

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF THE NATIONAL HISPANIC MEDIA COALITION

Jonathan Diaz
Law Student
Harvard Law School

Michael J. Scurato, Esq.
Jessica J. González, Esq.
National Hispanic Media Coalition
55 South Grand Avenue
Pasadena, CA 91105
(626) 792-6462

August 6, 2014

SUMMARY

The National Hispanic Media Coalition (“NHMC”) urges the FCC to take immediate action to improve its media ownership rules and ownership diversity initiatives. The Commission must not only maintain its existing media ownership rules, but also bolster them to both achieve its stated policy goals of increasing diversity of ownership and providing opportunities for minority and female owners. The Commission must ensure that any attempts to alter its media ownership rules comply with the Third Circuit Court of Appeals in *Prometheus I and II*, which has mandated that the FCC must consider the effects of its rules on minority and female ownership before making any changes to its media ownership rules.

The tentative conclusions and leading questions contained in the 2014 FNPRM are based on faulty logic and fail to address the lack of diverse owners in the broadcasting industry – instead, some tentative conclusions could lead to policies or rule changes that would exacerbate the lack of diverse ownership that currently exists. In particular, the Commission’s rationale for considering abolishing the radio cross-ownership rule is off base. Radio stations remain a key source of viewpoint diversity, particularly for the Latino community, which uses radio as a critical outlet for entertainment, news, and information. 95 percent of Latino consumers report listening to the radio once a week, with listeners age 12+ reporting nearly 13 hours of weekly listening. In addition to providing an important source of viewpoint diversity, the radio cross-ownership rules promotes new entrants and increases opportunity for ownership diversity, which furthers the Commission’s policy goals of competition and localism.

The deplorable state of diverse media ownership reflects a failure on the part of the Commission to adequately ensure that opportunities exist for minority and female owners. The rules as currently set, while likely preserving current levels of diverse ownership, have not made any significant strides to increase the number of diverse owners. Thus, the Commission must

take immediate and decisive action to address this problem by strengthening existing media ownership restrictions. This can only be accomplished by an aggressive research plan by the Commission to study the true impact of its rules on ownership diversity. Though the Commission's recent release of its Form 323 data is laudable, it is past time that the Commission begin performing its own analysis of the data that it has collected, particularly analysis relating to causal factors or market structures that are keeping the numbers of diverse owners inexcusably low. Such a research plan should include both a thorough analysis of the Commission's existing data and a renewal of dormant methods of data collection that could reveal the causes and effects of the lack of ownership by women and people of color.

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The National Hispanic Media Coalition (“NHMC”) respectfully submits these comments in response to the Federal Communications Commission’s (“FCC” or “the Commission”) Further Notice of Proposed Rulemaking (“2014 FNPRM”) initiating the 2014 Quadrennial Review of its media ownership rules and continuing its 2010 Quadrennial Review. NHMC has commented extensively on the importance of strong media ownership rules that prevent excessive consolidation and allow diverse, new entrants to participate – consistently urging the Commission to consider strengthening rules and lowering ownership caps.¹ It has also submitted overwhelming evidence of the negative consequences that communities across the country

¹ Comments of National Hispanic Media Coalition, et al., MB Dkt. 09-182, filed Mar. 5, 2012 (“NHMC 2011 Comments”), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021898422>.

currently experience due to a lack of diverse ownership of broadcast outlets.² NHMC incorporates by reference its previous filings during the course of these proceedings.³

I. THE COMMISSION CANNOT AND SHOULD NOT RELAX OR ELIMINATE ANY OF ITS MEDIA OWNERSHIP RULES

As NHMC has noted, the FCC's attempts to alter its media ownership rules in previous quadrennial reviews have been rejected by the Third Circuit Court of Appeals in *Prometheus I* and *II*. The Commission must take the opportunity created by merging the 2010 and 2014 Quadrennial Reviews to address any deficiencies found in the 2010 proceeding and, in particular, respond to the mandates of the Third Circuit with respect to diversity and ownership by women and people of color. Unfortunately, the 2014 FNPRM seems to take a step backward in this regard, tentatively concluding that radio cross-ownership rules should be eliminated under the cover of an inexplicable interpretation of the Third Circuit's rulings on this matter. Unless it reverses course, the Commission will once again fail to respond to the Court's mandate.

