

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

2014 Quadrennial Regulatory Review –)	
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	MB Docket No. 14-50
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2010 Quadrennial Regulatory Review –)	
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	MB Docket No. 09-182
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership In)	MB Docket No. 07-294
the Broadcasting Services)	

COMMENTS OF
OFFICE OF COMMUNICATION, INC. OF UNITED CHURCH OF CHRIST
MEDIA ALLIANCE
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION
COMMUNICATIONS WORKERS OF AMERICA
COMMON CAUSE
BENTON FOUNDATION
MEDIA COUNCIL HAWAII
PROMETHEUS RADIO PROJECT
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Summary

The Commission should not delay disclosure and attribution of shared service agreements (“SSAs”) yet again. The record already compiled in the 2010 Quadrennial Review (“QR”) shows that in many cases, SSAs are being used to circumvent the media ownership rules, including the local television rule, to the detriment of the public interest. Thus, the Commission should take immediate action to require public disclosure of SSA by requiring them to be placed in stations’ online public files.

The Commission should also immediately adopt rules attributing SSAs that reduce competition and diversity. If anything, the record for attributing SSAs is stronger than it is for JSAs, which the Commission has already attributed. While the sale of advertising for another station a strong indicator of control, provision of local news programming to another station directly reduces diversity, competition, and localism. The record includes many examples of SSAs in which one station produces all or substantially all of the local news for one or more other stations in the same market.

The Commission still has not complied with the Court’s remand order in *Prometheus II*. First, Commission has failed to adopt or even propose an eligible entity definition that would promote ownership by women and people of color.

Second, the Commission failed to collect the data and conduct the studies the Court told it to do in the 2010 QR. The 2014 323 Report, like the previous Form 323 report, merely counts the number of stations controlled by women, Hispanics, and racial minorities. While the Report confirms that women and people of color remain vastly underrepresented in broadcast station ownership, it offers no assessment of the impact of the prior policies designed to increase participation by women and people of color. Moreover, the Commission has failed to take the steps necessary to ensure that the data it does have is complete, accurate, and searchable.

UCC *et al.* strongly oppose the Commission’s tentative conclusion that there is insufficient evidence to show that remedying past racial (or gender) discrimination is a compelling (or substantial) interest. There is no basis for these conclusions because the Commission has conducted very little investigation of the impact of past discrimination on women or people of color. Similarly, UCC *et al.* disagree with the “tentative conclusion” that the record is insufficient to show that race-conscious measures are narrowly tailored to meet the compelling governmental interest in increasing diversity. In reaching this “tentative conclusion,” without conducting a single new *Adarand* study, the Commission completely ignores the Court’s direction in *Prometheus II* that if “the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies.”

Finally, UCC *et al.* agree that the local television, local radio, and newspaper-television cross-ownership rules remain necessary in the public interest. They strongly disagree, however, with the Commission’s tentative conclusion that the radio cross-ownership rules are unnecessary because radio stations produce little local news. This emphasis conflates diversity, the underlying rationale for cross-ownership rules, with localism, and ignores the many different ways that radio programming contributes to diversity and meeting community needs. Repeal of the radio-cross ownership rules would allow large owners to increase their holding and undermine the Commission’s goal of promoting station ownership by women and people of color.

Office of Communication, Inc. of the United Church of Christ, Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation,¹ Media Council Hawai`i, Prometheus Radio Project, and Media Mobilizing Project² (“UCC *et al.*”) file these comments in response to the *Further Notice of Proposed Rulemaking, 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371 (rel. Apr. 15, 2014) (“FNPRM”). These comments focus on three areas: shared services, the diversity remand, and the proposals to retain, modify, or repeal the current rules.³

I. Shared Service Agreements

The record already compiled in the 2010 Quadrennial Review (“QR”) shows that in many cases, shared services agreements (“SSAs”) are being used to circumvent the media ownership rules, including the local television rule, to the detriment of the public interest. Thus, the Commission should have required disclosure rather than seek additional comment on whether to require disclosure. UCC *et al.* request that the Commission take immediate action to require public disclosure of SSAs and to attribute SSAs where one station provides local news

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

² Media Mobilizing Project is a non-profit organization based in Philadelphia, PA. It exists to build a media, education, and organizing infrastructure that will cohere and amplify the growing movement to end poverty. It uses media to organize poor and working people to tell their stories to each other and the world, disrupting the stereotypes and structures that keep communities divided. Media Mobilizing Project has proven that direct training of poor people in technology and media literacy skills, in leadership development to unite them to address poverty’s causes, and in media-making and organizing to change systems that keep them poor is essential to building an educated, empowered, and engaged public that can earn measurable wins.

³ To the extent that the proposals made in the FNPRM are the same as those made in the 2010 Quadrennial Review (“QR”), UCC *et al.*’s prior comments and notices of ex parte may already address them. Because the Commission has left the 2010 QR docket open, those filings remain part of the record.

programming for another station in the same market or otherwise exercises significant influence over its programming, as previously proposed.⁴

The Commission has been aware of SSAs and similar arrangements for many years. The Media Bureau has been approving SSAs since at least 2003.⁵ Further, when the Commission released the 2009 public notice seeking input on what studies should be conducted as part of the 2010 QR, UCC *et al.* filed comments asking the Commission to collect data on the extent, type, and impact of sharing agreements, including SSAs and local news service agreements (“LNSs”), because “[s]hared news gathering directly affects the quality and coverage of local news available to viewers.”⁶

The 2010 QR *Notice of Inquiry* asked questions about sharing agreements, including “How should we treat other types of arrangements for shared news sources? How do shared news services affect the coverage of local events? Are these arrangements permissible under the cross-ownership rules and should they be?”⁷ UCC *et al.* responded by telling the Commission it should “investigate whether ‘shared services arrangements’ and ‘local news services’ agreements are being used to circumvent the local television rule and/or undermine the goal of ensuring diverse and competitive sources of local news.”⁸ Further, UCC *et al.* said, “[t]he Commission

⁴ Mar. 5, 2012 Comments of UCC *et al.*, at 16-19, 2010 QR, MB Dkt. 09-182.

⁵ The Media Bureau approved of an SSA between Raycom and American Spirit’s Ottumwa, Iowa station KYOU-TV on Oct. 31, 2003. *Application for Consent to Assignment of Broadcast Station Construction Permit or Lease*, Form 314, File No. BALCT-20030829ANZ; *see also Opposition of Southeastern Media Holdings to Petition to Deny* at 4, File No. BTCCDT-20131120AEP (filed Feb. 21, 2014).

⁶ Nov. 20, 2009 Comments of UCC *et al.*, at 5-6, 2010 QR, MB Dkt. 09-182. CWA and Media Council Hawai`i (“MCH”) also filed detailed comments about the increasing use of SSAs to circumvent local television ownership limits in the Commission’s Future of Media proceeding. May 7, 2010 Comments of CWA and MCH, GN Dkt. 10-25.

⁷ 2010 QR, *Notice of Inquiry*, 25 FCC Rcd 6086, ¶99 (2010) (“2010 QR NOP”).

⁸ July 12, 2010 Comments of UCC *et al.*, at i, 2010 QR, MB Dkt. 09-182.

should conduct a study to assess the numbers and types of sharing arrangements between local stations.”⁹

The 2010 QR *Notice of Proposed Rulemaking* asked even more questions about SSAs and LNSs. Specifically, it asked

[a]re LNS agreements and SSAs substantively equivalent to agreements that are already subject to our attribution rules, and are they therefore attributable today or should they be attributable?
. . . .

If we determine that LNS agreements and/or SSAs should be attributable, how should we define LNS agreements and SSAs and what attribution standard should we adopt?

Instead of focusing on attributing certain named agreements (e.g., JSAs, LMAs, SSAs, LNS agreements) as we have in the past, should we adopt a broader regulatory scheme that encompasses all agreements, however styled, that relate to the programming and/or operation of broadcast stations? What characteristics of such agreements are most likely to confer a degree of “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions?”¹⁰

UCC *et al.*’s NPRM comments extensively analyzed sharing agreements.¹¹ First, they focused on the fact that the agreements are used to circumvent the media ownership rules, including the local television restriction. Then, they detailed how the agreements harm

⁹ July 7, 2010 Comments of UCC *et al.*, at 5, 2010 QR, MB Dkt. 09-182; *see also* July 12, 2010 Comments of UCC *et al.*, at 8, 2010 QR, MB Dkt. 09-182 (“Another question concerning the local television rules that the NOI fails to ask is whether the purpose of the local television limits are being undermined by various types of ‘sharing’ arrangements between local television broadcasters. As described in comments in the Future of Media proceedings, it appears that Shared Services Agreements are being used to evade either the restriction on mergers of two top-four stations or prohibitions on mergers where fewer than eight independent voices remains.”).

¹⁰ 2010 QR, *Notice of Proposed Rulemaking*, 26 FCC Rcd 17489, ¶¶204-207 (2010) (internal footnotes omitted).

¹¹ Other public interest groups, such as Free Press and National Hispanic Media Coalition, also brought SSAs to the Commission’s attention. *See, e.g.*, Mar. 5, 2012 Comments of Free Press, at 44-61, 2010 QR, MB Dkt. 09-182; Mar. 5, 2012 Comments of National Hispanic Media Coalition *et al.*, at 9, 2010 QR, MB Dkt. 09-182.

competition, diversity, and station ownership by women and people of color.¹² UCC *et al.* proposed an attribution standard in those comments that accounted for the most harmful practices undertaken by stations pursuant to SSAs and other agreements, including when one station provides another in-market station with all of its local news programming, and when one station tells the Securities and Exchange Commission that it owns or operates the brokered station, yet tells the FCC that it does not.¹³

SSAs have become a routine aspect of media mergers in recent years. In 2012-2013 alone, the Media Bureau reviewed 22 transactions involving television JSAs, and all involved other types of sharing arrangements as well.¹⁴ The Bureau has repeatedly acquiesced to transactions that include sharing arrangements, rarely requiring any modifications or divestiture.¹⁵

A. All SSAs must be disclosed immediately, prior to the completion of the 2014 Quadrennial Review.

The Commission has addressed sharing agreements in part; specifically, Part VI of the FNPRM attributed joint sales agreements (“JSAs”) involving sales of advertising time above

¹² Mar. 5, 2012 Comments of UCC *et al.*, at 1-14, 2010 QR, MB Dkt. 09-182.

¹³ *Id.* at 16-19.

