

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

*Re: Broadcast Media Ownership, Diversity and Joint Sales Agreements*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256.

During my time as a Commissioner, I have had the privilege of casting votes on hundreds of items. This, almost certainly, is the most unfortunate item I have encountered.

Today, the Commission abdicates its legal obligation to review our media ownership regulations every four years. It arbitrarily singles out one aspect of those regulations—our treatment of joint sales agreements (JSAs)—and changes our policies in a way that ignores the realities of the modern media marketplace, will harm localism and diversity, and will drive many television stations out of business. And in response to a court remand, the Commission refuses to take any action to promote ownership diversity. Because today’s item is inconsistent with the law and unsupported by the facts, I dissent.

**I.**

Let’s start with the Commission’s failure to complete our current quadrennial review. Section 202(h) of the Telecommunications Act of 1996 states that the “Commission shall review its [media ownership rules] quadrennially . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition.”<sup>1</sup> This statutory provision then requires the Commission to “repeal or modify any regulation it determines to be no longer in the public interest.”<sup>2</sup>

Our prior media ownership review began on June 21, 2006, and ended on December 18, 2007. It has therefore been *over six years* since we have completed a task that we are required by law to conduct every four years. This morning, the Commission could have and should have begun to live up to our legal responsibilities. I presented my colleagues with a plan that would have brought our current quadrennial review to a close today. It would have modernized our media ownership regulations while still preserving our core values of competition, diversity, and localism. I thank Commissioner O’Rielly for supporting my proposal.

Unfortunately, the Commission took another path. Rather than completing the 2010 iteration of the quadrennial review process, we are folding it into yet another quadrennial review that is being launched today. When will we finish these old and new reviews? All we’ve been told is that the Media Bureau will present recommendations to the Commissioners by June 30, 2016.<sup>3</sup> That’s *more than eight-and-a-half years* after we finished our last quadrennial review.

Our decision today—or, to be more accurate, our lack of decision—is a thumb in the eye of Congress and an evasion of our legal obligations. What makes it even worse is that this item contains no meaningful explanation for why we are not resolving the quadrennial review. There are simply fleeting

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111–12 § 202(h) (1996), *as amended by* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004).

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

<sup>3</sup> Letter from Tom Wheeler, Chairman, FCC, to the Honorable John D. Rockefeller IV, John Thune, Mark Pryor, and Roger Wicker, U.S. Senate (Mar. 27, 2014).

references to a desire to “build on th[e] record” of the current proceeding and adopt rules that are based on a “comprehensive, refreshed record.”<sup>4</sup>

But here are the facts. During the 2010 quadrennial review process, we have compiled an extensive record. The Commission began over four years ago with a series of eight workshops held between November 2009 and May 2010, which examined our media ownership rules.<sup>5</sup> Then, on May 25, 2010, the Commission issued a Notice of Inquiry pertaining to our media ownership rules and received a comprehensive set of comments.<sup>6</sup> On June 15, 2011, the Commission publicly released five research studies on media ownership and adopted procedures for public access to its data sets.<sup>7</sup> On July 21, 2011, the FCC released three additional research studies on media ownership,<sup>8</sup> followed shortly by the release of the final three remaining research studies on July 27, 2011.<sup>9</sup>

The FCC next issued a Notice of Proposed Rulemaking on its media ownership rules on December 22, 2011.<sup>10</sup> On December 3, 2012, the Commission sought comment on its report on female and minority ownership of broadcast stations.<sup>11</sup> Several months later, on June 7, 2013, the Media Bureau invited comments on a study by the Minority Media and Telecommunications Council concerning the impact of changes to our cross-ownership rules on ownership diversity.<sup>12</sup>

At each stage of this process, the Commission received a voluminous array of comments. And all the while, a wide range of stakeholders has given us information and feedback through our *ex parte* process.

Notwithstanding all of this, all the Commission decides today is that we are not yet ready to make a decision. What information do we need that we do not have? Today’s item does not say. Moreover, any suggestion that the record we have compiled has grown stale would not only be untrue, it would also

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<sup>4</sup> *Order* at para. 1. A statement accompanying the item (but not the item itself) suggests that we are not completing the 2010 quadrennial review today because of “an inability to achieve a majority.” Statement of Chairman Tom Wheeler. This obscures the reality that the Chairman never presented the current roster of Commissioners a proposal for completing the 2010 quadrennial review.

<sup>5</sup> *See, e.g., Media Bureau Announces Media Ownership Workshop on Financial Issues*, MB Docket No. 09-182, Press Release (Dec. 18, 2009), available at <http://go.usa.gov/KM53>.

<sup>6</sup> *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, Notice of Inquiry, 25 FCC Rcd 6086 (2010).

<sup>7</sup> *FCC Releases Five Research Studies on Media Ownership and Adopts Procedures For Public Access to Underlying Data Sets*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 8472 (Med. Bur. 2011).

<sup>8</sup> *FCC Releases Three Additional Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10240 (Med. Bur. 2011).

<sup>9</sup> *FCC Releases the Final Three Research Studies on Media Ownership*, MB Docket No. 09-182, Public Notice, 26 FCC Rcd 10380 (Med. Bur. 2011).

<sup>10</sup> *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, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011).

<sup>11</sup> *Commission Seeks Comment on Broadcast Ownership Report*, MB Docket No. 09-182, Public Notice, 27 FCC Rcd 15036 (Med. Bur. 2012).

<sup>12</sup> *Media Bureau Invites Comments on Study Submitted by the Minority Media and Telecommunications Council in 2010 Quadrennial Review of Broadcast Ownership Rules*, Public Notice, 28 FCC Rcd 8244 (Med. Bur. 2013).

invoke the chutzpah doctrine.<sup>13</sup> It would be like a child who has murdered his parents throwing himself on the mercy of the court because he is an orphan. And it is bizarre to say that rules of ancient vintage must stay the same because the media marketplace is changing too quickly.

But my problem with today's item isn't just about process. For this isn't only a matter of fulfilling legal responsibilities or a concern about good government. Our dereliction of duty has a substantive impact in the real world. Our regulations should keep pace with the fast-changing media marketplace, but they are not.