A. The Commission Must Comply With The Mandates Of *Prometheus I and II*

As NHMC has noted in the past, the Third Circuit's *Prometheus* decisions have been clear about both what the Commission must do and what the Commission has failed to do in the course of its reviews of media ownership rules, particularly when it endeavors to change those rules. Notably, the FCC must not relax *any* media ownership rules without first "consider[ing] the effects of its rules on minority and female ownership."⁴

² Comments of the National Hispanic Media Coalition, MB Dkt. 09-182, filed Nov. 9, 2009 ("NHMC 2009 Comments"), available at <http://apps.fcc.gov/ecfs/document/view?id=7020349283>.

³ See NHMC 2011 Comments *supra* note 1; NHMC 2009 Comments *supra* note 2; Comments of the National Hispanic Media Coalition, MB Dkt. 09-182, filed Dec. 26, 2012 ("NHMC 2012 Comments"), available at <http://apps.fcc.gov/ecfs/document/view?id=7022092080>.

⁴ *Prometheus Radio Project v. FCC (Prometheus II)*, 652 F.3d 431, 471 (3rd Cir. 2011).

In the 2014 FNPRM, the Commission states, “[W]e reject the argument that the Prometheus II decision requires us to take no action unless we can show definitively that a rule change would have no negative impact on minority ownership levels.”⁵ NHMC wholeheartedly disagrees.⁶ In *Prometheus I*, the Third Circuit remanded the FCC’s decision in the 2002 Quadrennial Review to repeal the failed station solicitation rule while noting that the FCC also “fail[ed] to consider the effects of its *other* rules on minority and female ownership more broadly.”⁷ The court concluded that “[r]epealing the only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make broadcast spectrum available to all people ‘without discrimination on the basis of race.’”⁸ The *Prometheus I* opinion also directed the FCC to develop a socially disadvantaged business (“SDB”) definition to use for advancement of diversity objectives.⁹ The *Prometheus II* opinion reiterated this point, citing the relevant portion of the *Prometheus I* decision:

We anticipate, however, that by the next [2006] quadrennial review that the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission’s diversity objectives [compared to the revenue-based definition of eligible entities being used].¹⁰

In the 2006 Quadrennial Review, once again the Commission attempted to relax certain media ownership limits, namely the newspaper-broadcast cross-ownership ban (“NBCO

⁵ 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 ¶ 190 (2014) (“2014 FNPRM”).

⁶ NHMC 2012 Comments at 2-3.

⁷ *Prometheus II* at 465 (interpreting its own decision in *Prometheus I*) (emphasis added).

⁸ *Prometheus Radio Project v. FCC (Prometheus I)*, 373 F.3d 372, 421, n.58 (3rd Cir. 2004) (citing 47 U.S.C. §151).

⁹ *Prometheus I*, 373 F.3d at 428.

¹⁰ *Prometheus II*, 652 F.3d at 466 (citing *Prometheus I*, 373 F.3d at 428, n.70).

Rule”).¹¹ In the context of that proceeding, the FCC commissioned a series of studies, some of which attempted to address issues related to diversity and ownership by women and people of color.¹² Upon completion of the 2006 Review, the Third Circuit responded in *Prometheus II*:

Several of the FCC-commissioned economic research studies on media ownership, discussed above in regard to notice of the NBCO rule, attempted to address minority and female ownership issues. However, as the Congressional Research Service (“CRS”) concluded, “all the researchers (and the peer reviewers) agree that the FCC’s databases on minority and female ownership are inaccurate and incomplete and their use for policy analysis would be fraught with risk.” The CRS Report noted that the FCC would have difficulty complying with our remand with its existing data. “In its *Prometheus* decision, the Third Circuit instructed the FCC to consider the impact of changes in its ownership rules on minority ownership. Without accurate data on minority (and female) ownership, it is impossible to perform such analysis.”¹³

...

[The CRS Report] also noted that “[t]he same problem arises with respect to the impact of each and every media ownership rule on minority and female ownership,” which makes all of the FCC’s media ownership rules vulnerable to being overturned “until the Commission has developed a minority ownership database of sufficient accuracy to allow for reliable testing of the impact of the rules on minority ownership.”¹⁴

In a separate “Diversity Order” issued at the same time as the 2006 Quadrennial Review Order, the FCC deferred consideration of proposed SDB definitions. The Third Circuit concluded that the “FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions” and remanded it to do so “before it completes its 2010

¹¹ 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, MB Docket No. 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008).