¹⁴ 2014 QR, *Further Notice of Proposed Rulemaking*, 29 FCC Rcd 4371, ¶320 n.997 (2014) (“FNPRM”). Twenty transactions involved contingent financial interests, such as options for the broker station to buy the brokered station or for the broker station to guarantee loans taken by the brokered station. *Id.*

¹⁵ See, e.g., *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc., Memorandum Opinion and Order*, 28 FCC Rcd 16867 (MB 2013), *appl. for rev. pending* (“Gannett-Belo Order”). But see *Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc., Memorandum Opinion and Order*, MB Dkt. 13-203, DA 14-1055 (MB 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0724/DA-14-1055A1.pdf. UCC *et al.* were encouraged to see the Media Bureau take a closer look at the Sinclair-Allbritton transaction and require that certain stations be divested and certain agreements removed. The Commission should continue to view similar transactions with skepticism and require divestiture when it is appropriate.

15%.¹⁶ In a separate order adopted the same day, the Commission decided to presume “bad faith” when two top-four stations in the same market negotiate together for retransmission consent.¹⁷ Further, the Media Bureau recently released a public notice indicating it will take a closer look at sharing agreements that include a contingent financial interest, such as options to purchase or loan guarantees.¹⁸ Phil Verveer, Chairman Wheeler’s senior counsel, has analyzed these types of “sidecar” arrangements and found that they present serious public interest concerns.¹⁹

While *UCC et al.* commends the Commission for taking these important steps, SSAs must still be disclosed. First, the Commission and the public currently have no way to find out about SSAs unless an SSA is part of license transfer or assignment; however, stations can enter into SSAs at any time and largely avoid public scrutiny.²⁰ The FNPRM itself acknowledges that assessing the impact of sharing arrangements is “impeded because so little is known about the content, scope, and prevalence of sharing agreements.”²¹ Further, “[i]n the absence of greater information about the number of agreements . . . and their content, the Commission and the public cannot fully evaluate the potential public interest harms and benefits of various arrangements, which is necessary for the Commission to formulate sound public policy.”²² Thus,

¹⁶ *FNPRM*, at ¶340.

¹⁷ *Amendment of the Commission’s Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (2014).

¹⁸ *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, Public Notice*, 29 FCC Rcd 2647 (MB 2014).

¹⁹ Phil Verveer, *How the Sidecar Business Model Works*, FCC Blog (Mar. 6, 2014), <http://www.fcc.gov/blog/how-sidecar-business-model-works>.

²⁰ In Honolulu, HI, Raycom and MCG Capital entered into a sharing arrangement outside of a license transfer. *KHNL/KGMB License Subsidiary, LLC, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 26 FCC Rcd 16087 (MB 2011), *appl. for rev. pending*.

²¹ *FNPRM*, at ¶328.

²² *Id.* at ¶327. Further, the GAO recently released a report stating that the Commission cannot ensure its rules serve the public interest if it refuses to conduct a fact-based analysis and collect

more information and transparency is needed now so the Commission can conduct its statutorily mandated review of its ownership rules under Section 202(h).

Second, the consequences of further delaying disclosure are significant: failure to address this issue now will make it difficult for the Commission to undo any future harm.²³ Sharing news, management, employees, resources, and back-office services undermines viewpoint diversity and competition as multiple in-market media entities act in concert. Although the Commission required noncompliant JSAs to be unwound in the JSA attribution order, it is much easier for the Commission to prevent these transactions from occurring than to require them to be unwound after-the-fact.

It has been over four years since the Commission first asked about SSAs.²⁴ The Commission should not delay further before it decides whether SSAs should even be disclosed.

1. UCC *et al.* supports the Commission’s proposed definition of SSAs for the purpose of requiring disclosure.

For purposes of disclosure of SSAs, UCC *et al.* support the proposed definition:

any agreement or series of agreements, whether written or oral, in which (1) a station, or any individual or entity with an attributable interest in the station, provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not under common

the data it needs to do so. GAO Report to Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate on Media Ownership at 28, *available at* <http://www.gao.gov/assets/670/664484.pdf>.

²³ UCC *et al.* support unwinding any transaction previously approved (by the Media Bureau) that would violate any new rule. As explained in the applications for review of the Gannett/Belo and Tribune/Local TV transactions, there was no reliance interest in those cases: the media industry has been on notice for many years that sharing arrangement attribution would change. *See, e.g., Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc., Reply to Opposition to Application for Review at 3-7, MB Dkt. 13-189 (filed Feb. 19, 2014).* The full Commission can also overturn incorrect Media Bureau decisions, which it has the opportunity to do by acting on the multiple applications for review of similar transactions pending before it.

²⁴ 2010 QR NOI, at ¶99.

ownership (as defined by the Commission’s attribution rules); or (2) stations that are not under common ownership (as defined by the Commission’s attribution rules), or any individuals or entities with an attributable interest in those stations, collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.²⁵

UCC *et al.* support this definition of SSAs because it focuses on what resources are being shared rather than on the name given to the agreement by its drafters.

2. The public should be notified and have easy access to SSAs.

The Commission “seek[s] comment on the manner in which SSAs are to be disclosed to the public and the Commission.”²⁶ As an initial matter, UCC *et al.* are reassured to see that the Commission interprets its current JSA and LMA disclosure to “already require[] that all radio and television LMAs and JSAs between commercial broadcast stations be disclosed by placing them in the station’s public file, regardless of whether the agreements are attributable or filed with the Commission.”²⁷ UCC *et al.*’s experience in viewing public files suggests that many stations are not aware of this requirement. Therefore, they ask the Commission to remind all broadcast stations of this requirement, and take enforcement action where necessary.

Disclosure should be done in a way that both facilitates public access and provides a means for the public to easily learn about new SSAs or material changes in existing SSAs. The first goal is best achieved by requiring stations to place their SSAs and any material amendments in their online public inspection file. The public should be able to look at any particular station’s online public file and get a complete picture of the extent to which that station shares services and resources with another station.²⁸ Requiring individual stations to include all forms of sharing agreements is needed to assess the cumulative effect.²⁹

²⁵ *FNPRM*, at ¶330.

²⁶ *Id.* at ¶337.

²⁷ *Id.*

²⁸ This is of particular concern when stations have different agreements with different brokers: in

UCC *et al.* strongly oppose the alternative of requiring disclosure of agreements only in the *physical* public file.³⁰ The difficulties with the physical public file have already been catalogued extensively in the *Enhanced Disclosure* proceeding.³¹ Similarly, UCC *et al.* oppose the alternative of filing the agreements solely with the Commission because the agreements would not be available to the public.

The Commission should also make sure that the public receives notice when a new agreement is entered into or a currently-existing agreement undergoes a material change. UCC *et al.* support the FNPRM's proposal to create a permanent docket number in ECFS for all new and materially-amended SSAs.³² Otherwise, the need to constantly check public inspection files for all stations, nation-wide, would be unduly burdensome for the public. Stations could upload

Tucson, AZ, as a result of the Gannett-Belo transaction, KMSB (licensed to Sander Media, Co.) and KTTU (licensed to Tucker Operating Co.) have SSAs with Raycom and "Transition Services Agreements" (providing for sharing of back-office support) with Gannett. *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc., Memorandum Opinion & Order*, 28 FCC Rcd 16867, ¶7 (MB 2013), *appl. for rev. pending*.

²⁹ The cumulative effect analysis is relevant when the Commission reviews whether non-attributable agreements, taken together, nonetheless transfer control of the brokered station to broker station. *See Applications of BBC License Subsidiary, L.P.*, 10 FCC Rcd 7926, 7933 (1995) ("[T]he Commission has, in adjudicatory proceedings, expressly embraced the conclusion that we must assess the cumulative effect of all relevant factors to determine whether the goals of our multiple ownership rules will be served or hindered by the structure and relationships presented to us."); *see also Shareholders of the Ackerley Group, Inc, Memorandum Opinion and Order*, 17 FCC Rcd 10828, 10841 (2002) ("we conclude that these agreements together are 'substantively equivalent' to an LMA for more than 15% of [the brokered station's] weekly broadcast hours.").

³⁰ FNPRM, at ¶337.

³¹ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Second Report and Order*, 27 FCC Rcd 4535, ¶¶24-32 (2012); *see also* Dec. 22, 2011 Comments of Public Interest Public Airwaves Coalition, at 7-10, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Dkt. 00-168.

³² FNPRM, at ¶338.

the file once to the Commission, which could make them available online as it does with other filings.

3. SSAs between same-market television stations and daily newspapers and between same-market radio stations must also be disclosed.

In some recent transactions, a newspaper publisher purchased a television station group. In some markets, the newspaper publisher could not outright own the television stations it acquired because of the newspaper-broadcast cross-ownership rule. Instead of selling the stations, the newspaper publisher spun-off the television station to third party and entered into an agreement in which the newspaper and television station would share, among other things, news programming and back-office services.³³ These agreements, as with those between two television stations, can also reduce diversity and competition. Thus, any station with such an agreement with a newspaper in the same market should be required to disclose it in its online public file.

Similarly, radio stations, which are already required to disclose JSAs and LMAs in their public inspection files, may have other, similar agreements that could be just as relevant to public policy determinations as sharing agreements between television stations.³⁴ Unless the Commission also requires disclosure by radio stations, the Commission will not know whether there is a problem. Thus, UCC *et al.* support requiring radio stations to disclose SSAs to which they are party. Because radio stations are not required to put their public inspection files online, the Commission could set up a special docket in ECFS for radio stations to disclose their sharing agreements.

³³ See, e.g., *Gannett-Belo Order*, *supra* note 15.

³⁴ For instance, WLYK, a radio station in Cape Vincent, NY, has an LMA with Rogers Broadcasting (a Canadian broadcaster), and shares operations with other Canadian stations CIKR-FM and CKXC-FM. WLYK, Wikipedia, <https://en.wikipedia.org/wiki/WLYK> (last visited July 29, 2014); WLYK Form 323, File No. BOA-20131115BFW (indicating “LMA/radio JSA” with Border International Broadcasting, Inc.).

B. SSAs that involve practices that undermine diversity, competition, and localism should be attributed now.

Requiring the disclosure of SSAs broadly defined will provide information useful for determining the types or combinations of sharing arrangements that should be attributed for purposes of the ownership rules. Even without additional information, however, it is clear that some types do confer sufficient influence over the programming and operation of a station that they should be attributed now.