Consider the newspaper-broadcast cross-ownership rule. The rule was enacted in 1975, a time when the information marketplace was vastly different than it is today. Back then, cable news didn't exist; neither did the Internet. Now, Americans can access an ever-widening range of news and information online at any time, day or night, so fewer and fewer of us choose to subscribe to a daily newspaper. And as online advertising becomes ever more local and mobile, the advertising niche once served by newspapers is fading fast. The numbers say it all. Since the newspaper-broadcast cross-ownership rule was enacted in 1975, over one in five newspapers in the United States has gone out of business. During that same time period, while the number of households in our country has increased by over 55%, newspaper circulation has declined by more than 25%. In the last few years, we've seen daily newspapers close in major markets like Denver, Cincinnati, Tucson, Honolulu, and Albuquerque. And in New Orleans, my former local newspaper, the *Times-Picayune*, is printed only three times a week.

Had the prohibition on newspaper-broadcast cross-ownership been eliminated years ago, the industry's prospects might look brighter today. Investments in newsgathering are more likely to be profitable when a company can distribute news over multiple platforms. And cross-owned television stations on average provide their viewers with more news than do other stations. Given these facts and the substantial challenges facing the newspaper business, it doesn't make sense to single out broadcasters and prevent them from operating newspapers. If you are willing to invest in a newspaper in this day and age, we should be thanking you, not standing in your way.

Nonetheless, the newspaper-broadcast cross-ownership rule is on track to celebrate its fortieth birthday next year. It is quite remarkable when you think about it. The Commission has approved numerous large mergers and acquisitions over the last two decades; there is no need for me to recount them here. But a single newspaper purchasing a single radio station in the same market? Somehow, that remains a bridge too far.

As one former FCC Chairman put it, "Under current conditions in the media business the FCC's rule is perverse. . . . If a profitable broadcaster wants to buy a newspaper in its city . . . the FCC should welcome this extra support for the trouble-plagued newspaper industry."<sup>14</sup> And who was that former Chairman? None other than my friend Reed Hundt. Indeed, former FCC Chairmen of both parties—

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<sup>13</sup> See, e.g., *Marks v. Commissioner*, 947 F.2d 983, 986 (D.C. Cir. 1991) (fugitives from criminal prosecution argued that inadequate efforts were made to notify them of tax delinquency); *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 & n.5 (D.C. Cir. 1991) (subcontractor asserted contractor was negligent for relying on subcontractor's advice).

<sup>14</sup> Reed Hundt, "The FCC Should Repeal Its Newspaper-Broadcast Ownership Rule," *Washington Post* (June 16, 2013), available at [http://www.washingtonpost.com/opinions/the-fcc-should-repeal-its-newspaper-broadcast-ownership-rule/2013/06/06/7084e764-cebb-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/opinions/the-fcc-should-repeal-its-newspaper-broadcast-ownership-rule/2013/06/06/7084e764-cebb-11e2-8845-d970ccb04497_story.html); see also *Communications Daily* (June 16, 2013) (quoting Hundt as saying in same speech that FCC's enforcement of cross-ownership rules has become "an exercise in intellectual contortions that persuade[s] on-lookers that the Commission is acting in an arbitrary fashion"), available at <http://reedhundt.blogspot.com/2013/06/communications-daily-media-update-on.html>.

Hundt, Powell, Martin, and Genachowski—all have recognized the folly of the rule in its current form. And the Commission in its two most recently completed quadrennial reviews has found that it is not in the public interest to maintain the rule as is. Yet the rule remains on the books. It’s been said that after a nuclear holocaust, all that will be left are cockroaches and Cher. Perhaps the time has come to add a third thing to that list: the newspaper-broadcast cross-ownership rule.

It doesn’t have to be this way, and it certainly shouldn’t. Congress has instructed us to review the newspaper-broadcast cross-ownership rule every four years and repeal or modify it if we determine that it is no longer in the public interest. And here is the simple truth: The Commission has not been able to conclude *since 2000* that the newspaper-broadcast cross-ownership rule remains in the public interest. And today, the Commission dodges the issue entirely, putting off the issue until 2016, *sixteen years after our last determination!*

What’s the solution at this point? While writs of mandamus are not to be issued lightly, I believe that the D.C. Circuit would now be justified in ordering the Commission to remove the newspaper-broadcast cross-ownership rule from our books.<sup>15</sup> We have had plenty of opportunities to justify maintaining the newspaper-broadcast cross-ownership rule, but instead we have chosen to punt—including today. This, in my judgment, is an unlawful effort to evade court review. The administrative process has gone off the rails, and the time has come for judicial intervention.

## II.

Today, the Commission is unable to reach a decision as to whether the local television ownership rule remains in the public interest, whether the local radio ownership rule remains in the public interest, whether the newspaper-broadcast cross-ownership rule remains in the public interest, whether the radio-television cross-ownership rule remains in the public interest, or whether the dual network rule remains in the public interest.

We do, however, cherry-pick one issue for resolution. Somehow, notwithstanding our inability to reach a decision on any other topic, we are able to and do in fact decide that JSAs should be attributable for purposes of our local television ownership rule.

## A.

What is a JSA? It is an agreement between broadcast stations that allows them to cut down on costs by using the same advertising sales force. As discussed below, the efficiencies created by JSAs have enabled many television stations to thrive and have promoted the Commission’s interests in diversity, localism and competition. By entering into JSAs and shared service agreements (SSAs), local broadcasters are better able to secure bank financing,<sup>16</sup> attract advertising revenue,<sup>17</sup> produce original programming, including news,<sup>18</sup> and modernize their facilities.<sup>19</sup>

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<sup>15</sup> *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (issuing writ of mandamus against the FCC after seven-year delay in making a decision).

<sup>16</sup> See Letter from Clifford M. Harrington, Counsel for Sinclair Broadcast Group, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, Attach. at 3 (Feb. 5, 2014).

<sup>17</sup> See Letter from John K. Hane, Counsel for LIN Television Corporation d/b/a LIN Media, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, at 1–2 (Jan. 16, 2013) (LIN Jan. 16, 2013 *Ex Parte* Letter) (explaining JSAs as a “market response to [MVPD] interconnection agreements,” because media buyers typically want “aggregate[ed] advertising inventory across many channels and entire markets”).

<sup>18</sup> See Letter from Jennifer A. Johnson & Eve R. Pogoriler, Counsel for Bonten Media Group, Inc., et al., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-294, 09-182, 10-71, at 2–3 (Feb. 19, 2014).

While local broadcasters across the nation benefit from JSAs, the effects are especially pronounced outside of our nation's largest markets. The need to achieve efficiencies in these markets is greater because advertising revenue there is much more challenging to come by. For example, in Fort Smith, Arkansas, the nation's 100th largest market, the average revenue per television station is *less than one-tenth* that of the average station in New York City. And in Ottumwa, Iowa, the nation's 200th largest market, the average revenue per station is *less than one-thirtieth* that of the average station in New York City. In smaller markets, the choice is not between two stations entering into a JSA and those same two stations flourishing while operating completely independently. Rather, the choice is between two stations entering into a JSA and at least one of those stations' viability being threatened. If stations in these smaller markets are to survive and provide many of the same services as television stations in larger markets, they must cut costs. And JSAs are a vital mechanism for doing that.