¹² FCC’s Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic Studies for 2006 Quadrennial Regulatory Review of Commission’s Media Ownership Rules, MB Docket No. 06-121, Public Notice (rel. Sept. 5, 2007).

¹³ *Prometheus II*, 652 F.3d at 468 (internal citations omitted).

¹⁴ *Prometheus II*, 652 F.3d at 468, n.37 (emphasis added and internal citations omitted).

Quadrennial Review.”¹⁵ The court was very specific, urging the FCC to gather the data so that it may conduct *Adarand* studies and to “act with diligence to synthesize and release existing data such that studies will be available for public review in time for completion of the 2010 Quadrennial Review.”¹⁶

In remanding the Commission’s decision, the Third Circuit emphasized its displeasure with the Commission’s failure to examine the effect of its rule on ownership diversity:

Despite our prior remand requiring the Commission to consider the effects of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against 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.¹⁷

The Commission seems to further misinterpret the Third Circuit’s *Prometheus* opinions by conflating the collection and tallying of accurate data with actual analysis of that data. It misunderstands that, according to the Court, the Commission has a responsibility to augment its record with its own independent data and analysis, rather than relying exclusively on information submitted by third parties to the Commission. In the 2014 FNPRM, the Commission justifies its tentative conclusions and proposals by saying, “We tentatively find that the information in the current record asserting a potential impact would not change our underlying analysis regarding the possible rule modifications set forth above.”¹⁸ The Commission states that its “proposals and tentative conclusions in this FNPRM are supported by the current record and the most accurate

¹⁵ *Prometheus II*, 652 F.3d at 471.

¹⁶ *Prometheus II*, 652 F.3d at 471, n.42.

¹⁷ *Prometheus II*, 652 F.3d at 471-472.

¹⁸ 2014 FNPRM at ¶ 190.

data available.”¹⁹ Yet the FCC reached that conclusion without completing its own data analyses, and without the assistance of any of its own studies. Proceeding with these tentative conclusions and proposals without performing the requisite analysis and conducting its own studies is unlikely to satisfy the Court’s remand.

B. The Commission’s Rationale For Tentatively Concluding To Eliminate The Radio Cross-Ownership Rules Is Off-Base

In the 2014 FNPRM, the Commission “seek[s] comment on whether the newspaper/radio cross-ownership restriction advances our interest in promoting viewpoint diversity or whether we should eliminate the restriction” and “seek[s] comment on the Commission’s tentative conclusions that radio stations are not the primary outlets that contribute to viewpoint diversity in local markets and that consumers rely predominantly on other outlets for local news and information.”²⁰ Further, the Commission “seek[s] comment on whether the radio/television cross-ownership rule, which limits the combined number of commercial radio and television stations a single entity may own in the same market, is still necessary in the public interest or whether it should be repealed.”²¹ The Commission goes on to note that “promoting viewpoint diversity has been the Commission’s lone justification” for retaining its radio cross-ownership restrictions,²² and implies that it is unlikely that radio contributes to viewpoint diversity because consumers reportedly rely less on radio for news and because there are few all-news radio stations.

However, this logic is flawed because it rests on the faulty premise that music format stations do not contribute to viewpoint diversity nor disseminate news and information to the

¹⁹ *Id.* at n. 556.

²⁰ *Id.* at ¶¶ 144-145.

²¹ *Id.* at ¶ 200.

²² *Id.* at ¶ 145.

public. The available evidence suggests that this premise and the logic that flows from it is particularly off-base when it comes to describing the consumption habits of the Latino community, which continues to rely on radio stations, including both music format and news/talk stations, for news and information, making radio an important source of viewpoint diversity. Additionally, apart from viewpoint diversity, retention of the Commission's current media ownership rules promotes ownership diversity by preventing consolidation and preserving opportunities for new entrants.