If anything, the record for attributing SSAs is stronger than it is for JSAs, which the Commission has already attributed. While the sale of advertising for another station is a strong indicator of control, provision of local news programming to another station directly reduces diversity, competition, and localism. The record includes many examples of SSAs in which one station produces all or substantially all of the local news for one or more other stations in the same market.³⁵ Even if an SSA does not include the provision of local news, a substantial amount of control is transferred when two media outlets share studios, office space, and employees.

The FNPRM acknowledges that “commenters have raised important issues about how and to what extent sharing agreements implicate our competition, localism, and diversity policy objections.”³⁶ Moreover, in reviewing the sharing arrangement in Honolulu, the Media

³⁵ UCC *et al.* also disagrees the characterization of the record in the 2010 QR as not containing “comprehensive data or information about the breadth, content, or prevalence of sharing agreements.” FNPRM, at ¶327. For example, Free Press submitted as study S. Derek Turner, Cease to Resist (Oct. 2013) filed in Docket No. 09-182 on Nov. 19, 2013. Professor Danilo Yanich submitted his study “Local TV News and Service Agreements: A Critical Look,” in Docket 09-182 on Oct. 24, 2011. CWA and MCH submitted comments in a related docket, *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Docket No. 10-25, on May 7, 2010, that discussed news sharing arrangements and appended a list of stations involved in different types of news sharing. UCC *et al.* referred the Commission to this study in their Mar. 5, 2012 Comments, *supra* note 12, at 2. The American Cable Association also submitted a great deal of factual information about sharing arrangements. *See, e.g.*, Ex Parte Letter, Docket No. 09-182 (June 3, 2013).

³⁶ *See* FNPRM, at ¶327.

Bureau found that “the net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is *clearly at odds with the purpose and intent of the duopoly rule*. For this reason, *we will include in the ongoing 2010 quadrennial review proceeding the duopoly rule issues that this and similar cases raise.*”³⁷ For the Commission to now take a step backward from considering attribution of SSAs as it did in the 2010 QR to merely proposing disclosure in the 2014 QR is arbitrary and capricious and contrary to the record.

In *Prometheus I*, the Court upheld the “Commission’s decision to modify its attribution policy to ‘reflect accurately the competitive conditions of today’s local radio markets,’ and thus prevent its local radio rule from being undermined.”³⁸ UCC *et al.* strongly urge the Commission to act now to modify its attribution policy to reflect the changes in the local television markets and to prevent its local television limits from being undermined. If it waits until the end of the 2014 QR to define SSAs and then proposes attribution rules, it will be too late. Thus, we urge the Commission to promptly adopt a rule similar to the one UCC *et al.* proposed in the 2012 QR comments,³⁹ that at minimum attributes sharing arrangements that are clearly designed to circumvent the rules and that result in the same or substantially identical news produced by one station on one or more other stations in the same market.

³⁷ *KHNL/KGMB License Subsidiary, LLC, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 26 FCC Rcd 16087, ¶23 (MB 2011) (emphasis added), *appl. for rev. pending*.

³⁸ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 429 (3d Cir. 2004) (citation omitted) (“*Prometheus I*”).

³⁹ *Supra* note 12, at 16-19.

II. Diversity Order Remand

A. The Commission has once again failed to undertake the analysis required by the Third Circuit on remand.

In *Prometheus II*, the Court required the Commission to adopt a new definition of “eligible entity” and assess the effects of its rules on station ownership by women and people of color.⁴⁰ Previously, in *Prometheus I*, the Court remanded the Commission’s 2002 *Biennial Review Order* so the Commission could reconsider its repeal of the failed station solicitation rule (“FSSR”).⁴¹ The Court found that “the Commission created the FSSR to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled – and consequently more affordable – stations were for sale.”⁴² The Commission’s actions were deemed arbitrary and capricious because the Commission repealed the FSSR without explaining its purpose, without determining whether the FSSR served its intended purpose, and without analyzing the impact of repeal on potential minority station owners.⁴³ In addition, as part of the remand, the Court expected that the Commission would “reevaluate whether a [Socially Disadvantaged Business]-based waiver will better promote the Commission’s diversity objectives” than the eligible entity waiver, which applied only to small businesses.⁴⁴

In the remand from *Prometheus I*, which was folded into the 2006 QR, the Commission reinstated the FSSR but failed to analyze the impact of that or any other rules and proposals on ownership opportunities for women and people of color.⁴⁵ It also deferred a decision on whether

⁴⁰ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) (“*Prometheus II*”).

⁴¹ *Id.* at 420-21.

⁴² *Id.* at 420.

⁴³ *Id.* at 420-21.

⁴⁴ *Id.* at 428 n.70.

⁴⁵ The Commission adopted two separate orders at the same meeting in December 2007, but the orders were released at different times. One adopted a revised rule for the newspaper-broadcast cross-ownership rule, while finding that the local television and radio rules remained necessary in the public interest. *2006 QR, Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010 (2008) (“*2006 QR Order*”). The other addressed proposals for increasing racial and gender

to utilize preferences for socially- and economically-disadvantaged businesses (“SDBs”), and instead, sought comment on whether a definition that included race as a factor would withstand a constitutional challenge.⁴⁶

In *Prometheus II*, involving a challenge to the 2006 *QR Order* and the *Diversity Order*, the Court again reversed and remanded parts of the Commission’s decisions. It found that “[d]espite our prior remand requiring the Commission to consider the effect 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.”⁴⁷

Specifically, the Court found that the definition of “eligible entity” as a small business “lack[ed] a sufficient analytical connection to the primary issue that the Order intended to address.”⁴⁸ Among other things, the Commission failed to explain how the small business definition adopted would increase broadcast ownership by women and people of color.⁴⁹ Moreover, “the Commission referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women.”⁵⁰ Thus, the Court “conclude[d] once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration

diversity. *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”).

⁴⁶ *Diversity Order*, at ¶83.

⁴⁷ *Prometheus II*, 652 F.3d at 471.

⁴⁸ *Id.*

⁴⁹ *Id.* at 470. The Court noted that “by the Commission’s own calculations, minorities comprise 8.5% of commercial radio station owners that qualify as small businesses, but 7.78% of the commercial radio industry as a whole—a difference of less than 1%. Thus, these measures cannot be expected to have much effect on minority ownership.” *Id.* (citation omitted).

⁵⁰ *Id.* (emphasis in original).

of the proposed SDB definitions and remand[ed] for it to do so *before* it completes its 2010 Quadrennial Review.”⁵¹

The Court acknowledged that the Commission had “no accurate data to cite,”⁵² and that there were “significant challenges involved in meeting th[e] important policy goal” of promoting broadcast ownership by women and people of color.⁵³ But, the Court cautioned that “[s]tating that the task is difficult in light of *Adarand* does not constitute ‘considering’ proposals using an SDB definition.”⁵⁴

The court went on to observe that the

FCC’s own failure to collect or analyze data . . . does not excuse[] its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.⁵⁵

Thus, the Court expected that the Commission would “act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.”⁵⁶ Nonetheless, the Commission ignored the Third Circuit’s clear instructions on remand.

1. The Commission failed to propose, much less adopt, a definition of eligible entity that would promote ownership opportunities for women and people of color.

In the 2010 QR *Notice of Proposed Rulemaking*, the Commission proposed to reinstate the small business definition of eligible entity for the purpose of promoting small business

⁵¹ *Id.* at 471 (emphasis added).

⁵² *Id.* at 470.

⁵³ *Id.* at 472.

⁵⁴ *Id.* at 471 n.42.

⁵⁵ *Id.*

⁵⁶ *Id.*; *see id.* at 472 (“we re-emphasize that the actions required on remand should be completed within the course of the Commission’s 2010 Quadrennial Review of its media ownership rules”).

ownership instead of promoting ownership by women and people of color.⁵⁷ In the FNPRM, the Commission “tentatively conclude[d] that a revenue-based eligible entity standard is an appropriate and worthwhile approach for expanding ownership diversity,” even though it “concede[d] that we do not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership.”⁵⁸ The Commission acknowledges, but does not act on, UCC *et al.*’s prior suggestion that the Commission assess whether the small business definition had any effect on station ownership by minorities and women.⁵⁹

The Commission does present some analysis to support its claim that the revenue-based definition promotes viewpoint diversity. Specifically, it analyzes transfers of construction permits in which eligible entities could take advantage of additional time for construction. It found that 247 self-certified eligible entities took advantage of the extra time and that 67% of those applicants were non-commercial educational (“NCE”) entities.⁶⁰

The Commission does not, however, take the next step and analyze whether any of the applicants that benefited from eligible entity status were controlled by women or people of color, even though the Commission has collected race and gender information from broadcast station owners since 2009. Also in 2009, the Commission proposed to collect race and gender data from NCE entities, but it never acted on that proposal.⁶¹ Nor has the Commission examined the extent to which eligible entity status actually reflects diversity or whether it has been effective in other contexts.⁶²

⁵⁷ 2010 QR, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶160 (2010) (“2010 QR NPRM”).

⁵⁸ FNPRM, at ¶267.

⁵⁹ *Id.* at ¶266.

⁶⁰ *Id.* at ¶269.

⁶¹ See *infra* note 75 and accompanying text.

⁶² For example, in *Prometheus I*, the Court rejected broadcasters’ challenge to the Commission’s

The failure of the Commission to cite any evidence that the small business definition will promote racial and gender diversity, combined with the extremely low number of stations controlled by women or people of color,⁶³ confirms the Court’s conclusion that the definition of “eligible entity” lacks a sufficient analytical connection the goal of racial and gender diversity. But merely altering the goal to diversity in general, as the Commission has proposed, does not satisfy the remand, particularly in light of the Commission’s failure to adopt any other measures to promote racial and gender diversity.

2. The Commission’s Form 323 Reports do not satisfy the Third Circuit’s remand.

The *Prometheus II* Court could not have been clearer that it would no longer accept the Commission’s excuse that it lacked adequate data. Specifically, it expected the Commission to “synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.”⁶⁴ The Commission did not, however, release a report summarizing the 2009 and 2011 Biennial Ownership Report Form 323 data until November 2012. In June 2014, two months into the comment period, it released the report summarizing the 2013 Form 323 data.

decision to limit transfers of grandfathered radio station groups to eligible entities. 373 F.3d at 426-29. It also rejected Prometheus Radio Project’s argument that the Commission should have limited waivers to socially- and economically-disadvantaged businesses (“SDB”). The Court noted that the Commission had argued that small businesses often include stations owned by women or people of color, and the definition of SDBs was too uncertain at that time. The Court then stated its anticipation that “by the next quadrennial review 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.” *Id.* at 428 n.70. Given the Court’s expectation, one would have thought that during the time the eligible entity exception was in place, the Commission would have made some effort to evaluate its efficacy.