The efficiencies created by JSAs are not a luxury in today's digital age. They are necessary, as local broadcasters face fierce competition for viewers and advertisers. Between 2003 and 2012, Internet advertising grew at a compound annual growth rate of 18.7%, and cable TV advertising grew at a rate of 7.9%.<sup>20</sup> During that same time period, broadcast television station advertising revenue had declined at an annual rate of 0.2%.<sup>21</sup> Between 2013 and 2017, online/digital advertising revenues are expected to increase from \$26.5 billion to \$44.5 billion (a 13.8% rate), while traditional advertising revenues are projected to only grow slightly, at a rate of 0.1%.<sup>22</sup>

Furthermore, local broadcasters face intense competition in the market for local advertising from multichannel video programming distributors (MVPDs) like cable companies, direct broadcast satellite companies, and new entrants like Google Fiber. Increasingly, large and small MVPDs are joining together to form "local interconnects" that sell local advertising on a market-by-market basis, in direct competition with local broadcasters.<sup>23</sup> These local interconnects, which are increasing in size and scope, often serve larger shares of viewers than the local broadcasters with which they compete, and pose stiff competition for broadcasters in the market for local advertising.<sup>24</sup> I have no problem with MVPDs entering into such arrangements; like JSAs, they let MVPDs aggregate their reach to better serve advertisers. But effectively prohibiting television stations from entering into similar arrangements is arbitrary and capricious and puts local broadcasters at a competitive disadvantage.<sup>25</sup>

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<sup>19</sup> See Letter from Jack N. Goodman, Counsel for Schurz Communications, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 04-256, 09-182, 10-71, at 2-3 (Feb. 26, 2014) (Schurz *Ex Parte* Letter).

<sup>20</sup> See Letter from Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters, MB Docket No. 09-182, at 2 (Feb. 18, 2014) (citing SNL Kagan, *Ad market decelerates in 2013, projected to be up 1.4% to 223B* (Dec. 17, 2013)).

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

<sup>22</sup> See *id.* (citing BIA/Kelsey, *BIA/Kelsey Forecasts Overall U.S. Local Media Ad Revenues to Reach \$151.5B in 2017, Lifted by Faster Growth in Online/Digital*, Press Release (Nov. 19, 2013)).

<sup>23</sup> See Letter from John K. Hane, Counsel for LIN Television Corporation d/b/a LIN Media, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, 10-71, at 2 (Feb. 18, 2014) (LIN Feb. 18, 2014 *Ex Parte* Letter).

<sup>24</sup> "MVPD giants DISH and DirecTV—the second and third largest MVPDs—recently announced they will jointly sell political advertising." Letter from John K. Hane, Counsel for LIN Television Corporation d/b/a LIN Media, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, 10-71, at 2 (Feb. 26, 2014). Further, "in each of LIN's four JSA markets, local MVPDs sell advertising with respect to a larger share of viewing than LIN and its JSA counterparties combined." *Id.*

<sup>25</sup> The Commission does not deny that today's action puts local broadcasters at a competitive disadvantage vis-à-vis MVPDs. It sidesteps that point, arguing instead that there is not legal notice for the Commission to regulate MVPDs' local interconnects here. See *Order* at note 1106. While I certainly don't dispute that latter contention, it doesn't address the problem created by the Commission's decision and is not a credible excuse given that the

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## B.

The record is replete with evidence that JSAs promote localism and diversity. JSAs help television stations pay for services that we should want broadcasters to provide. They enable new entrants and diverse voices to participate in the broadcast industry. And they allow television stations to remain financially viable instead of going out of business. Here are just some of the uncontested facts.

In my home state of Kansas, a JSA between Schurz Communications, Inc. and Entravision Communications Corp. has allowed Entravision to provide valuable Spanish-language programming through KDCU, its station in the Wichita media market. Because of this JSA, KDCU is now able to broadcast weekday, hour-long newscasts in HD as well as weather programming and weather, emergency, and community activity closing “crawls,” all in Spanish. With Wichita being located in “tornado alley,” these services are crucial for the safety of the area’s growing Latino population.<sup>26</sup> However, a representative of Entravision told me earlier this year that all of this Spanish-language news will go off the air if the company is forced to terminate its JSA with Schurz.

Across the border in the “Show Me” State, Missouri JSAs show JSAs’ public interest benefits. In the Joplin market, a JSA between Nexstar Broadcasting, Inc.’s KSNF and Mission Broadcasting, Inc.’s KODE produced \$3.5 million in cost savings. Some of that money was used to upgrade the stations’ Doppler radar system, which likely saved lives when a devastating tornado destroyed much of Joplin in 2011. Moreover, JSAs between Nexstar and Mission have helped Mission become the largest female-controlled television company in the United States and air an additional 170 hours per week of locally produced news on its stations.

Seventy miles to the east in Springfield, Missouri, a JSA between Schurz-owned KYTV and Perkin Media, LLC-owned KSPR demonstrates just how dramatically JSAs can improve the quality of local programming. Before Schurz and Perkin Media entered into a JSA, KSPR provided limited news programming, had outdated facilities, and lacked the resources to cover news stories outside of the immediate Springfield area. Since entering into these agreements however, over \$11 million dollars in capital improvements have been made to KSPR. As a result, KYTV and KSPR moved into two separate newsrooms. KSPR was able to produce the first HD local news broadcast in the Springfield market and conduct its own, independent investigative reporting. In fact, KSPR’s news content has been so successful that it was awarded the prestigious Edward R. Murrow Award for the best newscast by a station in a market outside of the top 50. Moreover, KSPR’s closed-captioning technique for its weather and sports newscasts recently served as the basis last month of the Commission’s best practices template. In other words, JSAs not only allow local broadcasters to stay afloat, they enable local broadcasters to better serve their communities.

JSAs between the Bonten Media Group, Inc. and Esteem Broadcasting, LLC prove this point. For years, before Bonten and Esteem entered into a JSA in the Eureka, California market, neither Bonten’s ABC-affiliated station nor Esteem’s Fox-affiliated station were able to carry any local news. But as a result of the economies of scale created by their JSA, both stations are now planning on launching separate, non-repeat local newscasts in July 2014, tripling the number of competitors providing local news in the Eureka market. A similar agreement between Bonten and Esteem stations in the small Chico-Redding, California market have allowed their two stations to broadcast over 25 hours of combined local news per week. Without the efficiencies allowed by a JSA, producing this amount of local news

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Commission declines to examine interconnects in the accompanying Notice. To be clear, my solution to this dilemma would be to neither attribute JSAs nor regulate MVPD local interconnects.

