry Patrick, an industry broker and chairman of the National Association of Broadcasters' Political Action Committee, recently stated: "This wave of consolidation has been the biggest wave in my view in the history of television. You have seen huge companies, some under pressure...but others who just said 'Look, I either have to play this game to get much, much, much bigger so that I can negotiate harder on retrans and I can negotiate more effectively for programming, or I need to sell.'" *See* Sarah Barry James, "Broadcast M&A Boom: It's Not Over Yet," *SNL Kagan*, Sept. 13, 2013.

[2] S. Derek Turner, "Cease To Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation," Free Press, Oct. 2013 (and attached hereto).

[3] *See* 47 C.F.R. § 73.3555(b)(1).

[4] *Id.* § 73.3555(d)(1). Section §310(d) of the Act requires Commission permission for any transfer of direct or indirect control of a station license. As the Commission has explained, the statute encompasses "every form of control, actual or legal, direct or indirect, negative or affirmative, over basic operating policies." *Application of Southwest Texas Public Broadcasting Council For Renewal of Licenses*, 85 F.C.C.2d 713, 715 (1981).

Speaking generally about existing arrangements (and not about any specific pending transaction), these outsourcing arrangements often include the following attributes and aspects:

- The operating company purchases all the so-called "non-license" assets of a station. In practice this means that the purported licensee continues to be listed as the majority (or sole) voting interest holder, but the license and the responsibility for the studio's lease are in many cases the only assets that this purported licensee legally controls. In such cases, the operating company owns all equipment inside the studio and controls the station's day-to-day operations. However, in many instances of outsourcing, the license-holding company actually has no physical presence, as the operating company consolidates all physical operations in the studio of its other in-market station(s).

- The operating company controls every aspect of the station just as it would if it were the FCC-recognized license holder. Some broadcasters who engage in such outsourcing defend this practice as legal, claiming that the operating company is responsible for programming less than 15 percent of a station's total airtime – even when that constitutes all of the operated station's news and locally produced programs – and the license holder *retains the responsibility* for programming the other 85 percent. However, while the license holder has on paper the *responsibility* for programming that airtime, it appears in practice that performance of this task is often delegated back to the operating company.

- In some instances where the financial terms of these outsourcing arrangements are publicly disclosed, it appears that the operating company receives substantially all of the operated-station's profits, while the license holder is given a nominal management fee.

- In some instances where terms are disclosed, it appears the operating company is the party ultimately responsible for the license-holding company's bank notes.

- Nearly every single outsourcing agreement is accompanied by option agreements that grant the operating company an option or right of first refusal to obtain the operated station's license, often for less than market-value prices.

- The legal fiction of the so-called "sidecar company" tactic, practiced by entities like Sinclair (with its sidecars Deerfield Media, Cunningham Broadcasting, and Howard Stirk Holdings) or Nexstar Broadcasting (with its sidecar Mission Broadcasting), only exists at the FCC. Under Securities and Exchange Commission rules and Generally Accepted Accounting Principles, these operating companies and their sidecars are considered one and the same. SEC rules recognize that the operating company "has the power to direct the activities" of the sidecar that "most significantly impact [that sidecar company's] economic performance." Indeed, Free Press has identified several instances where the operating company specifically lists the sidecar company's FCC licenses as assets attributable to the operating company.

Free Press has long requested that the Commission do something about these blatant violations of its ownership rules, and reiterated that request in the above-captioned docket. Given the widespread use of these arrangements, the serious violation of the public trust they entail, and the acceleration of such attempts to subvert the rules, we would welcome Commission action regarding these arrangements in a rulemaking. However, contrary to some industry protestations, a license transfer proceeding is also an opportune time for the Commission to conduct due diligence on these practices — past, present, and future — to determine if there is, or will be, illegal *de facto* control of the licenses subject to the transfer application.[5]

Thus, without commenting on any specific pending transaction, we strongly agree with Senator Rockefeller's recent letter to you, in which the Commerce Committee Chairman urged caution in the Commission's consideration of such agreements.[6] We also reiterate our request,[7] echoed recently by the American Cable Association ("ACA"),[8] that the Commission review license applications involving the use of outsourcing agreements *en banc* at the Commission level, and in "permit-but-disclose" proceedings. These arrangements raise substantial issues of controversy and are anything but routine. Thus, as ACA reiterated, it is not in the best interest of the public for the Media Bureau to decide these matters under delegated authority.

We also urge the Commission to investigate these arrangements fully, placing the burden of proof on the purported license holders and operating companies to demonstrate that there is no illegal *de facto* control.[9] There is often little publicly available evidence to *conclusively* rebut claims that there is no illegal *de facto* control of these licenses. Such an investigation will require the Commission to do as it routinely does in cellular license transfer proceedings, and to issue exhaustive information requests. Given the clear public interest issues at stake, such investigations should offer third parties the opportunity to participate meaningfully by accessing confidential documents under Commission-issued protective orders.

Respectfully submitted,

/s/ Matthew F. Wood

Policy Director
Free Press
mwood@freepress.net

---

[5] We are also deeply concerned about a recent trend of a company purchasing the non-license assets of one or more competing in-market stations and assuming operation of those stations under outsourcing agreements. In these instances, there is no license transfer application filed, and no opportunity for the Commission to investigate whether or not these arrangements are legal under the Communications Act and Commission rules. *See e.g.* "Sinclair Buys KRNV Reno For Triple Play," *TV News Check*, Nov. 25, 2013.

[6] Letter from John D. Rockefeller IV, Chairman, United States Senate Committee on Commerce, Science and Transportation to Hon. Thomas Wheeler, Chairman, Federal Communications Commission (Nov. 25, 2013).

[7] *See, e.g.*, Petition to Deny of Free Press *et al.*, MB Docket No. 13-189, at 8 (filed July 24, 2013); *see also* 47 C.F.R. § 0.283.

[8] Letter from Matthew M. Polka, President and CEO, The American Cable Association to The Honorable Thomas Wheeler, Chairman, Federal Communications Commission, MB Docket No. 09-182 (filed Nov. 26, 2013).

[9] *See e.g.*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc.*, *Transferor to Sirius Satellite Radio Inc.*, *Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶5 (2008) ("Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.").