⁶³ See App. C.

⁶⁴ *Prometheus II*, 652 F.3d at 471 n.42.

a. Many stations are still not filing Form 323 as required.

In commenting on the *2012 323 Report*, UCC *et al.* identified many ways in which it fell short of what the Court required on remand. For example, many stations failed to file Form 323, especially in 2009. As a result, one could not know whether a change in percentage ownership of stations controlled by women or people of color between 2009 and 2011 reflected a real change or merely the fact that more stations filed in 2011 than 2009.⁶⁵

In 2013, filing rates improved in most categories, but remain well below 100% in all classes of stations except for full-power commercial television stations. The table below, which is based on the data in Appendix B, shows the percentages of stations filing Form 323 by year.

Station Type	2009	2011	2013
% of Full Power Commercial TV Stations Filing	85.37	97.19	99.93
% of Class A TV Stations Filing	73.21	82.63	90.14
% of Low Power TV Stations Filing	41.74	60.53	64.98
% of FM Radio Stations Filing	81.46	85.93	86.41
% of AM Radio Stations Filing	79.77	80.41	79.04

Some classes of stations had particularly low filing rates. In 2013, low-power television stations had the lowest filing rate—at 65%. The *2014 323 Report* points out that this represents an increase from 60% in 2011.⁶⁶ However, the change in percentage is largely accounted for by a decrease in the total number of low power television (“LPTV”) stations from 2070 in 2011 to 1936 in 2013.⁶⁷ Similarly, the total number for Class A Television stations fell from 545 in 2009 to 436 in 2013.⁶⁸ Accordingly, even though fewer Class A stations filed in 2013, percentage filing increased from 73% to 90%.

⁶⁵ Dec. 26, 2012 Comments of UCC *et al.*, at 11-12, *2010 QR*, MB Dkt. 09-182.

⁶⁶ *2014 QR, Report on Ownership of Commercial Broadcast Stations* at App. B page 2, MB Dkt. 14-50, DA 14-924 (MB 2014) (incorrectly says 66% instead of 65%), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-924A1.pdf (“*2014 323 Report*”).

⁶⁷ App. B. Between 2009 and 2011, the number of stations dropped precipitously, from 2477 in 2009 to 2070 in 2011. *Id.*

⁶⁸ *Id.*

Reporting levels for radio remained about the same between 2011 and 2013, with about 86% of FM and 80% of AM stations filing. The number of AM stations that did not file (759) far exceeded the number of stations controlled by women (310).⁶⁹ In addition, there were 232 AM stations that did not file sufficient data.⁷⁰ Regarding FM stations, 383 are controlled by women, 550 did not file sufficient data, and 349 did not even file.⁷¹

Such low filing rates in the third year of filing are unacceptable. The Commission's rules require that all commercial stations file Form 323.⁷² Thus, UCC *et al.* urge the Commission to begin enforcement actions against stations that failed to file.

b. The Commission still has not addressed shortcomings in its data collection.

To obtain a complete snapshot of station ownership, the Commission needs to complete several pending rulemakings, some of which have languished for five years. The FNPRM acknowledges “that previous shortcomings in the Form 323 data have impaired the ability of the Commission and interested parties to study and analyze issues relating to minority and female ownership,” but claims to have addressed those shortcomings.⁷³ Most of the initiatives cited as improving the completeness and accuracy of data, however, have not been implemented.⁷⁴

These include the following:

Diversity Fourth FNPRM, released in May 2009, which proposed that noncommercial licensees include race, ethnicity, and gender in their filings;⁷⁵

⁶⁹ 2014 323 Report, Table D(1a).

⁷⁰ *Id.*

⁷¹ *Id.* at Table E(1a).

⁷² 47 CFR §73.3615(a).

⁷³ *FNPRM*, at ¶251.

⁷⁴ *Id.* at ¶252.

⁷⁵ *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896 (2009). UCC *et al.* supported this proposal. June 26, 2009 Comments of UCC *et al.*, at 2, *Promoting Diversification*

Diversity Fifth FNPRM, released in October 2009, which reversed an earlier order requiring certain non-attributable owners to file Form 323, and sought comment on whether to reinstate the requirement;⁷⁶ and

Diversity Sixth FNPRM, released in January 2013, which proposed to eliminate the use of interim Special Use FCC Registration Numbers to ensure the accuracy, reliability, and usefulness of the Form 323 data.⁷⁷

UCC *et al.* urge that the Commission promptly adopt these proposals.

UCC *et al.* urge the Commission to promptly fulfill its promise to create a fully functional ownership database. In the *Report & Order*, released in May 2009 as part of the *Diversity Fourth FNPRM*, the Commission directed the Media Bureau to develop an electronic interface that “is searchable, and can be aggregated and cross-referenced.”⁷⁸ Yet, the FNPRM admits that the Bureau has “not had the opportunity or resources to create a fully interactive database of minority and female ownership information.”⁷⁹

of Ownership in the Broadcasting Services, MB Dkt. 07-294.

⁷⁶ *Promoting Diversification of Ownership in the Broadcasting Services, Memorandum Opinion & Order and Fifth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 13040 (2009). UCC *et al.* supported reinstatement. Feb. 14, 2013 Comments of UCC *et al.*, at 4, *Promoting Diversification of Ownership in the Broadcasting Services*, MB Dkt. 07-294. Under current attribution rules, if a single shareholder owns more than 50 percent of the voting stock, other shareholders are not attributed and do not need to file Form 323. Because individuals who can control up to 49% of the stock can still exercise significant influence over a broadcast station’s operation, they should file Form 323 to provide a more accurate assessment of participation by women and minorities. *See id.*

⁷⁷ *Promoting Diversification of Ownership in the Broadcasting Services, Sixth Further Notice of Proposed Rulemaking*, 28 FCC Rcd 461 (2013). UCC *et al.* also supported this proposal. Feb. 14, 2013 Comments of UCC *et al.*, at 7, *Promoting Diversification of Ownership in the Broadcasting Services*, MB Dkt. 07-294.

⁷⁸ *Supra* note 75, at ¶20.

⁷⁹ *FNPRM*, at ¶259. Indeed, staff informed counsel for UCC *et al.* that the results in both Form 323 reports had to be done “by hand.”

c. The 2014 323 Report leaves many questions unanswered.

Despite the fact that the Commission has collected “snapshots” of the data in three different years now, the Commission provides no trend analysis in the *2014 323 Report* or elsewhere. UCC *et al.* pointed out that the *2012 323 Report* provided little more than the number of stations according to type of service and race, gender and ethnicity.⁸⁰ It did not, for example, identify the owners in each category, the location or market rank of stations, or call signs—information essential for commenters to analyze how amending or retaining the ownership limits would affect ownership by women and people of color.⁸¹

Like the *2012 323 Report*, the *2014 323 Report* merely totaled up the number of stations in each category and did not identify the stations, owners, or locations. Nor was that data included in the spreadsheets posted online the day the report was released. On July 31, 2014, one week before the due date for these comments, UCC *et al.* were informed that the Media Bureau had posted additional spreadsheets in a “new format.”⁸² This new format includes call sign, city of license, and name of the licensee. While UCC *et al.* appreciate the release of this

⁸⁰ Dec. 26, 2012 Comments of UCC *et al.*, at 15, *2010 QR*, MB Dkt. 09-182.

⁸¹ The Commission responds that it never suggested that the *2012 323 Report* “constitutes a study,” or that it alone fulfills its statutory obligations. *FNPRM*, at ¶261. But, it adds that “[t]his report and future reports like it, collectively, should provide a reliable factual underpinning for future analysis of trends concerning ownership of broadcast stations by minorities and women.” *Id.*

⁸² Media Bureau Reports on Industry, FCC, <http://www.fcc.gov/encyclopedia/media-bureau-reports-industry> (showing “2014 Ownership Report Data New Format”) (last visited Aug. 5, 2014). No public notice of this new information was provided; it merely appeared on the website as shown below.

6/27/14

Report on Ownership of Commercial Broadcast Stations.

Report: [Word](#) | [Acrobat](#)

2014 Ownership Report Data: [Zip File \(2 MB\)](#)

2014 Ownership Report Data New Format: [Zip File \(2 MB\)](#)

important additional information, they have not had time to analyze it carefully because it was released so close to the comment due date.

d. The 2014 323 Report demonstrates that women and people of color continue to be vastly underrepresented.

Assuming that the data in the 323 Reports are correct, women and people of color continue to control very few broadcast stations relative to their percentage in the population. According to the Census Bureau, women made up 50.8% of the population in 2013. For the same year, the racial and ethnic make-up of the US population was as follows:

- Whites (not Hispanic or Latino), 62.6%
- Hispanics or Latinos, 17.1%
- Black or African American, 13.2%
- Asian, 5.3%
- American Indian and Alaska Native, 1.2%
- Native Hawaiian and Other Pacific Islander, 0.2%⁸³

The charts in Appendices A and C use Census data and Form 323 data, provided by the Commission in spreadsheet form, to examine how the percentage and number of stations owned by women and people of color has changed over time.⁸⁴ Although the Commission's local television ownership rules have not changed between 2009 and 2013, the number of television stations of all types controlled by women declined over those years.⁸⁵ Although women constitute 50.8% of the population, they control a mere 6.3% of full power commercial television stations.⁸⁶ The highest percentage of any type of station controlled by women is 14.9% for LPTV stations.⁸⁷

⁸³ Data calculated from US Census Data July 1, 2013, Census Bureau, <http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2013/PEPASR6H?slice=hispanic~totpop!year~est72013>.

⁸⁴ The results reported by race, ethnicity, and gender are in Appendix A.

⁸⁵ App. C, at C-1.