<sup>26</sup> In Raleigh, North Carolina, a Latino family perished in a tornado in part because they were not able to understand local television warnings that were broadcast in English. See Schurz *Ex Parte* Letter at 3.

content would have simply been impossible in that market. In the Tri-Cities, Tennessee-Virginia market, a JSA between Bonten and Esteem has allowed Esteem's station to go from airing no local news at all, to airing 38 hours per week. And JSAs have also allowed Bonten and Esteem stations in the Eureka, Tri-Cities, and Greenville-New Bern-Washington, North Carolina markets to upgrade to HD, giving these stations a much stronger foothold in the competition for local advertising.

JSAs also play a critical role in facilitating minority ownership. For example, WLOO is owned by Tougaloo College, a historically African-American college in Jackson, Mississippi. As a college-owned station, WLOO also allows approximately 50 student-interns at a time to gain hands-on training in television production. This internship program provides its students with the skills needed to compete in today's job market. And since entering a JSA with Jackson's WDBD, WLOO has been able to thrive despite the College's limited resources. For example, WLOO has upgraded to HD. WLOO now produces its own content and carries programming created by and for African-American Southerners, providing a platform for diverse voices in the media marketplace.<sup>27</sup> And WLOO covers local high school sports, furthering the Commission's interest in localism. Without its JSA, none of this would have been possible for WLOO. Indeed, the station's general manager, Pervis Parker, sat in my office recently and told me that he doubts that the station would have survived but for the JSA.

Additionally, a JSA between Sinclair Broadcast Group and Howard Stirk Holdings has allowed Armstrong Williams to become one of the only African-American full-power broadcasters in the United States today. His company owns stations in Flint, Michigan, and Myrtle Beach, South Carolina. And, but for the Media Bureau's recent Public Notice announcing a new policy concerning transactions with sharing agreements and contingent financial interests, Howard Stirk Holdings would have soon owned stations in Harrisburg, Pennsylvania and Charleston, South Carolina, increasing the number of African-American owned stations in the United States by two. Because of the Commission's crackdown on JSAs, however, that deal is no more. Indeed, with respect to the issue of diversity, consider this: *There is only one African-American-owned full-power commercial television station in the United States that is not party to a JSA. And a study by my office estimates that 43% of female-owned full-power commercial television stations in the United States participate in a JSA.*<sup>28</sup>

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<sup>27</sup> Due to the revenues generated by WLOO's JSA with WDBD, WLOO has been able to produce a program called "I.M.A.G.E. ("Imagine Making A Greater Effort . . . To Do the Right Thing"). This program seeks to educate teens about important issues such as "abuse, drinking, texting and driving, bullying, healthy eating, tobacco use, teen pregnancy, and violence" through sketches, music, and dance performances. WLOO has also been able to air programming produced by the Soul of the South network which covers the "events, lifestyles, and culture of African-American Southerners." WLOO is currently considering creating original programming for Soul of the South. See Letter from Jennifer A. Johnson & Eve R. Pogoriler, Counsel for Tougaloo College (WLOO), to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294, at 2 (Feb. 28, 2014).

<sup>28</sup> *Office of FCC Commissioner Ajit Pai Releases Results of Broadcast Ownership Diversity Research*, Press Release (Mar. 20, 2014), available at <http://go.usa.gov/Kz93>.

The preceding examples, of course, do not constitute an exhaustive list of JSAs that have produced public interest benefits.<sup>29</sup> Countless other JSAs have helped promote localism, diversity, and competition, including the following:

- Stations entering into JSAs with Sinclair Broadcast Group from October 2011 to December 2013 have added a net total headcount of 192 employees, added a net news headcount of 119 employees, added 64 hours per week of news programming, committed over \$33,000,000 in additional resources to station operations, and committed \$25,000,000 in additional resource for news operations.<sup>30</sup>
- Sharing arrangements involving LIN Media stations have facilitated:
  - The broadcasts of local St. Patrick’s Day and Martin Luther King, Jr. Day Parades and college sporting events in the Savannah, Georgia market.
  - The broadcast of a local community talk show, live political debates, and investigative reporting segments in the Providence, Rhode Island market.
  - The construction of new station facilities and broadcast of a new morning newscast in the Austin, Texas market.

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<sup>29</sup> The Commission asserts in a footnote that the record contains no evidence linking these public benefits to JSAs and implies that, notwithstanding the fact that all of the stations discussed in the text above participate in JSAs, these benefits could solely be the result of other non-JSA sharing arrangements. *See Order* at note 1103. This argument, however, flies in the face of the uncontested record evidence. For example, with respect to the benefits to the Wichita, Springfield, and Augusta markets described in the text above, Schurz Communications had this to report: “We . . . were asked if these benefits could continue if joint sales agreements were prohibited. The answer was no. First, the cost of a stand-alone sales operation would have to be undertaken by stations that now participate in joint sales agreements. Those costs would reduce the funds available for news and other public service programming. Second, without the potential for sharing in sales revenue, the price of the services provided under shared services agreements would have to reflect their full cost, and for stations like Entravision’s startup KDCU-DT, those costs would not be sustainable, particularly in markets where the size of Latino population remains limited. . . . [Entravision’s representative] also made clear that, the JSA was an essential part of its agreement with KWCH-DT in Wichita. Without that agreement, KDCU-DT would not have been able to offer a Spanish-language local news program; its entry into broadcasting would have been delayed, as it developed a station facility on its own and on a more limited basis; and it would not have been as successful in convincing local advertisers of the benefits of reaching the Latino market.” Letter from Jack Goodman, Counsel for Schurz Communications, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 04-256, 09-182, 10-71, at 3–4 (Feb. 26, 2014); *see also, e.g.*, Letter from Jennifer Johnson and Eve Pogoriler, Counsel for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 04-256, 07-294, 09-182, 10-71, at 7 (Mar. 20, 2014) (Coalition of Smaller Television Stations *Ex Parte*) (“Attribution of JSAs would require stations that participate in JSAs to undertake the cost of a stand-alone sales operation to secure a share of this local advertising business, which is particularly challenging in smaller markets. Employing and training a sales staff with personal knowledge of the market that can engage in substantial, personal outreach (e.g., knocking on doors) to meet with prospective advertisers and make sales requires substantial resources that would have to be drawn away from service to the public. Supporting a separate sales staff would siphon off resources that a station could invest directly in programming and infrastructure, and it would hinder a station’s ability to compete for advertising because it would have a less desirable platform on which to air those ads.”); Letter from Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 04-256, 09-182, 10-71, at 2 (Mar. 14, 2014) (“Both Mr. Gorman and I noted that the proposal to make JSAs attributable would have the unintended consequence of creating serious harm to his company and the service he provides in the Chico market.”).