1. The Latino Community Continues To Rely On Radio For News And Information

Radio remains an influential medium and an important outlet for Latino communities across the country. According to a recent report by Arbitron (now Nielsen Audio):

About 95% of Hispanic consumers tune to the radio in an average week, underscoring a strong relationship with an important and growing listener segment. Radio listenership among Hispanic consumers is bigger than other ethnic groups measured by Arbitron. Radio remains a reliable entertainment and information source for Hispanic listeners, regardless of their language preference, country of origin, age, gender, income, or listening location.

Radio's reach among 25-54 Hispanic listeners is even better, reaching nearly 97% of women 35-44 weekly. In an era where all consumers are presented with many media choices, time spent listening to radio among Hispanic persons is holding steady (and in some cases, increasing) in key demographics.²³

Available data suggests that Latinos don't just "tune in," but they spend a great deal of time listening to the radio. According to AdAge, "Hispanic listeners age 12+ averaged 12 hours, 54 minutes per week."²⁴ Latino men between the ages of 55 and 64 listen to the radio for an

²³ ARBITRON, *HISPANIC RADIO TODAY 2013: HOW HISPANIC AMERICA LISTENS TO RADIO 2* (2013), *available at*

http://www.arbitron.com/downloads/Hispanic_Radio_Today_2013_execsum.pdf.

²⁴ *11th Annual Hispanic Fact Pack*, ADVERTISING AGE, July 28, 2014, at 24, *available at* http://gaia.adage.com/images/bin/pdf/Hispanic_Fact_Pack_2014_web.pdf.

average of 16 hours and 26 minutes per week.²⁵ On a typical weekday, 56 percent of Latinos say they get their news from radio.²⁶

2. Radio Stations, Including Both Music Format Stations And News/Talk Stations, Contribute To Viewpoint Diversity

Radio stations, particularly those that are owned, operated by or serving Latinos (collectively, “Latino stations”), unquestionably contribute to viewpoint diversity in their communities of license. This is true of both traditional news/talk format stations and music format stations, which often provide local news and information to listeners. Although NHMC contends that even stations that exclusively program music contribute to viewpoint diversity, it will focus on instances where news and information is offered for the purposes of these comments.²⁷

Latino stations across the country very often blur the lines between different formats and programming choices and are often responsive to their communities’ interests to the point of altering programming decisions with very little notice to serve their communities’ needs. This is often out of necessity as the extremely limited number of Latino stations across the country are required to be a “one-stop shop” for an audience with a diverse set of interests and needs and a small number of outlets to choose from. One example of this phenomenon is KQSE – La Nueva

²⁵ *Id.*

²⁶ MARK HUGO LOPEZ & ANA GONZALEZ BARRERA, A GROWING SHARE OF LATINOS GET THEIR NEWS IN ENGLISH 1 (Pew Research Hispanic Trends Project, 2013), *available at* <http://www.pewhispanic.org/2013/07/23/a-growing-share-of-latinos-get-their-news-in-english/>.

²⁷ There is a large body of research concerning the usage of music to share knowledge, create political power, and advance social movements. *See* Ugo Corte, *Music matters to social movements and in a number of ways, but can we use it to advance our understanding of emotions and the body?*, MOBILIZING IDEAS, Jun. 3, 2013, *available at* <http://mobilizingideas.wordpress.com/2013/06/03/music-matters-to-social-movements-and-in-a-number-of-ways-but-can-we-use-it-to-advance-our-understanding-of-emotions-and-the-body/>.

Mix in Colorado. According to a recent article about the success of the station, and its non-traditional format:

La Nueva Mix is primarily a music station, playing Norteño ballads and other Latin American tunes. But since its debut six years ago, program director Axel Contreras has also introduced talk shows on health, real estate and dealing with police encounters. By far the most popular, though, is *Punto Legal*, a weekly immigration law call-in.

...

Conteras, a Guatemalan who came to the U.S. illegally 20 years ago and is now a legal resident, hopes that the news and information he airs help immigrants integrate into American society. "Our station is just a bridge for the Latino community," he says. Its approach has attracted a broad listenership[.]

...