⁸⁶ *Id.*

⁸⁷ *Id.*

Racial and ethnic minorities are also underrepresented. Combined, they made up more than one-third of the population (35.5%). However, they own only 6% of full power television stations, 13.3% of Class A stations, 12.3% of LPTV stations, 5.7% of FM radio stations, and 11% of AM radio stations.⁸⁸ Whites (not including Hispanics) make up 62.6% of the population, but control 77.2% of full power television stations, 83% of Class A television stations, 84.3% of LPTV stations, 80% of FM stations, and 77.4% of AM stations.⁸⁹ Moreover, in all station types except AM radio, whites have increased the proportion of stations owned. For example, the percentage of full power television stations owned by whites increased from 63.4% in 2009 to 69.4% in 2011 and 77.2% in 2013.⁹⁰ Whites also hold 83% of Class A and 84.3% of LPTV stations,⁹¹ even though those services were established in large part to provide opportunities for women and people of color to own television stations.⁹²

The number of stations controlled by people of color as a whole declined in three of five categories between 2011 and 2013: Class A, LPTV, and FM radio.⁹³ Some races experienced particularly significant declines. For example, African Americans experienced declines in all services except Class A Television.⁹⁴ And where there were increases, they were relatively modest. The maximum increase of any one category was one percentage point (Asian ownership of full-power TV).⁹⁵ The continuing and increasing disparity between the relevant populations

⁸⁸ *Id.* at C-2.

⁸⁹ *Id.* at C-3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 Fed. Reg. 21468, ¶80 (1982); LPTV was considered “a rich, if distant, opportunity to promote diversity of ownership generally and to widen opportunities for minority ownership in particular...” *Id.* (separate statement of Commissioner Henry M. Rivera).

⁹³ App. C, at C-2.

⁹⁴ *Id.*

⁹⁵ *Id.* at C-1.

and station ownership contradicts the Commission's assumption that merely retaining existing television and radio limits will advance the goals of increasing ownership by women and people of color.⁹⁶ In fact, continued adherence to the current rules will likely result in further loss of ownership by women and people of color.

The Commission declines to infer discrimination based on gross underrepresentation of women and people of color in station ownership, citing *Croson* for the proposition that when special qualifications are required, comparisons to the general population have limited probative value.⁹⁷ The Commission, however, offers no alternative, identifies no special qualifications necessary to own a broadcast station, and points to no other relevant group for comparison purposes. Thus, comparisons to the general population are appropriate.

e. Further information and analysis is needed to comply with the remand.

Over many years, UCC *et al.* has suggested numerous studies that should be undertaken to evaluate the efficacy of its race-neutral initiatives. These include:

- whether the new entrant bidding credit, which was adopted by the Commission in 1998 to help women and people of color acquire licenses in broadcast auctions, had been successful;
- whether the relaxation of the television duopoly rules affected the number of television stations owned by women and people of color;
- whether the relaxation of the radio rules (both generally and by counting noncommercial stations in the numerical limits) affected the number of stations owned or controlled by women and people of color;
- whether the decision in the 2002 Biennial Review to permit the transfer of grandfathered combinations of radio stations to eligible small businesses had resulted in any increase in stations owned by women or people of color; and
- whether the re-implementation of the FSSR was working as intended to promote opportunities for women and people of color to obtain broadcast stations.⁹⁸

⁹⁶ *FNPRM*, at ¶¶70, 108.

⁹⁷ *Id.* at ¶303.

⁹⁸ Dec. 26, 2012 Comments of UCC *et al.*, at 15, 2010 *QR*, MB Dkt. 09-182.

This type of analysis will be needed should the Commission ultimately adopt rules that take race and/or gender into account. Yet, unfortunately, neither the FNPRM nor the 323 Reports address or answer these questions.

The FNPRM explains that it lacks the data to answer some of these questions. For example, it notes that new entrant bidding credits continue to be actively utilized in awarding broadcast licenses. In an auction of 93 FM permits held in April 20, 2012, 31% took advantage of the 35% credit for holding no other media interests, and 19% took advantage of the 25% credit for applicants with three or fewer other media interests. The FNPRM claims that it was impossible to assess whether bidding credits for new entrants promoted entry by women or people of color because that information is not included in the application form.⁹⁹ But applicants that receive licenses do have to file Form 323. Surely the Commission could have examined the Form 323s filed by auction winners to assess whether the bidding credits helped women or people of color. Or, in the alternative, it could have amended the application form to collect this information.¹⁰⁰

Finally, the Commission should collect additional information needed to assess the impact of retaining or amending the ownership limits. For example, during the 2010 QR, UCC *et al.* asked the Commission to collect information about television station SSAs and LNSs and other forms of joint ventures between local broadcast stations because of concern that these agreements were being used to circumvent the local television rule and/or undermine the goal of ensuring diverse and competitive sources of local news.¹⁰¹ They also pointed out that SSAs may reduce opportunities for entrants who are women and people of color by allowing struggling stations to avoid having to seek an out-of-market buyer by entering into a sharing arrangement

⁹⁹ FNPRM, at ¶300 n.917.

¹⁰⁰ Similarly, with respect to the FSSR, the Commission claimed that it cannot assess the effectiveness of the FSSR because it does not collect data regarding the FSSR. *Id.*

¹⁰¹ *Supra* note 9.

with another station in the same market.¹⁰² Yet, as discussed above, the Commission fails even to collect information about SSAs.

B. It is premature for the Commission to tentatively conclude that action to address station ownership by women and people of color would violate equal protection.

UCC *et al.* strongly oppose the Commission’s tentative conclusion that there is insufficient evidence to show that remedying past racial (or gender) discrimination is a compelling (or substantial) interest.¹⁰³ There is no basis for these conclusions because the Commission has conducted very little investigation of the impact of past discrimination on women or people of color.

While UCC *et al.* agree that increasing diversity is a compelling governmental interest,¹⁰⁴ they strongly oppose finalizing the Commission’s “tentative conclusion” that the record is insufficient to show that race-conscious measures would be narrowly tailored, as required by *Adarand*.¹⁰⁵ In reaching this “tentative conclusion,” without conducting a single new *Adarand* study, the Commission completely ignores the Court’s direction in *Prometheus II* that if “the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies.”¹⁰⁶ Nor is it appropriate for the Commission to place the burden of providing additional evidence on commenting parties. This is especially the case

¹⁰² Dec. 26, 2012 Comments of UCC *et al.*, at 16, 2010 QR, MB Dkt. 09-182.

¹⁰³ FNPRM, at ¶¶302-06. UCC *et al.* are also troubled that even while admitting that diversity is an important governmental objective, the FNPRM “tentatively concludes” that women-controlled stations do not contribute to viewpoint diversity. *Id.* at ¶301. The Commission has done little to no research on women’s ownership, even though it has known about the record deficiencies since at least 1992. See *Lamprecht v. FCC*, 958 F.2d 382, 395-98 (D.C. Cir. 1992).

¹⁰⁴ See Nov. 8, 2004 Reply Comments of UCC *et al.*, at 3, *Ways to Further Section 257 Mandate and to Build on Earlier Studies*, MB Dkt. 04-228.

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Prometheus II*, 652 F.3d at 471, n.42. Some of the studies released in 2000 found past discrimination, but the FNPRM finds them insufficient because the evidence is not as substantial as that accepted by courts in other contexts. FNPRM, at ¶¶305-06. But the Commission has made no attempt to build that record beyond asking for comment.

here, where the Commission finds the numerous studies submitted to date insufficient, but does not say what it believes would be necessary to meet strict scrutiny.

While the FNPRM suggests that the Commission has been working diligently all along to “enhance the ability of minorities and women to participate,”¹⁰⁷ this claim is belied by the Commission’s failure to act, as detailed above. Furthermore, if one looks closely at the Commission’s claimed “diversity” initiatives, there really is “no there there.” The FNPRM mentions that the Diversity Advisory Committee has continued its efforts, but fails to cite a single recommendation from the Advisory Committee that has been adopted by the Commission.¹⁰⁸ It also cites to its October 2013 announcement concerning a study of Hispanic television viewing.¹⁰⁹ That study, however, has not been completed nearly one year later. Moreover, the Commission fails to mention that it abandoned plans to do a pilot study of the Critical Information Needs of Communities, apparently in response to political concerns raised on the basis of incorrect information.

In sum, the Commission still has a lot of work to do. Until the work is complete, the Commission should refrain from making any tentative conclusions.

III. Comments on Specific Media Ownership Rules

The Commission proposes to retain the local television ownership rule and the local radio ownership rule. It finds that the newspaper-television cross-ownership rule remains necessary to

¹⁰⁷ FNPRM, at ¶247.

¹⁰⁸ The Diversity Advisory Committee recommended in 2010 that the Commission award additional preference for individuals competing in an auction of broadcast licenses who have overcome substantial disadvantages. Recommendation on Preference for Overcoming Disadvantage, FCC Advisory Committee on Diversity for Communications in the Digital Age (Oct. 14, 2010), *available at* <http://www.fcc.gov/DiversityFAC/meeting101410.html>. Although the Bureau sought public comment on this proposal, no further action was taken. While the FNPRM does not explicitly reference the advisory committee proposal, it does list a host of arguments against it. FNPRM, at ¶¶299-300.

¹⁰⁹ FNPRM, at ¶248.

promote viewpoint diversity in local markets, and seeks comments on criteria for granting waivers of the newspaper-television cross-ownership rules.¹¹⁰ It proposes to eliminate the radio-television and radio-newspaper cross-ownership rules.

A. The local television rule remains necessary in the public interest.

UCC *et al.* agree that the local television rule remains necessary in the public interest to promote competition.¹¹¹ They also agree that the Commission should retain the top-four prohibition because mergers between two top-four stations would result in a reduction of viewpoint diversity, competition, and localism by eliminating an independent source of local news. They also agree that “affiliation swaps” should be subject to the top-four prohibition. UCC *et al.* does not, however, support the proposal that “parties that acquired control over a second in-market top-four station by engaging in [affiliation swaps] prior to the release date of a decision to adopt such a rule would not be subject to divestiture or enforcement action.”¹¹² This proposal is essentially an invitation for stations to begin swapping affiliations to gain control over two top-four television stations. Instead, the Commission should put broadcasters on notice that any future transaction may be subject to enforcement actions.

¹¹⁰ *Id.* at ¶¶151-56.

¹¹¹ *Id.* at ¶¶15, 25.