<sup>30</sup> *See* Letter from Clifford M. Harrington, Counsel for Sinclair Broadcast Group, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 10-71, at 1–2 (Feb. 26, 2014).

- The broadcast of simultaneous, competing newscasts in the Youngstown, Ohio market, as well as the broadcast of live high school and college sporting events, and local pre-game shows.<sup>31</sup>
- A JSA between two stations in the Augusta, Georgia market has led to an additional 10 hours per week of local news and four hours per week of locally originated programming.<sup>32</sup>
- A JSA in the Burlington, Vermont/Plattsburgh, New York market allowed WFFF-TV to launch its first-ever news operation and allowed WVNY(TV) to reestablish a news department, creating 28 new local jobs.<sup>33</sup>
- A JSA in the Baton Rouge, Louisiana market resulted in both participating stations airing their first ever news programs, as well as a local high school sports program.<sup>34</sup>
- A JSA in the El Paso, Texas market not only preserved KDBC-TV's local news programming, it allowed KDBC-TV to offer news and other content in HD.<sup>35</sup>
- A JSA in the Dayton, Ohio market allowed WBDT to add Bounce, an African-American oriented network, on a multicast channel.<sup>36</sup>
- A JSA in the Rochester, Minnesota market allowed KXLT-TV to broadcast a late evening newscast six nights per week.<sup>37</sup>
- A JSA in the Montgomery-Selma, Alabama market allowed WNCF, an ABC affiliate, to begin offering 17 hours a week of local news.<sup>38</sup>
- A JSA in the Fort Wayne, Indiana market has enabled both WISE and WPTA to air more hours of local news programming.<sup>39</sup>
- A JSA in the Peoria, Illinois market allowed WHOI-TV to avoid cutbacks in news coverage and staffing and instead hire more personnel and cover more stories.<sup>40</sup>

These are just some of the public interest benefits that are jeopardized because of today's Commission's action. The decision to scrap JSAs like these will mean less news programming, less high-quality journalism, less diverse programming, fewer upgrades to station facilities, and less ownership diversity. Even worse, it will lead to more television stations going out of business.

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<sup>31</sup> See LIN Feb. 18, 2014 *Ex Parte* Letter, Attach. at 7.

<sup>32</sup> See Letter from M. Anne Swanson, Counsel for Media General, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-182 (Jan. 8, 2013).

<sup>33</sup> See Coalition to Preserve Local TV Broadcasting Reply, MB Docket No. 09-182, at 12–13 (July 26, 2010).

<sup>34</sup> See *id.* at 13.

<sup>35</sup> See *id.* at 14.

<sup>36</sup> See LIN Jan. 16, 2013 *Ex Parte* Letter at 2.

<sup>37</sup> See Letter from Jennifer A. Johnson, Counsel for NBC Television Affiliates, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, MB Docket Nos. 10-71, 09-182, 07-294, Attach. (Jan. 28, 2013).

<sup>38</sup> See Letter from M. Anne Swanson, Counsel for Bahakel Communications Ltd., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 06-121, at 1–3 (Jan. 16, 2013).

<sup>39</sup> See Coalition to Preserve Local TV Broadcasting Reply, MB Docket No. 09-182, at 15 (July 26, 2010).

<sup>40</sup> See *id.* at 16.

## C.

What is the Commission's response to all of this evidence contained in the record? The item essentially ignores it. To be sure, the order grudgingly admits that JSAs "may have public interest benefits in some circumstances."<sup>41</sup> But we are told that these benefits are irrelevant to today's decision, that they should be considered in the context of the local television ownership rule.<sup>42</sup>

However, the Commission refuses to make any decision today about whether our local television ownership needs to be modified. Instead, we have been informed that that decision perhaps will come sometime after June of 2016. This is a classic bait-and-switch tactic. The Commission won't consider broadcasters' arguments about JSAs' public interest benefits now. Rather, the Commission will evaluate them in a proceeding that won't be resolved *until after the Commission's two-year deadline for terminating JSAs*. This is the epitome of arbitrary and capricious decision-making. I hope that our nation's courts will not countenance this cynical maneuver by the Commission to wipe JSAs off the books without taking into consideration the resulting public interest harms.

The merits of our attribution rules can't be separated from the merits of our local television ownership rules. If, as the Commission submits, it is taking action today to "prevent the circumvention of our ownership limits,"<sup>43</sup> then it follows that we are obliged to take into consideration arguments regarding the adequacy of those ownership limits. The Commission attempts to justify its actions by pointing to the *2002 Biennial Review Order* as precedent for the Commission revising its attribution rules without also modifying its ownership limits.<sup>44</sup> There, the Commission altered its attribution rules for radio JSAs while largely maintaining its local radio ownership limits.<sup>45</sup> But the *2002 Order* affirmatively decided to maintain the radio ownership limits (rather than to relax them) and explained why that decision was in the public interest.<sup>46</sup> There was no attempt to dodge consideration of uncomfortable or inconvenient facts. By contrast, today's item fails to decide whether our current local television ownership rule remains in the public interest, reserving the issue for another day—or more accurately, another year.<sup>47</sup>

To summarize, the Commission says that the public interest arguments against making JSAs attributable must be considered in the local television ownership proceeding. But it won't resolve that proceeding now, even though we have already blown past the legal deadline for doing so by at least two years. Such a result should not be allowed to stand.<sup>48</sup>

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<sup>41</sup> *Order* at para. 359.

<sup>42</sup> *Id.* at para. 358.

<sup>43</sup> *Id.* at para. 363.

<sup>44</sup> *Id.* at note 1098 (citing *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13731–32, paras. 290–91 (2003)).

<sup>45</sup> Compare *2002 Biennial Review Order*, 18 FCC Rcd at 13743, para. 317, with *id.* at 13731, para. 290.

<sup>46</sup> "We find that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets." *Id.* at 13731, para. 290.

<sup>47</sup> This outcome is all the more galling because, as explained above, the Commission is legally obligated to review its local television ownership rule every four years, and it has been over six years since the Commission last determined whether the rule in its current form remains necessary in the public interest.

