

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

In the Matter of)	
)	
2014 Quadrennial Regulatory Review – Review of)	MB Docket No. 14-50
the Commission’s Broadcast Ownership Rules and)	
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
2010 Quadrennial Regulatory Review - Review of)	MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and)	
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	
)	
Rules and Policies Concerning)	MB Docket No. 04-256
Attribution of Joint Sales Agreements)	
In Local Television Markets)	

COMMENTS OF RAYCOM MEDIA, INC.

Raycom Media, Inc. (“Raycom”) adopts the positions of the Small Market Coalition in its comments in this proceeding, and writes separately solely to oppose the Commission’s tentative conclusion to launch a new and extraordinary policy of regulating the transfer of network affiliation agreements. This unprecedented expansion of the Commission’s regulatory authority into contractual programming agreements would be unwise, unworkable and illegal.

I. THE COMMISSION SHOULD NOT AND CANNOT PROHIBIT AFFILIATION SWAPS OR SALES.

The Commission justifies its proposed “clarification” as an extension of the top-four prohibition. This approach is precisely backward. The top-four prohibition and other restrictions on broadcast ownership should be scaled back, not expanded. The proposed expansion of the top-four ownership prohibition is especially problematic because it would not

regulate *ownership* at all. The *FNPRM* forthrightly acknowledges that the transfer of network affiliation agreements “do[es] not involve the assignment or transfer of a station license,” and therefore “is not subject to prior Commission approval under Section 310(d) of the Communications Act of 1934.”¹ Section 310(d) is unambiguous in granting the Commission authority to review the assignment or transfer of licenses and of corporations holding licenses. In transactions where no license is assigned and no licensee undergoes a transfer of control, Section 310(d) confers no authority.² *Prometheus II* is inapposite, as that decision (contrary to the Commission’s assertion) did not condone the regulation of affiliation or other content divorced from any regulation of ownership of licenses.³ As a result, the Commission may not adopt the proposed “clarification” under its authority to regulate the assignment or transfer of stations’ licenses.

Rather than accept any limit on the Commission’s authority, however, the *FNPRM* proposes that the Commission instead execute an end run around the plain language of Section 310(d) by entangling the Commission in the naked regulation of content. Embarking on the *FNPRM*’s content regulation would represent a dramatic departure from longstanding Commission policies. The Commission’s rules have never restricted the licensee of an FCC-authorized TV duopoly from changing the programming of one or both of its stations if that change might result in the co-owned stations becoming top four ranked. Indeed, the Commission

¹ *2014 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 and Report and Order, 29 FCC Rcd 4371, at ¶ 47 (2014) (“*FNPRM*”).

² See *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

³ *FNPRM* at ¶ 50 (citing *Prometheus Radio Project v. FCC*, 652 F.3d 431, 464 (3d Cir. 2011)).

has expressly ruled that a duopoly station owner “will not later be required to divest if . . . the two merged stations subsequently are both ranked among the top four stations in the market.”⁴

The Commission also has been careful to note that, because the First Amendment and Section 326 of the Communications Act “prohibit the Commission from censoring program material or interfering with broadcasters’ free speech rights,” broadcasters have “broad discretion in determining the programming that they choose to air.”⁵

More broadly, the Commission has long recognized that its proper role in the regulation of broadcast stations’ content is sharply limited, especially in areas where competition is thriving. Four decades ago, the Commission correctly concluded in the radio context “that review of program formats was not required by the Communications Act . . . would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.”⁶ The *Format Policy Statement* recognized that the costs and uncertainties resulting from Commission oversight of stations’ format decisions also “have a constitutional dimension,” with the chilling effect of such oversight likely to “result[] in an inhibition of constitutionally protected forms of communication with no off-setting justifications.”⁷ The

⁴ *Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, at para. 64 (1999).

⁵ *Mr. J.C. Olszowka*, Letter, 22 FCC Rcd 5579, 5580 (MB 2007); *see also Univision Communications Inc.*, 22 FCC Rcd 5842, 5855 (2007) (reiterating that with rare exception, “licensees are afforded broad discretion in the scheduling, selection and presentation of programs aired on their stations, and the Commission will not substitute its judgment for that of the station regarding programming matters”); *Richard J. Bodorff, Esq.*, Letter, 29 FCC Rcd 5010, 5011 (MB 2014) (“A licensee has broad discretion – based on its right to free speech – to choose the programming that it believes serves the needs and interests of the members of its audience.”).

⁶ *Marnie K. Sarver, Esq.*, Letter, 28 FCC Rcd 1009, 1010 (MB Aud. Div. 2013) (citing *Changes in the Entertainment Formats of Broadcast Stations*, Mem. Op. and Order, 60 F.C.C.2d 858, 865-66 (1976) (“*Format Policy Statement*”)).

⁷ *Format Policy Statement*, 60 F.C.C.2d at 865.