In times of crisis, Contreras converts La Nueva Mix into a sort of emergency warning system. In 2011, for instance, during the "Strawberry Days" carnival down the street from the station, federal immigration agents conducted a raid, disrupting the festivities and arresting several suspected undocumented immigrants. Immediately, Contreras took to the airwaves and urged people to avoid the carnival.²⁸

Perhaps the most profound example of Latino stations coming together to share diverse views and information with their communities, regardless of their format, was the role that radio played in facilitating the 2006 immigration rallies across the country. The rallies represented an important political moment for Latinos in the United States:

During four short months in the spring of 2006, an estimated 3.5 to 5.1 million Latinos protested in the streets of over 160 cities in the United States. Several cities held multiple marches, each drawing tens of thousands of participants. The unprecedented Latino activism was a public response to the threat of House Bill 4437 (HR 4437) that would have increased penalties on undocumented immigrants as well as those who employ and assist them.²⁹

²⁸ Nelson Harvey, *Latino radio stations connect immigrant communities*, HIGH COUNTRY NEWS, Jun. 10, 2013, available at <http://www.hcn.org/issues/45.10/latino-radio-stations-connect-immigrant-communities>.

²⁹ Matt A. Baretto et al., *Mobilization, Participation, and Solidaridad: Latino Participation in the 2006 Immigration Protest Rallies*, 44 *Urban Affairs Review* 736, 736-737 (2009), available at http://www.mattbarreto.com/papers/uar_immig.pdf (Internal citations omitted).

Subsequent research into the organization of these rallies reveals that Latino stations and disc jockeys, and their unique viewpoints, played a pivotal role in educating and mobilizing Latinos in communities across the country. According to one Latina leader from Chicago, “It was very helpful to talk to them about this, they understood the problems of the community, they were very collaborative ... every radio deejay was talking about this big thing that was going to happen.”³⁰ A similar sentiment was echoed in Central Florida by another community leader who said, “The commitments that our radio stations have to the community are different ... When you have disc jockeys talking about their own stories ... how they have friends and families and co-workers that will be affected, I think they directly connect with the community.”³¹ In Los Angeles, a coalition of radio personalities from rival stations (almost exclusively music format stations), devoted airtime to the cause and helped spark one of the largest demonstrations in the history of Los Angeles:

Rally supporters, including immigrant-rights activists, churches, and labor and community groups, agreed that the active advocacy of the region's top Spanish-language radio personalities was critical in drawing the enormous crowds, who marched more than 20 blocks along Spring and Main streets and Broadway to City Hall, wearing white "peace" shirts and waving American and Mexican flags.

The promoters included such on-air celebrities as KHJ's Humberto Luna, KBUE's Ricardo "El Mandril" (The Baboon) Sanchez, Renan "El Cucuy" (The Boogeyman) Almendarez Coello — whose often risque show has cast him as a sort of Latino version of Howard Stern — and [Eddie] Sotelo, better known to listeners as "El Piolin," or Tweety Bird.

...

“The Latino media played it more as how will this affect you, how will it affect your job, how will it affect your kids,” [Felix] Gutierrez[, a journalism professor

³⁰ *Id* at 744-745.

³¹ Jose Cardenas & Eric Deggans, *Immigrant Rallies Born on Air*, ST. PETERSBURG TIMES, Apr. 12, 2006, available at http://www.sptimes.com/2006/04/12/news_pf/State/Immigrant_rallies_bor.shtml.

at USC's Annenberg School for Communication] said. "They were much closer to their audience, in terms of the direct effect."³²

As the examples above show, the Commission's characterization of radio and justification for considering elimination of radio cross-ownership rules is not supported by the facts. Latino media and Latino communities yield countless examples of the importance of radio in contributing to the overall viewpoint diversity of our media system. Without diverse owners and employees of radio outlets, certain views might never be shared and the needs of communities would not be met.

Further, radio outlets have also been well known to espouse very strong viewpoints that have been harmful to the Latino communities that they serve. For instance, over the years, NHMC has documented many instances of Clear Channel radio outlets targeting Latinos and other diverse communities over their airwaves, with hate speech, calls to action and violence, and negative stereotypes.³³ And because Clear Channel often owns numerous radio stations in the markets that it serves, it is able to insulate offending programs from community outcry and market-based consequences by shifting advertising among its other outlets. While these viewpoints are not always welcome, and a strong case can be made that airing them contravenes public interest obligations of broadcast license holders, it is wrong for the Commission to imply that radio outlets do not contribute to viewpoint diversity.