<sup>48</sup> To be sure, the Commission is correct that attribution levels generally need not be included in a biennial (or now quadrennial) review. See *Order* at para. 357 & note 1101. But if the Commission wants to render a decision regarding attribution that, in combination with the local television ownership rule, bans JSAs in most markets, then

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## D.

So the record contains overwhelming evidence regarding the public interest benefits produced by JSAs, and today's item makes no serious effort to contest this fact. But all of these public interest benefits must be weighed against any harms caused by JSAs. And on this issue, the case presented in the item is embarrassingly weak.

Let's start with the basics. JSAs, of course, are principally about the sale of advertising time. It is curious, then, that the Commission fails to discuss the effect that JSAs have on advertisers. Ostensibly, one would think that if anyone would be harmed by JSAs, it would be advertisers. By uniting their sales efforts, might two parties to a JSA be able to request higher prices? Tellingly, the Commission does not rely on this theory. Even more curiously, the item does not cite a single advertiser who has complained about a JSA. Indeed, I am unable to find any evidence in the record at all of an advertiser complaining about the impact of JSAs. This is the equivalent of the dog that didn't bark at night in the Sherlock Holmes mystery "Silver Blaze."

The reason that dog hasn't barked in this proceeding is simple: JSAs probably help advertisers.<sup>49</sup> They allow them to make larger buys more efficiently. They help advertisers reach local, particularized markets that they may otherwise not be able to reach. And they provide for more robust competition for advertising dollars between broadcast stations and joint MVPD sales operations. So if advertisers are not being injured by JSAs, today's item begs a question that it does not answer: Who exactly is being harmed by JSAs?

The Commission's decision today relies almost entirely on its theory that a JSA allows one station to exert undue influence over another station's programming decisions and operations. But where is the evidence to support this theory? The item does not contain a single example of a station in a JSA exercising undue influence over another station. Indeed, the item does not contain a single instance where a JSA has allowed one station to influence *a single programming decision* of another station. Here is a second dog that hasn't barked.<sup>50</sup>

Moreover, this evidence-free theory contradicts long-established precedent based on economic realities. When a broadcast station retains a substantial portion of its advertising revenues, it has a significant economic incentive to control its programming and operations. If the station's advertising revenues go up, the brokered station will get the substantial majority of the upside. And if the station's

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it may not refuse to address the consequences of such a prohibition and use the quadrennial review—especially one that is long overdue and won't be resolved until 2016 at the earliest—as its excuse for doing so.

<sup>49</sup> See, e.g., Letter from Rob Fellman, Boardman Subaru, to David Coy, President/General Manager (Mar. 6, 2014) (Attachment to Coalition of Smaller Market Television Stations *Ex Parte*) ("As a[n] advertiser in the Youngstown market, I have purchased time from both WKBN and WYTV through your shared sales force. I've found your shared sales force to be honest, reasonable, and time-saving. Instead of having multiple account executives pitching me, I'm able to get exactly what I want from both WKBN and WYTV by contacting a single sales person. . . . I hope that the FCC doesn't take away this great service.").

<sup>50</sup> The Commission responds that it need not produce any such facts in support of its decision but rather may rely on its predictive judgment. See *Order* at note 1081. But in light of the fact that at least 85 JSAs have been in operation across the country for many years, the Commission may not so easily escape its responsibility to evaluate and weigh JSAs' real-world benefits and harms. And here, unfortunately, the Commission chooses to ignore this record evidence, raising the prospect of arbitrary and capricious agency action. See *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (internal quotation marks omitted and emphasis added)).

advertising revenues go down, the brokered station will get hit with the substantial majority of the downside. This might explain why, since 2008, the Commission has approved 85 JSAs in the course of transactional reviews.<sup>51</sup> For the Media Bureau has repeatedly approved JSAs only where the brokered station receives at least 70% of the advertising revenue generated by that station, reasoning that such a division of revenues does not give the brokering station *de facto* control of or undue influence over the brokered station.<sup>52</sup> The item's refusal to acknowledge this policy—even that it *is* a policy—is disappointing,<sup>53</sup> not to mention flatly contradicted by indisputable, contemporary facts. Less than four months ago, the Bureau approved JSAs in the context of the Gannett/Belo transaction where the brokered station would retain 70% of its advertising revenue.<sup>54</sup> The Bureau specifically found that opponents of the JSAs had even “fail[ed] to raise a substantial and material question of fact as to whether [the brokered stations] will have an economic incentive to control programming.” Why? The Bureau explained that the brokered stations’ “profits would align with their ownership of the stations in [those] markets.”<sup>55</sup> This precedent, like dozens of precedents upon which it builds, is sound,<sup>56</sup> and we should adhere to it today.<sup>57</sup>

<sup>51</sup> Letter from Gordon H. Smith, President and CEO, National Association of Broadcasters, to Tom Wheeler, Chairman, FCC, MB Docket Nos. 10-71, 09-182, 07-294, 04-256 (Mar. 24, 2014).

<sup>52</sup> See, e.g., *J. Stewart Bryan III & Media Gen. Commc'ns Holdings, LLC (Transferor), Shareholders of New Young Broadcasting Holding Company, Inc., and Its Subsidiaries (Transferor) and Post-Merger Shareholders of Media General, Inc. (Transferee) For Consent to Transfer Control of Licenses*, MB Docket No. 13-191, File No. BTCCDT-20130703ABQ *et al.*, Memorandum Opinion and Order, 28 FCC Rcd 15509 (Med. Bur. 2013) (“[U]nder the terms of the JSA, WLAJ(TV) retains 70% of cash flow resulting from operation of the station, a split that the Bureau has previously approved.”); *Saga Broadcasting, LLC c/o Gary S Smithwick, Esq. H3 Communications, LLC c/o David Tillotson, Esq.*, File No. BALCDT-20120501ACQ, Letter, 28 FCC Rcd 399, 400 (Med. Bur. 2013) (“The draft JSA submitted in response to the September 12, 2012, staff letter indicates that CBG will collect revenues on H3’s behalf, and pay 70% of those revenues to H3, and the SSA and JSA both indicate H3 will maintain full authority and control over the operation of the station, including programming.”); *Sagamorehill of Corpus Christi Licenses, LLC c/o Todd Stansbury, Esq. Eagle Creek Broad. of Corpus Christi, LLC c/o Dennis Corbett, Esq. Channel 3 of Corpus Christi, Inc. c/o Robert B. Jacobi, Esq.*, File No. BALCT-20080730AKQ, Letter, 25 FCC Rcd 2809, 2811 (Med. Bur. 2010) (“In exchange for its sales representation, Evening Post will retain the lesser of the revenues it collects minus a set Base Rate, or 30% of all revenues.”); *Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc. c/o Howard M. Lieberman, Esq. Ft. Smith 46, Inc. c/o Peter Tannenwald, Esq.*, Letter, 23 FCC Rcd 3528, 3536 (Med. Bur. 2008) (“Mission will receive 70% of all advertising revenues . . . . The Structure of the relationship between Mission and Nexstar is markedly different from that considered in the 2002 *Ackerly Order*, and does not support a finding of attribution.”).