¹¹² *FNPRM*, at ¶49 n.124. The *FNPRM* cites only one example of an affiliate swap—the one in Honolulu—which it characterizes as achieving “a result that is prohibited under the local television ownership rule.” *Id.* at ¶48. However, the Bureau decision declining to take action is not final because MCH filed an application for review by the full Commission. *KHNL/KGMB License Subsidiary, Application for Review* (filed Dec. 27, 2011). As MCH argued in its Reply filed Jan. 23, 2012, at 4, “while MCH welcomes the FCC’s decision to examine this issue in the 2010 QR, it does not relieve the FCC from the need to interpret existing rules in an adjudication that is now before it.” The Commission should rule on the application based on the merits, and not decide in advance that divestiture will not be required. Moreover, the logic underlying the *FNPRM*’s conclusion that network affiliate swaps in violation of the top-four limitation are contrary to the public interest applies equally to the situation in Honolulu. The citizens of Hawai`i should not be deprived of diversity enjoyed by citizens in other markets because of the Media Bureau’s erroneous decision.

The Commission’s tentative decision not to relax the local television rule is prudent and necessary because, as explained in prior comments, the upcoming incentive auction is likely to result in increased consolidation and reduced diversity.¹¹³ As part of the incentive auction, the Commission plans to grandfather post-auction station combinations that violate the ownership rules that arose through circumstances outside the owner’s control.¹¹⁴ In particular, in markets with eight or fewer independent owners, the loss of one or more stations would be especially problematic for competition and diversity. Until it is known what effect the auction will have on the number and diversity of television stations owners, it would be premature to consider relaxing the rule.

As UCC *et al.* pointed out previously, spectrum auctions are also likely to have a negative effect on ownership opportunities for women and people of color.¹¹⁵ The Commission itself has recognized that the lowest-performing stations are the ones most likely to exit the market and stations in this category are the ones most likely to be owned or purchased by women and people of color.¹¹⁶ Moreover, incentive auctions will result in the loss of spectrum for LPTV

¹¹³ Dec. 26, 2012 Comments of UCC *et al.*, at 17-24, 2010 *QR*, MB Dkt. 09-182.

¹¹⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order* at ¶691, GN Dkt. 12-268, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-50A1.pdf.

¹¹⁵ Dec. 26, 2012 Comments of UCC *et al.*, at 17-24, 2010 *QR*, MB Dkt. 09-182. The incentive auction continues to have an impact on the diversity of station ownership because speculators are buying stations owned by women and people of color for purposes of selling the spectrum in the incentive auction (“flipped”). The three speculators UCC *et al.* know about are OTA Broadcasting, NRJ, and LocusPoint—all owned by white men. Based on press reports and previous Form 323 Reports, the following stations were flipped in 2012-13:

- WEBR: a Class A station previously owned by an Asian male, sold to OTA Broadcasting in 2012;
- WDWO: a Class A station previously owned by an American Indian/Alaska Native woman, sold to LocusPoint in 2013;
- WOCH: a Class A station previously owned by an Asian woman, sold to NRJ in 2013.

There are likely to be many more flipped stations before the auction occurs.

¹¹⁶ December 26, 2012 Comments of UCC *et al.*, at 18, 2010 *QR*, MB Dkt. 09-182 (citing Bill

service. The loss of LPTV stations will have a particularly harsh effect on women and Hispanics. According to the *2014 323 Report*, women control 187 (14.9%) LPTV stations compared to 87 (6.3%) full power stations.¹¹⁷ Hispanics control 126 (10%) LPTV stations compared to 42 (3%) of full power stations.¹¹⁸

The FNPRM states that “while we do not propose to retain the [local television] rule with the specific purpose of preserving the current levels of minority and female ownership, we tentatively find that retaining the existing rule would *effectively address the concerns of those commenters who suggested that additional consolidation would have a negative impact on minority and female ownership.*”¹¹⁹ But this tentative conclusion is clearly wrong. Retaining the current numerical limits for full power television stations, while reducing the total number of television stations by means of the spectrum auction, effectively relaxes the limit and will result in less diversity, less competition, and fewer stations controlled by women and people of color.

Even if this “tentative conclusion” were correct, it ignores the important public interest goal of *increasing* opportunities for women and minorities.¹²⁰ As shown above, these levels are already extremely low. Indeed, the FNPRM characterizes them as “discouragingly low.”¹²¹

Lake, Chief, Media Bureau, remarks, Federal Communications Bar Association, CLE, Getting from Here to There: The Road Ahead for Spectrum Auctions (June 6, 2012) (indicating large market financially successful stations unlikely to participate in auction)).

¹¹⁷ App. A, at A-1, A-17.

¹¹⁸ *Id.* at A-2, A-18.

¹¹⁹ FNPRM, at ¶73 (emphasis added).

¹²⁰ “We conclude that use of this definition of ‘eligible entity’ will advance our objectives of *promoting* diversity of ownership in the broadcast industry by *making it easier for small businesses and new entrants . . . to acquire a license* and attract the capital necessary to compete in the marketplace with larger and better financed companies.” *Diversity Order* at ¶7 (emphasis added); *see also Prometheus II*, 652 F.3d at 470 (“The Commission has long sought to promote broadcast station ownership by minorities and women in order to foster diversity in broadcasting.”) (quoting *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896, ¶1 (2009)).

¹²¹ FNPRM, at ¶193.

Because the existing limits that permit common ownership of more than one television station in certain circumstances are part of the reason for such low rates, they clearly cannot be justified on the ground that they will not make the problem worse.¹²² Thus, while retaining the local television rule is better than relaxing the rule, more needs to be done to increase diversity.

B. The local radio rule remains necessary in the public interest.

UCC *et al.* agree with the Commission’s tentative conclusion that the current local radio rule remains necessary in the public interest to promote competition, diversity, and ownership of stations by women and people of color.¹²³ At the same time, as UCC *et al.* pointed out in prior comments, these goals would be advanced even further were the Commission to lower the numerical caps and/or end the grandfathering of combinations in excess of the numerical limits.¹²⁴

The *2014 323 Report* shows that women and people of color have experienced some increase in the number and percentage of radio stations they control between 2009 and 2013. For example, the number of FM radio stations controlled by women increased from 325 (6.2%) to 383 (6.7%), and the number of AM stations controlled by women increased from 267 (7%) to 310 (8.3%).¹²⁵ While any increases are welcome, the total percent ownership of women and people of color in each type of radio service remains quite small relative to the fact that women comprise 50.8% of the U.S. population and minorities comprise 35.5% of the U.S. population.

¹²² The Commission’s suggestion that the local television rule will preserve existing level of ownership is inconsistent with its finding in FNPRM ¶100 regarding the newspaper-broadcast rules: “considering the low levels of minority and female ownership reflected in the *2012 323 Report*, we do not believe the record evidence shows that the cross-ownership ban has protected or promoted minority or female ownership of broadcast stations in the past 35 years, or that it could be expected to do so in the future.”

¹²³ FNPRM, at ¶74.

¹²⁴ Mar. 5, 2012 Comments of UCC *et al.*, at 27-29, *supra* note 12.

¹²⁵ App. A, at A-25, A-33.

Some minorities actually lost ground. The number of FM stations controlled by African-Americans decreased from 93 (1.7%) in 2011 to 73 (1.3%) in 2013, and the number of AM stations controlled by African-Americans decreased from 106 (2.8%) to 93 (2.5%) during the same time period.¹²⁶ The reports also show a slight decrease in the number and percentage of radio stations controlled by all minorities from 2011 to 2013. The number of minority-owned AM stations fell from 237 (6.2%) to 225 (6%) and the number of minority-owned FM stations fell from 196 (3.5%) to 169 (3%).¹²⁷

Thus, the record supports the Commission's tentative conclusion that retaining existing numerical limits will help promote ownership opportunities for women and people of color, but also shows that more needs to be done.

C. The cross-ownership rules remain necessary in the public interest.

UCC *et al.* strongly disagree with the FNPRM's tentative conclusion that the radio-television cross-ownership rule and the radio-newspaper cross-ownership rule are no longer necessary in the public interest.¹²⁸ They also have concerns regarding the Commission's proposed changes to the waiver standard for newspaper-television cross-ownership.

1. Radio continues to promote diversity even if it does not provide local news.

The FNPRM tentatively agrees with some commenters such as Bonneville that if the newspaper-radio cross-ownership restriction "were no longer necessary to support the Commission's viewpoint diversity policy, then [the] restriction would be left without a public interest rationale."¹²⁹ Similarly, the FNPRM notes that, with respect to the radio-television cross-ownership rule, "the record suggests that, unlike local television stations and daily newspapers, radio stations are not a dominant source of local news and information, and thus, we

¹²⁶ *Id.* at A-27, A-35.

¹²⁷ *Id.* at A-31, A-39.

¹²⁸ *FNPRM*, at ¶¶145, 210.

¹²⁹ *Id.* at ¶145.

seek comment on whether retention of this rule is necessary to promote and preserve viewpoint diversity in local markets.”¹³⁰

These tentative conclusions are based on flawed reasoning. Repealing the rules to allow even greater consolidation would not be in the public interest because radio stations provide diverse programming as well as a means of entry for women and people of color.

a. The FNPRM’s analysis conflates diversity and localism.

The Commission’s tentative conclusion to repeal the radio cross-ownership rules conflates diversity with localism. Localism is “designed to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers.”¹³¹ The diversity goal is intended

to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves. The policy is premised on the First Amendment, which “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” The Commission historically has approached the diversity goal from five perspectives: viewpoint, outlet, program, source, and minority and female ownership diversity.¹³²

Thus, diversity emphasizes whether many speakers are available to the public to express a wide range of views, not whether the speakers provide local news. While diversity in local news is desirable, nothing in the definition of diversity requires a station to produce news programming.

Provision of local news is not a requirement for localism because stations can “treat[] the significant needs and issues of the community” without necessarily providing local news. The

¹³⁰ *Id.* at ¶210.

¹³¹ *2010 QR NPRM*, at ¶14 (quoting *Broadcast Localism Report*, 23 FCC Rcd 1324, 1327 (2008)). The FNPRM tentatively concludes that the policy goals identified in the *2010 QR NPRM* are the same in the 2014 QR. *FNPRM*, at ¶14.

¹³² *2010 QR NPRM*, at ¶16 (citations omitted).

Commission has recognized as much in the context of deregulating radio.¹³³ The Commission would be committing a fundamental error that would undermine many other rules and policies if it repealed the radio-cross ownership rules based on a conclusion that local radio stations are incapable of contributing to diversity if they do not produce local news.

b. Radio continues to play an important role in informing the public.