Commission therefore concluded, based on a careful review of the record, that “the marketplace is the best way to allocate entertainment formats in radio” and “the best available means of producing the diversity to which the public is entitled.”⁸ Almost twenty years ago, the Commission concluded that due to “enormous change” in the television market, including a “significant increase of sources of programming,” the public interest would be best served by reducing the Commission’s regulation of the relationship between networks and stations.⁹ Given the prevalence of broadcast, cable, and online outlets, the video marketplace is even more competitive today by orders of magnitude. That marketplace remains the best way to allocate programming.

The Commission’s proposal to reverse course and increase its interference in the network affiliation marketplace is both ill-advised and unlawful. However the Commission dresses up this proposal, it amounts to regulation of a station’s content. Stations enter into network affiliation agreements for the purpose of obtaining network content. The Commission’s proposed rule would state that a non-top-four station in a duopoly may not negotiate to obtain certain packages of content — *i.e.*, certain network affiliations — from other in-market stations if the content to be acquired is too popular, and a station would be subject to enforcement action if it acquires forbidden content.¹⁰ This is the essence of content-based regulation. The restriction cannot be called content neutral, as the Commission itself admits that it will impact ability to disseminate Big Four network programming in particular.¹¹ Such regulation may be

⁸ *Id.* at 863.

⁹ *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 4538, 4539, 4542 (1995).

¹⁰ *FNPRM* at ¶ 49.

¹¹ *Id.* at ¶ 47.

carried out “only by the least restrictive means necessary to promote a compelling state interest.”¹²

The *FNPRM* makes no attempt to meet this standard. Indeed, the *FNPRM* does not explain why preventing a duopoly station from entering the top four is a “compelling” interest in some cases but not others, nor is it clear how the proposed affiliation restriction could logically be expected to serve any interest in light of the *FNPRM*’s proposals as a whole. The Commission proposes to ban “swaps” of affiliations between in-market stations, but at the same time it asserts that the proposal would not likely “have a significant impact on the negotiation of affiliation agreements.”¹³ The Commission does not elaborate on how both these statements can be true, but presumably the Commission must mean that duopoly stations would remain free to acquire an affiliation with a top-four network so long as the station negotiates with the network rather than the existing in-market affiliate. If that is not the Commission’s intended meaning, then the Commission must indeed intend to place certain content categorically off-limits to duopoly stations. Yet that interpretation makes no sense, either, given the *FNPRM*’s conclusion that a single station should be *permitted* to multicast two top-four networks.¹⁴ In short, the *FNPRM* fails to identify what supposedly “compelling” interest its affiliation restrictions are aimed at, nor can it show how the restriction is tailored to serve such an interest.

The *FNPRM*’s perplexing constellation of proposals only reinforces Raycom’s concern that the Commission apparently has prejudged the affiliation swap issue. For instance, the Commission distinguishes so-called affiliation swaps from “legitimate” actions to improve

¹² *Action for Children's Television v. F.C.C.*, 59 F.3d 1249, 1253 (D.C. Cir. 1995).

¹³ *FNPRM* at ¶ 50 n. 126.

¹⁴ *FNPRM* at ¶ 69.

programming.¹⁵ The characterization of affiliation swaps as illegitimate, despite the absence of any legal prohibition, betrays a decision already made. The Commission also alludes to the possibility of taking adverse action against the parties in future licensing proceedings if they engage in an affiliation swap, warning that “parties are on notice that similar efforts to evade the media ownership rules could be subject to enforcement action.”¹⁶ Penalizing parties for failing to anticipate and comply with possible future changes to the Commission’s rules is arbitrary, unfair and procedurally suspect. More broadly, the Commission should not rely on predetermination, nor on its apparent — and unjustified — view that the need for its proposed rule is “evidenced” by the Raycom-HITV transaction.¹⁷ In fact, as Raycom has noted previously,¹⁸ this transaction has benefitted the public in Hawai’i by ensuring greater availability of award-winning news and other local public interest programming in the market.

¹⁵ *Id.* at ¶ 50 n.126.

¹⁶ *FNPRM* at ¶ 49 n.125. Raycom again objects to the assumption made as to motivation.

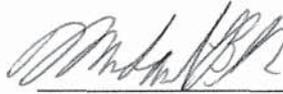
¹⁷ *FNPRM* at ¶ 48.

¹⁸ Letter of Kurt Wimmer, Counsel for Raycom Media, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-294 & 09-182 (May 1, 2012).

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In sum, expanding the top-four prohibition to prohibit transactions that relate solely to programming is unwise, unconstitutional, and contrary to the public interest in a competitive and diverse media market. Raycom's transaction with HITV demonstrates that affiliation swaps can serve the public interest by preserving high-quality consumer options in difficult economic times and promoting efficiencies that enable greater provision of news and other programming of public interest.

Respectfully submitted,



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August 6, 2014