<sup>53</sup> See *Order* at note 1072.

<sup>54</sup> See *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co. Inc.*, MB Docket No. 13-189, File Nos. BTCCDT-20130619AAY *et seq.*, 28 FCC Rcd 16867 (Med. Bur. 2013) (*Gannett/Belo Order*); *Belo Kentucky, Inc.*, Application for Consent to Assignment of Broadcast Station License (FCC Form 314), WHAS-TV, File No. BALCDT-20130619AFM, Exhibit 13, Asset Purchase Agreement at Exhibit B-2, Sec. 3.1(b) (granted Dec. 20, 2013) (70% of net sales revenue shall be retained by the brokered stations); *KTTU-TV, Inc.*, Application for Consent to Assignment of Broadcast Station License (FCC Form 314), KTTU(TV), File No. BALCDT-20130619ADJ, Exhibit 13, Asset Purchase Agreement at Exhibit B-3, Sec. 3.1(b) (granted Dec. 20, 2013) (70% of net sales revenue shall be retained by the brokered station).

<sup>55</sup> *Gannett/Belo Order*, 28 FCC Rcd at para. 28.

<sup>56</sup> The Commission attacks a straw man by pointing out that it may change its rules and is not bound by Media Bureau precedent. See *Order* at note 1072. Of course those general propositions are true. In this instance, however, the Commission lacks a reasoned basis for taking either step, which raises not only policy but also legal concerns. Cf. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (“[T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. . . . It would be

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To support its theory, the Commission relies on the decision over a decade ago to make same-market radio JSAs attributable. But that precedent is inapposite. In reaching its conclusion with respect to radio JSAs, the Commission specifically explained that “licensees of stations subject to [radio] JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.”<sup>58</sup> And the Third Circuit relied on this fact in upholding the Commission’s decision, stating that a brokering station “assumes the financial risks and rewards of advertising.”<sup>59</sup> Then, in the 2004 NPRM addressing television JSAs, the Commission asked if the same was true for television JSAs.<sup>60</sup> Indeed, in setting forth the justification for attributing television JSAs, the Commission stated back then that “a JSA providing a licensee with a fixed monthly fee, regardless of the advertising sales or audience share of the TV station, transfers all market risk from the licensee to the broker.”<sup>61</sup>

But the record here establishes that television JSAs are nothing at all like the radio JSAs addressed by the Commission in 2003.<sup>62</sup> As explained above, pursuant to Media Bureau policy, the licensee in a television JSA must receive at least 70% of advertising revenues. Far from transferring all market risk from the licensee to the broker, such a division of revenues gives the licensee a powerful economic incentive to control its programming and operations.

#### E.

A decision to attribute JSAs on a prospective basis would be bad enough. But unfortunately, it gets worse. Today, the Commission refuses to grandfather existing JSAs. Instead, JSAs in most markets must be unwound within two years.

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arbitrary or capricious to ignore such matters. . . . [A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”).

<sup>57</sup> To be sure, the general manager of a brokered station may solicit programming advice from the broker station. But that same general manager may also solicit such advice from a consultant, his best friend, or his pastor. Entertaining programming advice from the broker station or any other quarter is not indicative of a surrender of control. There is no dispute that the brokered station retains the ultimate decision-making authority over its programming, and it also has a strong economic incentive to exercise that control.

<sup>58</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13744, para. 320 (emphasis added).

<sup>59</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 429 (3d Cir. 2004).

<sup>60</sup> *See Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256, Notice of Proposed Rulemaking, 19 FCC Rcd 15238, 15242–43, paras. 12–14 (2004).

<sup>61</sup> *Id.* at 15242, para. 13 (emphasis added).

<sup>62</sup> *See* Letter from Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 04-256, 09-182, 10-71, at 2–3 (Mar. 14, 2014) (“[W]ith regard to various contentions that attributing television JSAs is rational because the agency already attributes radio JSAs, I made the point that the rationale that led the Commission to attribute radio JSAs does not apply to television JSAs. . . . [T]elevision JSAs do not rely on flat fees to brokers. Instead, licensees retain 70% or more of net sales revenue and thus, both the market risk and upside potential remain with the licensee.”); *see* Letter from Elizabeth Ryder, Senior Vice President and General Counsel, Nexstar Broadcasting, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71, 09-182, 07-284, 04-256, at 12 (Mar. 10, 2014) (“[U]nder radio JSAs in effect at the time the Commission deemed them attributable interests, the broker retained all of the brokered station’s revenues and paid the licensee a flat fee that remained the same regardless of what the brokered station revenues were. In contrast, television JSAs pay a percentage of the revenues (generally 70%) earned back to the brokered station licensee. This fundamental difference gives the brokered station licensee significant incentive to provide the best and most attractive programming on the station in order to increase its revenues earned.”).

This is not how we usually do things. When the Commission adopted its newspaper-broadcaster cross-ownership rule, it grandfathered existing newspaper-broadcast combinations “because of the disruption and losses which could be expected to attend divestiture.”<sup>63</sup> The same is true here; there will be extensive disruptions if existing JSAs must be unwound. Programming, such as Spanish language news in my home state of Kansas, will be forced off the air. Employees in news departments across the county will be laid off. And some stations will probably go off the air entirely.

Indeed, grandfathering reflects the basic principle that the Commission should not bless an agreement, only to change its rules and later force parties to unwind that agreement. As I mentioned earlier, since 2008, the Commission has approved transactions involving 85 JSAs. But what is our message today to companies that have entered into such arrangements? We borrow the expression often used by Emily Litella, the *Saturday Night Live* character brought to life by Gilda Radner: “Never mind.”<sup>64</sup>

Furthermore, the ramifications of this decision extend far beyond the confines of this proceeding. By vitiating already-approved transactions, the Commission creates uncertainty throughout the communications marketplace. If we second-guess consummated transactions, could AT&T be told to spin off Cricket? If we prohibit foreign investment in carriers, should Softbank sell off Sprint? If we adopted a cable-broadcast cross-ownership rule, should Comcast prepare to break up with NBC? Investors will be more reluctant to risk their capital when the regulator has no compunction about undoing done deals. (And it’s not as if private equity, venture capital, and other major financing have been flocking to small-town broadcasters as it is.)