Radio has vast reach in the American public even in the face of alternate distribution technologies. According to the Radio Advertising Bureau, radio reaches 91.5% of American consumers over 12 years old weekly, including 92% of all African American consumers and 93% of Hispanic consumers.¹³⁴ In addition, the most recent Pew Research Center *Report on the State of the Media 2013* finds that radio listening is on the increase and that traditional AM/FM

¹³³ *Deregulation of Radio, Report and Order*, 84 FCC2d 968, 983 (1981) (emphasis added), *aff'd in part*, *UCC v. FCC*, 707 F.2d. 1413 (D.C. Cir. 1983):

While we believe the record demonstrated that news programming is presented in response to the interests of listeners, other programming that may be necessary to comply with the requirement to address issues of public importance may not be. We feel that such programming is an important component of the public interest standard and should be available on radio. Nonetheless, we do not believe that it is advisable or necessary to specify precise quantities of programming that should be presented by all stations regardless of local needs and conditions. Therefore, we will . . . not specify any particular amount of total non-entertainment programming that should be presented [on radio]. . . . Rather, stations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented. . . . The licensee *need not demonstrate that it provided news programs, agricultural programs, etc.* It need only show that it addressed community issues with whatever types of programming that it, in its discretion and guided by the wants of its listenership, determined were appropriate to those issues.

¹³⁴ Radio Advertising Bureau, Why Radio, <http://www.rab.com/whyradio/index.cfm> (last visited Aug. 4, 2014).

radio still reaches far more Americans than digital radio.¹³⁵ These figures do not count public radio, for which 26 million listeners per year are accounted for in National Public Radio figures alone.¹³⁶

The Pew Research Center has also found that a large segment of the public listens to news on the radio. According to its 2012 media consumption survey, 33% of adults listened to news radio “yesterday.” Pew notes that while that number is “down considerably from 43% in 2000 and 52% in 1990,” it is *higher* than the percentage of respondents who reported reading a newspaper yesterday, which was 29%.¹³⁷ Moreover, a substantial portion (20%) of young adults aged 18-24 reports listening to radio news. Pew notes that whether listeners select sports, music, or another type of radio station, there is a very good chance listeners “are exposed to top-of-the-hour headline newscasts.”¹³⁸

A 2011 study by the Knight Foundation also found that radio is important in providing American communities with local news and information. That study, *How People Learn About Their Local Community*, found that 51% of people turn to radio at least once a week for local news and information. It explained that “[r]adio is a key information source for the most time-sensitive local news and information topics.”¹³⁹

¹³⁵ Laura Santhanam, et al., *Audio: Digital Drives Listening Experience*, Pew Research Center, available at <http://stateofthemedial.org/2013/audio-digital-drives-listener-experience>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *How People Learn About Their Local Community*, Knight Foundation 35 (2011), available at <http://www.knightfoundation.org/publications/how-people-learn-about-their-local-community>. The Commission relied on this study in its *2010 QR NPRM*. 26 FCC Rcd 17489, 17529-30, ¶112; see also Keith Stamm, Michelle Johnson & Brennon Martin, *Differences Among Newspapers, Television, and Radio in Their Contribution to Knowledge of the Contract with America*, 74 *Journalism & Mass Comm. Q.* 687, 697 (1997) (concluding that radio was more important than television and as important as television and newspapers for some viewers and listeners).

Moreover, talk radio has become one of the most popular formats and an important source of information and viewpoints. The Pew study found a large number (4,012 stations) calling themselves “news/talk/information” or “talk/personality” and that this category was the second most popular format behind only country music. Further, according to Arbitron, news/talk/information and talk/personality have the longest average listening time of any radio formats they track, with the average listener tuning in for 6 hours and 45 minutes per week.¹⁴⁰

As these studies make clear, radio remains a vibrant medium that listeners rely on for news, information, and political discussion. Beyond providing critical information to listeners, the industry remains “surprisingly healthy.”¹⁴¹ The healthy prognosis of the industry cuts against any need to encourage cross-ownership with other media.

c. Even if a radio station provides no local news, it still contributes to diversity.

Radio stations may express diverse viewpoints through many different types of programming in addition to or instead of news programming. Here are some examples.

Issue-responsive programming. When the Commission deregulated radio in 1981, it eliminated license renewal guidelines based on the percentage of news, public affairs, and other non-entertainment programming by a station.¹⁴² It did so because it was “convinced that absent these guidelines significant amounts of non-entertainment programming of a variety of types will continue on radio.”¹⁴³ It stressed that radio stations would still be obligated to provide programming discussing “issues of concern to its community of license” and that citizens needed

¹⁴⁰ *Id.*

¹⁴¹ The Information Needs of Communities, Federal Communications Commission 61 (July 2011).

¹⁴² *Deregulation of Radio*, *supra* note 133, at 975.

¹⁴³ *Id.* at 977.

such programming to make “intelligent, informed, decisions essential for the proper functioning of a democracy.”¹⁴⁴

To ensure that stations meet this core public interest obligation, each station must create and place in its public inspection file an issues-programs list documenting that it provided community-responsive programming.¹⁴⁵ A recent review of issues-programs lists of radio stations illustrates some of the many ways that radio stations address issues of community concern.¹⁴⁶ For example, in the fourth quarter of 2012, WKYS, a station that broadcasts hip-hop music in the Washington, D.C., market, aired segments that stressed awareness of HIV/AIDS and the importance of ongoing testing and prevention. The station interviewed people at organizations that had HIV/AIDS-related events planned. The station also aired interviews with survivors of domestic violence and informed listeners of programs available to help individuals who are victims. Finally, the station interviewed Maryland Governor Martin O’Malley about how to stay safe during Hurricane Sandy and, in the aftermath of the hurricane, interviewed local utility companies to provide updates on mass power outages.¹⁴⁷

A review of the websites of radio stations owned by people of color, attached as Appendix D, revealed many examples of how stations owned by people of color provide unique programming expressing editorial viewpoint and meeting local needs even though those stations would not be classified as “all news” stations. For example, Russ Parr’s morning show on WKYS-FM in Washington D.C., addresses, “domestic violence, mental health, breast cancer awareness, registering to vote and countless other critical issues.” Leroy Jones, Jr. hosts the *Political Jones Report* on WATV-AM in Birmingham, AL, with a “new voice with a unique

¹⁴⁴ *Id.*

¹⁴⁵ Media Bureau, *The Public and Broadcasting*, July 2008, FCC, p.29-30.

¹⁴⁶ Law students from Georgetown inspected the public files of several stations in the Washington, D.C. metropolitan area in Spring 2013.

¹⁴⁷ See Programming Issue List, 93.9 WKYS, Oct-Dec 2012. This information is available at WKYS’s headquarters in Silver Spring, MD.

perspective on the major political issues affecting us today.” WOL, Radio One’s flagship station, offers talk radio shows by Rev. Al Sharpton and Carl Nelson, a Peabody-award winning journalist. KAST-AM in Astoria, OR, offers a morning radio news-magazine show, as well as the *Lars Larson Northwest Show*. “Lars believes the only way to improve our community, state, and union is through honest discussion. Sometimes that means people (including Lars) will be made uncomfortable as ideas are challenged.” These and other examples in Appendix D demonstrate that radio stations that are not all-news stations contribute diverse editorial viewpoints to their local radio markets.

Choice of Format. In addition to providing issue-responsive programming, radio stations serve different demographics by their choice of program format. There are many different types of radio format and each format can be sub-divided into many specialty formats.¹⁴⁸ For example, formats within the talk genre include all-news, sports, conservative talk, progressive talk radio, and Christian talk. Within the music genre, there are many more formats including adult contemporary, Christian contemporary, classic rock, classical, country, easy listening, gospel, jazz, oldies, and urban contemporary (mostly rap, hip hop, soul). In addition, many radio stations broadcast in languages other than English and serve specific ethnic audiences.¹⁴⁹

A radio station’s choice of format alone may express a viewpoint. For example, WAY-FM in South Carolina which has a Christian music format, describes its mission as “[u]sing media in a culturally relevant way to influence this generation to love and follow Jesus.”¹⁵⁰

¹⁴⁸ See, e.g., *Guide to Radio Station Formats*, News Generation, available at <http://www.newsgeneration.com/broadcast-resources/guide-to-radio-station-formats> (last visited Aug. 4, 2014).

¹⁴⁹ In 2011, Cision, a media-tracking company, found there were 883 radio stations that had programming in 35 foreign languages. Judy Keen, *Foreign-Language Radio Stations Provide Connection to Home*, USA Today (June 16, 2011), http://usatoday30.usatoday.com/news/nation/2011-06-15-Foreign-language-radio-immigrants_n.htm

¹⁵⁰ *Mission, Value, Faith*, WAY-FM, <http://www.wayfm.com/about> (last visited Aug. 4, 2014).

Smaller station ownership groups tend to provide more programming to niche audiences.¹⁵¹ For example, a study by Future of Music Coalition (“FMC”) found that Bluegrass and Folk were absent from large station groups’ programming and that “smaller station groups are the sole source for whole other groups of radio formats: programming for children, religious programming, foreign-language and ethnic-group-focused programming, and certain categories of news and public service programming.”¹⁵²

Selection of music. The selection of songs within a format is another way in which radio stations contribute to diversity and meet local needs. Music is an important form of creative expression that often conveys a viewpoint on important social issues.¹⁵³

That music expresses viewpoint is further supported by what some stations *refuse* to play as much as by what they choose to play. For example, a radio station WUVS-LP in Muskegon, MI, recently announced that it would no longer play any music by artists Lil Wayne or Rick Ross

¹⁵¹ Peter DiCola, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry*, 87-88 (Dec. 2006), available at <http://futureofmusic.org/sites/default/files/FMCradiostudy06.pdf>. The most popular formats were Country (19%), Talk (8%), Oldies (7%) and Adult Contemporary (7%). This study was filed in the 2006 Quadrennial Review. See Reply Comments of Future of Music Coalition, MM Dkt. 06-121 (filed Jan. 16, 2007).

¹⁵² DiCola, *supra* note 151, at 98.