³² Teresa Watanabe & Hector Becerra, *How DJs Put 50,000 Marchers in Motion*, LATIMES.COM, Mar. 28, 2006, available at <http://colombiareport.ss.uci.edu/webdocs/TheImmigrationDebate.pdf>.

³³ See e.g. *Media Ownership in the 21st Century: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce*, 113th Cong. (2014) (testimony of Jessica J. González, Executive Vice President and General Counsel, National Hispanic Media Coalition).

3. Even If The Commission Finds That Radio Does Not Contribute To Viewpoint Diversity, It Should Still Justify Retention Of Rules To Promote New Entrants And Ownership Diversity

Even if the Commission is correct in saying that radio stations do not contribute to viewpoint diversity, it should still justify retention of the radio/newspaper and radio/television cross-ownership rules using the rationale that such rules promote ownership diversity by limiting consolidation in the media industry and preserving opportunities for new entrants. The Commission recognizes that repeal of rules “would potentially allow for the acquisition of a limited number of additional radio stations in some markets by incumbent[s and] we seek comment on the impact that elimination of the rule would have on media consolidation and thus on small broadcast owners, including minority and women owners.”³⁴

Any rule change, such as the ones contemplated here, which would allow incumbent owners of media properties to own additional media properties or allow well-capitalized new entrants to simultaneously purchase multiple outlets, would largely limit ownership opportunities for diverse individuals such as women and people of color. Given the discouragingly low numbers of women or people of color who are incumbent media outlet owners, it is unlikely that the considered rule changes would do anything to facilitate more stations being acquired by diverse individuals. And given the well-documented challenges that diverse new entrants have with obtaining access to capital required to purchase one outlet, it is unlikely that a rule blessing the simultaneous purchase of multiple outlets would serve the interests of diverse parties. Therefore, by retaining the rules and limiting the number and types of outlets that one party can simultaneously own, the Commission would be preserving opportunities for the diverse new

³⁴ 2014 FNPRM at ¶ 223.

entrants that would be required to create any demonstrable change to the current levels of ownership by women and people of color.

II. THE DEPLORABLE STATE OF DIVERSITY IN MEDIA OWNERSHIP REFLECTS A FAILURE OF COMMISSION POLICY THAT REQUIRES IMMEDIATE ACTION

Despite the Commission's clear statutory obligations, stated policy goals, and initiatives and efforts that the Commission has undertaken to promote broadcast ownership by women and people of color,³⁵ there has been no significant progress made on improving ownership diversity over the better part of the past two decades. In fact, if anything, the situation has gotten markedly worse.³⁶ Unfortunately, it is well beyond time for the Commission to take dramatic action to confront this problem, which involves the equitable distribution of a public resource, spectrum, and the ability of diverse communities and individuals to exercise their rights to free speech and expression.

It is clear through three Commission data collections spanning six years, and independent third party analysis prior to that, that the Commission's diversity promotion policies to this point have failed. Further, to the extent that the Commission's media ownership rules are supposed to promote the Commission's goal of "promoting minority and female participation in [the] communications industries," the rules and limits set at their current levels have failed.³⁷ There are important first steps that the Commission must take in order to rectify this situation and put reasonable and effective policies in place – namely collecting and analyzing data and conducting studies exploring the barriers to entry that are keeping diverse ownership so low. To that end, the

³⁵ 2014 FNPRM at ¶ 245.

³⁶ Statement of Free Press, MB Dkt. 09-182, filed Mar. 24, 2014 (noting that there were 19 African American owners of full power commercial television stations in 2006, but only 4 remain today).

³⁷ 2014 FNPRM at ¶ 7.

Commission must immediately develop and undertake an aggressive research plan and take steps to perform its own analysis of existing data.