I also fear what this decision means for the incentive auction. For broadcasters to participate in the incentive auction, they must be able to trust the Commission. They must believe that we will treat them fairly. And they must have confidence that we will follow through on our commitments. But what broadcaster can trust the Commission after today’s item? Our promises regarding the incentive auction may prove as illusory as our prior approvals of JSAs.

A deficit of trust is especially problematic for the many broadcasters that may consider channel-sharing. On the one hand, the Commission wants our nation’s broadcasters to embrace channel sharing, calling it a “once-in-a-lifetime opportunity.”<sup>65</sup> But on the other hand, we are cracking down on stations

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<sup>63</sup> *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, Second Report and Order, 50 FCC 2d 1046, 1080, para. 112 (1975).

<sup>64</sup> The Commission claims that the 2004 NPRM put broadcasters on notice that they may have to unwind JSAs. *See Order* at note 1130. That argument might have had force in 2005. But it is now 2014, and no broadcaster could be blamed for thinking that the Commission had abandoned its tentative conclusions from a decade ago. Indeed, just two years ago the Commission proposed to terminate that proceeding as dormant since no action had been taken nor any pleading filed since December 23, 2005. *See Consumer & Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant*, CG Docket No. 12-39, Public Notice, 27 FCC Rcd 1613, 1616, Attach. A (Consumer & Gov’t Aff. Bur. 2012). Notably, no party objected to closing that proceeding. The only warning broadcasters had that the issue was still live was a cryptic proclamation that that “further action may . . . be necessary” in the proceeding, *Termination of Certain Proceedings as Dormant*, CG Docket No. 12-39, Order, 27 FCC Rcd 11284, 11286, para. 8 (Consumer & Gov’t Aff. Bur. 2012). This is hardly the notice one might expect (or, legally speaking, would require) given that the Commission’s only other action with respect to TV JSAs over the last six years was approving over seven dozen of them. Moreover, the Commission’s argument entirely ignores the public interest harms that will result from disrupting existing JSAs.

<sup>65</sup> Remarks of FCC Chairman Tom Wheeler at the Computer History Museum, Mountain View, California, at 4 (Jan. 9, 2014), available at <http://go.usa.gov/KtAY>.

sharing an advertising sales force and we are signaling that the sharing of other services might soon be on the chopping block. And so broadcasters who volunteer to share channels might be the heroes of today. But will they become the villains of tomorrow?<sup>66</sup> And if so, can they rely on the Commission to shield them from future policy changes? Based on today's item, the answer to that question is a resounding no.

#### F.

To mitigate the damage, the Commission points out that broadcasters are free to seek waivers. This is cold comfort. The waiver standard set forth in the item is not objective or measurable, but vague and inchoate. The Commission "will take into account the totality of the circumstances in order to assess whether strict compliance with the rule is inconsistent with the public interest."<sup>67</sup> To be sure, the Commission lists some relevant considerations, but they are as soft as mush. It is impossible to tell which considerations, if any, will be outcome-determinative.

This waiver standard will not provide broadcasters with any certainty, and I have no confidence that it will be used to avoid most of the negative impacts of today's decision. Rather, it is a fig leaf designed to allow members of the Commission to disclaim responsibility for the foreseeable consequences of today's item and to help a few politically-favored parties. We should not kid ourselves. Today's item gives the Media Bureau, under the direction of the Chairman, almost unbridled discretion to grant or deny a waiver request. And while I very much hope I am wrong—I fear that the substantial majority of requests will not meet with a favorable response.

#### III.

Finally, a brief word about the Commission's treatment of the Third Circuit's remand of our 2008 *Diversity Order*.<sup>68</sup> I am disappointed that this item spends forty-one pages discussing the topic but doesn't take a single action to promote ownership diversity or new entry into the broadcasting industry. Our nation's President campaigned for office speaking of the "fierce urgency of now." This item, by contrast, exhibits the casual indifference of whenever.

Since taking office, I have heard repeatedly that the greatest barrier to minority ownership in the broadcast industry is a lack of access to capital. That's why the Commission should establish a voluntary incubator program as proposed by the Diversity and Competition Supporters—a program I've publicly supported for a long time now. Through this program, established broadcasters would be able to provide financing and other forms of assistance for new entrants looking to break into the business. By incubating a "valid eligible entity," a broadcaster under certain circumstances would be allowed to own one more radio station in a market than they otherwise could under our local radio ownership rule. This would be a limited and targeted measure. And the benefits of incubating a new voice in the market would far outweigh any harm—especially since an incubator is likely to be most valuable in small-town markets where broadcast spectrum is plentiful but the economics are tough.

Commissioner O'Rielly and I supported including an incubator program in today's item, but unfortunately, we fell one vote short. An incubator program has received widespread support from civil rights organizations, including the NAACP, LULAC, the National Urban League, the Rainbow PUSH

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<sup>66</sup> Given today's disposition, it's not far-fetched to imagine a scenario in which the Commission determines that one channel-sharing broadcaster is effectively evading the media ownership limits by unduly influencing the sales, programming, and/or other decisions of a co-channel broadcaster.

<sup>67</sup> *Order* at para. 364.

<sup>68</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (reviewing *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008)).

Coalition, the National Council of La Raza, the Minority Media and Telecommunications Council, and the Asian American Justice Center. I am saddened that we couldn't join together across party lines to establish such a program.

Here too, it appears the Commission's handling of media ownership is impervious to the law and impervious to the facts. An incubator program would increase minority ownership. But that's no match for the fervent ideological commitment to opposing at all costs any relaxation of a single media ownership regulation, no matter how slight or necessary that relaxation might be.

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At the end of the day, today's item is little more than an elaborate shell game expressly designed to evade judicial review. We maintain the newspaper-broadcast cross-ownership rule without modification but refuse to find that doing so is necessary in the public interest. We make JSAs attributable for purposes of our local television ownership rule but refuse to address the substantial record evidence that taking this step will harm localism and diversity. That evidence, the Commission says, must be addressed in our evaluation of the local television ownership rule itself—an issue that we will hopefully get around to resolving in the summer of 2016, months after our deadline for unwinding JSAs. And we are declining to promote media ownership diversity . . . just because.

For all of the foregoing reasons, I hope that our nation's judiciary will restore sanity to our media ownership proceeding. I dissent.