A. The Commission’s Current Rules And Policies Have Failed To Improve The State Of Diverse Ownership Of Broadcast Outlets

The Commission recently released its second “Report on Ownership of Commercial Broadcast Stations,” reporting on the results of its Form 323 data collection after a revision of the form. Unfortunately, according to the data, ownership by women and people of color has remained intolerably low. Analysis of the 2012 and 2014 Ownership Reports reveals that ownership levels for Latinos across broadcast radio and television remain stagnant: the miniscule changes in the percentages of Latino owners of full power TV stations (2.9 percent to 3.0 percent), low power TV stations (9.1 percent to 9.4 percent), commercial AM radio stations (7.8 percent to 8.3 percent), and commercial FM radio stations (5.8 percent to 6.7 percent) each amount to an increase of less than 1 percent.³⁸

The data clearly indicates that the rules, as they are currently set and have been set for many years, have done next to nothing to uphold the Commission’s statutory responsibilities or “longstanding policy goals of fostering competition, localism, and diversity” by promoting diversity of ownership among broadcast licensees and expanding opportunities for minorities and

³⁸ *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, Report on Ownership of Commercial Broadcast Stations* at ¶ 6, MB Dkt. 14-50, rel. June 27, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0627/DA-14-924A1.pdf (“2014 Ownership Report”); *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* at ¶ 6, MB Dkt. 09-182, rel. Nov. 14, 2012, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-12-1667A1.pdf (“2012 Ownership Report”). With each data collection, the FCC accounts for new stations that were not counted in previous collections, therefore, the slight increases noted in text may well be a symptom of more accurate data collection as opposed to an increase in ownership diversity.

women to participate in the broadcast industry.³⁹ However, rather than making the sound determination that the current rules impermissibly allow excessive consolidation and limit opportunities for new entrants and exploring ways to tighten the rules to promote diversity – an undertaking that NHMC has repeatedly stated that it would enthusiastically support – the Commission seems to view the lack of progress as a sign that certain rules are no longer required.⁴⁰ That logic is akin to saying that a law making homicide a crime ought to be taken off the books if it fails to lower murder rates. The absence of progress could indicate that a rule is not sufficiently strong to be a deterrent or not being properly enforced, but not that it is unnecessary.

B. The Commission Must Undertake An Aggressive Research Plan To Study The Impact Of Its Rules On Diversity

The Third Circuit *Prometheus* opinions require the Commission to collect, release, and publicly analyze data, and direct the completion of studies that would use that data to determine the effects of its rules on ownership diversity. Although a tremendous amount of time has passed since the Commission was made aware of the expectations of the Court, and an immense amount of effort and resources have been expended at the Commission to design research, we are, unfortunately, left in largely the same position that the *Prometheus II* Court found us – with no completed *Adarand* studies, none on the horizon, and no clear indication that the Commission is interested in moving forward in a way that would respond to the Third Circuit.

³⁹ 2014 FNPRM at ¶ 14.

⁴⁰ See 2014 FNPRM at ¶ 222 (stating “[W]e do not believe that record evidence shows that the [radio/television] cross-ownership ban has protected or promoted minority or female ownership of broadcast stations, or that it could be expected to do so in the future.”).

In a particularly disappointing episode, the Commission recently abandoned plans to undertake a study into the Critical Information Needs of Communities – a study that had been contemplated and worked on for many months under previous Chairs Genachowski and Clyburn. This study had the potential to fulfill the FCC “obligation to Congress to identify barriers to entry into the communications marketplace faced by entrepreneurs and other small businesses,” yet the Commission determined not to go forward with the study, and has yet to come up with a suitable replacement.⁴¹

On a more positive note, the FCC’s ongoing Hispanic television market study, initiated under the leadership of Acting Chairwoman Clyburn, is the first step in a long process towards understanding how the Commission can achieve its statutory goal of a more diverse media ecosystem in the face of an exceptionally low number of women and people of color owning and controlling media outlets. This study should only be the beginning. For meaningful improvements to occur, the Commission must engage in an ongoing dialogue with the community to ensure that it is compiling a complete picture of the broadcast ownership landscape for analysis.

C. The Commission Must More Thoroughly Analyze Its Existing Data And Renew Dormant Efforts To Collect Data That Could Reveal The Causes And Effects Of Lack Of Ownership By People Of Color

The Commission’s work to collect, clean, and release to the public its Form 323 ownership data is laudable, and the Commission’s goal of “provid[ing] a reliable basis for analyzing ownership trends in the industry, including ownership by racial and ethnic minorities

⁴¹ Press Release, Federal Communications Commission, Statement on Critical Information Needs Study (Feb. 28, 2014), *available at* <http://www.fcc.gov/document/statement-critical-information-needs-study>.

and women” is important.⁴² However, it is past time that the Commission begins performing its own analysis of the data that it has collected, particularly analysis relating to causal factors or market structures that are keeping the numbers of diverse owners inexcusably low.⁴³ Statements made in the 2014 FNPRM suggest that the Commission believes that the data can and should be analyzed further, although it seems to imply that the burden of completing such analysis should fall on third parties.⁴⁴ While third parties have certainly gone to great lengths in the past to analyze data where the Commission has not,⁴⁵ it is unrealistic and contradictory to the Third Circuit’s mandate to expect third parties to be the only source of data analysis in the Commission’s record. The time is long overdue for the Commission to reap the fruits of its efforts to clean up the Form 323 data collection and begin analyzing the data to inform its rulemaking process.

Additionally, the FCC should reinstate Form 395, which required that each station report EEO data on the number of employees in each of nine job categories by race and gender.⁴⁶ Reinstating the collection and public release of broadcast stations’ employment demographics would allow the public to hold broadcast stations accountable for their minority hiring practices

⁴² 2014 Ownership Report *supra* note 37 at ¶ 2.

⁴³ See 2014 FNPRM at n. 745; Comments of Free Press at 16, MB Dkt. 09-182, filed Mar. 5, 2012 (“Free Press 2011 Comments”).

⁴⁴ See 2014 FNPRM n. 746 (listing studies that were completely using 2009 Form 323 data); 2014 FNPRM n. 749 (noting “that no party to this proceeding submitted studies utilizing the minority or female ownership data collected via the revised Form 323 2009 biennial filings, even though the data from these filings were made available to the public when the forms were filed with the Commission in 2010”).

⁴⁵ See S. DEREK TURNER, *OFF THE DIAL: FEMALE AND MINORITY RADIO OWNERSHIP IN THE UNITED STATES* (Free Press, 2007), *available at* http://www.freepress.net/sites/default/files/resources/off_the_dial.pdf; S. DEREK TURNER, *OUT OF THE PICTURE: MINORITY AND FEMALE TV STATION OWNERSHIP IN THE UNITED STATES* (Free Press, 2006), *available at* http://www.freepress.net/sites/default/files/fp-legacy/out_of_the_picture.pdf.

⁴⁶ Reply Comment of National Hispanic Media Coalition, et al. at 2, MB Docket 10-103 (filed Sept. 13, 2010) (“NHMC Reply Comment”).

and give the Commission a strong record upon which to build new policies to promote diverse ownership. Previously, this information was made publicly available by station, and was used by the FCC to compile annual “trend reports” tracking the aggregate percentage of people of color and women employed in each job category.⁴⁷ However, following the D.C. Circuit’s determination that portions of the FCC’s EEO rules were unconstitutional in *Lutheran Church-Missouri Synod v. FCC*⁴⁸ and *MD/DC/DE Broadcasters Association v. FCC*,⁴⁹ the FCC stopped gathering Form 395 data.⁵⁰ In response to those two decisions, the FCC revised its Form 395 information gathering rules in 2002, emphasizing that the data would be used only to provide trend reports, and not to determine compliance with EEO regulations; however, the FCC deferred its decision to reinstate the broadcast and multi-channel video providers (“MCVP”) employment data filing requirements until 2004.⁵¹ However, the FCC did not make Form 395-B available – instead seeking comment as to whether the information should be kept private under the Confidential Information Protection and Statistical Efficiency Act of 2002 (“CIPSEA”)⁵². As of 2010, the FCC had not made a decision as to keeping the information confidential, and had still not collected or disseminated employment data.

CONCLUSION

The FCC’s rules on media ownership are meant to promote diversity, localism, and competition in the broadcasting industry. In particular, the radio cross-ownership rules serve an important role, as radio remains an influential and important medium for news, information, and

⁴⁷ *Id* at 2.

⁴⁸ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

⁴⁹ *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

⁵⁰ NHMC Reply Comment *supra* note 46 at 1.

⁵¹ *Review of the Commission’s Broadcast and Cable Equal Opportunity Rules and Policies*, 2d R&O and 3d NPRM, 17 FCC Rcd. 24018, 24025 (2002).

⁵² NHMC Reply Comment *supra* note 46 at 3-4.