¹⁵³ For example, a list of 20 socially conscious songs . . . that address everything from civil rights to gang violence to safe sex” includes: James Brown’s “Say It Loud – I’m Black and I’m Proud” (1968), motivating African Americans to proudly declare their racial identity; Marvin Gaye’s “What’s Goin’ On” (1971), addressing the concerns of the Vietnam War and the political turbulence of the 1960s; Nas’s “I Can” (2003), which calls for saving youths from the perils of today’s society and touches on sex, the way the media portrays African Americans, and illiteracy; Common’s “Faithful” (2005), which questions how men treat women and how he would treat a woman “if God was a her;” and Lupe Fiasco’s “Bitch Bad” (2012), taking on misogyny in hip-hop and discusses how the use of the word “bitch” affects children psychologically and society overall. Aja Johnson, *Wake Up: 20 Socially Conscious Songs*, Root (June 28, 2013), http://www.theroot.com/photos/2013/06/20_socially_conscious_songs_that_inspire.html. These songs represent just a few examples of popular music that carry social meaning and viewpoint.

due to the offensive nature of the rappers' lyrics.¹⁵⁴ In 2003, many country radio stations boycotted all music by the Dixie Chicks after lead singer Natalie Maines made negative public remarks about then-president Bush.¹⁵⁵ In 2002, radio stations across the country banned Tom Petty's "The Last DJ," which criticizes the music industry and the state of FM radio.¹⁵⁶

In sum, radio stations contribute to diversity and help shape our local and national discourse. To deny the First Amendment value of creative contributions such as these would be an abject failure on the part of the Commission.

d. Radio plays a particularly important role in communities of color.

Radio plays a particularly important role for underserved communities, such as African-Americans. For example, the Pew Project for Excellence in Journalism found that radio played a key role in providing the African American community with political news in the run-up to the 2008 presidential election.¹⁵⁷ Specifically, it found that the "presidential candidates . . . ma[de] more use of black talk radio as a way of reaching out to the African American community."¹⁵⁸ In addition to providing political news, radio stations also sell time to candidates for public office. The Radio Advertising Bureau issued a report in 2013 stating that radio stations ran

¹⁵⁴ A statement released by the station said, "[w]hile we believe in freedom of speech, creative writing and individualism, we refuse to be part of the problem by spreading messages that could harm or end someone's life." Kai Acevedo, *Michigan Radio Station Refuses to Play Lil Wayne, Rick Ross*, *Crème Magazine* (Mar. 29, 2013), <http://creme-magazine.com/2013/03/29/michigan-radio-station-refuses-to-play-lil-wayne-rick-ross>.

¹⁵⁵ Frank Franklin II, *Radio Stations Boycott Dixie Chicks*, *USA Today* (Mar. 14, 2003), http://usatoday30.usatoday.com/life/music/news/2003-03-14-dixie-chicks_x.htm.

¹⁵⁶ Spencer Patterson, *Rock Veteran Petty Saves the Best for 'Last'*, *Las Vegas Sun* (Nov. 1, 2002), <http://www.lasvegassun.com/news/2002/nov/01/rock-veteran-petty-saves-the-best-for-last>.

¹⁵⁷ *The Obama Factor*, Pew Project for Excellence in Journalism: The State of the News Media, <http://stateofthemediamedia.org/2009/ethnic-intro/the-obama-factor>; see also Jim Rutenberg, *Black Radio on Obama is Left's Answer to Limbaugh*, *N.Y. Times* (July 27, 2008), <http://www.nytimes.com/2008/07/27/us/politics/27radio.html>.

¹⁵⁸ *Obama Factor*, *supra* note 157. Additionally, Radio One, a minority-owned company, conducted a voter registration drive that enrolled 30,000 voters in one day. *Id.*

\$124.1 million worth of political ads in the 2012 election cycle in the markets analyzed.¹⁵⁹ This was a 15% increase from 2008.¹⁶⁰

A study by Oberholzer-Gee and Waldfogel found that the more media outlets targeted a particular niche, such as African Americans, the more likely the group was to vote.¹⁶¹ The authors explain that the easier it is for political candidates to reach a discrete audience, the more likely the audience is to receive information relevant to them and the more likely they are to be civically engaged. Moreover, the study found that the racial identity of the radio station owner mattered with respect to its impact on voter participation: “[i]ncreases in the number of black-targeted, black-owned station[s] result in higher turnout rates,” but they found no such effect for white-owned black-targeted stations.¹⁶²

Waldfogel also conducted a study for the 2010 QR examining the ownership structure of radio and the provision of programming to minority audiences.¹⁶³ He found that “blacks and nonblacks—and Hispanics and non-Hispanics—have starkly different preferences in radio programming.”¹⁶⁴ He also concluded that “most minority-owned stations target minority

¹⁵⁹ *Marketing Charts, Radio Revenues Grew by 4% in Q4, 1% in 2012 Overall*, Marketing Charts (Feb. 18, 2013), <http://www.marketingcharts.com/wp/radio/radio-revenues-grew-by-4-in-q4-in-2012-overall-27088>.

¹⁶⁰ *Id.*

¹⁶¹ Felix Oberholzer-Gee & Joel Waldfogel, *Electoral Acceleration: The Effect of Minority Population on Minority Voter Turnout*, NBER Working Paper No. 8252 (April 2001), available at <http://www.nber.org/papers/w8252>.

¹⁶² *Id.* at 23, 25.

¹⁶³ Joel Waldfogel, *Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009* (June 6, 2011), at 24, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307480A1.pdf (“2010 Media Ownership Study 7”). A prior study by Waldfogel found similar results. See Peter Siegelman & Joel Waldfogel, *Race and Radio Preference Externalities, Minority Ownership, and the Underprovision of Programming to Black and Hispanic Listeners, Advertising and Differentiated Products* (Michael R. Baye and Jon P. Nelson, eds., 2001).

¹⁶⁴ *2010 Media Ownership Study 7*, *supra* note 163, at 24.

listeners” and that the “presence of minority-owned stations in markets appears to raise the amount of minority-targeted programming.”¹⁶⁵

Other studies show that smaller station groups are more likely to serve underserved audiences. For example, FMC found that smaller commercial station groups were the almost exclusive providers of foreign-language and ethnic-community programming.¹⁶⁶ Moreover, Free Press found that minority owners are more likely to air formats that appeal to audiences of color, even though other formats might be more lucrative. Among the 20 general station format categories, minority-owned stations were significantly more likely to air “Spanish,” “religion,” “urban,” and “ethnic” formats.¹⁶⁷

2. Repeal of the radio cross-ownership rules would limit ownership opportunities for women and people of color.

Because of the higher costs of purchasing and operating television stations, radio has traditionally been viewed as one of the few remaining entry points into media ownership for women and people of color.¹⁶⁸ Repealing the radio cross-ownership rules would lead to a further reduction in the already small number of stations controlled by women and people of color.

The FNPRM suggests that because it proposes to retain the local television and local radio rules to protect competition in local markets, it may be unnecessary to retain the cross-media limits.¹⁶⁹ UCC *et al.* strongly disagree. Repealing the radio-television cross-ownership rules would effectively increase the maximum number of radio stations that could be commonly controlled from eight to ten. And as broadcaster Mt. Wilson points out, “elimination of the

¹⁶⁵ *Id.*

¹⁶⁶ DiCola, *supra* note 151, at 7.

¹⁶⁷ S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States 6* (Free Press, 2007), available at http://www.freepress.net/sites/default/files/fp-legacy/off_the_dial_summary.pdf.

¹⁶⁸ *FNPRM*, at ¶208.

¹⁶⁹ *Id.* at ¶223.

radio/television cross-ownership rule will benefit group owners, such as CBS, by allowing them to acquire additional co-owned radio stations in a market, and thereby giving them a further competitive benefit to the disadvantage of independent broadcasters.”¹⁷⁰ Thus, repeal of the radio cross-ownership rules would further squeeze out stations currently controlled by women and people of color as well as limit opportunities for new entry.

The FNPRM acknowledges that *UCC et al.* and other commenters criticized the Commission for proposing to relax the radio cross ownership rules “without first determining that there will be no negative impact on minority and female ownership.”¹⁷¹ In response, it states:

We have considered carefully whether there is evidence in the current record that elimination of the radio/television cross-ownership rule would likely adversely affect minority and female ownership, and we believe, as discussed below, that the current record does not establish that such harm is likely. Furthermore, we do not believe that record evidence shows that the 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.¹⁷²

The FNPRM then adds, without any citation, that the “current record does not suggest that minority/female-owned radio stations contribute more significantly to viewpoint diversity than other radio stations.”¹⁷³

UCC et al. strongly disagree with the Commission’s characterization of the current record. Indeed, most of the studies discussed above are already in the record, and there are others as well. Moreover, if the Commission’s unsupported claim that stations owned by women and people of color do not contribute to diversity more than other radio stations were true, it

¹⁷⁰ *Id.* App. D at ¶56.

¹⁷¹ *FNPRM*, at ¶222 (citing NABOB 323 Report Comments at 2-3; Free Press NPRM Comments at 9-10; NALIP NPRM Reply at 1-2; and CWA NPRM Reply at 6).

¹⁷² *Id.* at ¶222.

¹⁷³ *Id.* at ¶223.

would fundamentally undermine the entire rationale for the Commission’s long standing efforts to “foster diversity” in terms of ownership by women and people of color.¹⁷⁴

The Commission does not cite any studies showing that radio stations owned by women or people of color do not contribute to diversity. Instead, it asserts that “radio/television cross-ownership combinations were not the focus of the commenters’ concerns in response to the [2010 QR] NPRM,” and that “no commenter . . . presented empirical data or other analyses that established that repeal of this rule would harm . . . diversity in local markets.”¹⁷⁵ This language evidences a complete misunderstanding of the legal standard in Section 202(h).

In *Prometheus I*, the Court explained that in conducting its “periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis.”¹⁷⁶ Thus, because the Commission found that the radio cross-ownership rules promoted diversity when it adopted them and found that they served the public interest in promoting diversity in the 2006 QR,¹⁷⁷ commenters are not required to show that repeal of the radio cross-ownership rules would *harm* diversity for the Commission find they continue to serve the public interest. To place this burden on commenters is plainly inconsistent with the Court’s rejection of this flawed argument that claims Section 202(h) operates “only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations.”¹⁷⁸

¹⁷⁴ *Id.* at ¶¶245-48.

¹⁷⁵ *Id.* at ¶223.

¹⁷⁶ *Prometheus I*, 373 F.3d at 395; *see Prometheus II*, 652 F.3d at 445 (quoting *Prometheus I*).

¹⁷⁷ 2006 QR, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, ¶82 (2006).

¹⁷⁸ *Prometheus I*, 373 F.3d at 394.

3. The public must receive meaningful notice when stations request a waiver of the newspaper-broadcast cross-ownership rule.

UCC *et al.* support the Commission’s tentative conclusion that “a general prohibition on newspaper/television combinations in all markets is the appropriate starting point when considering the impact of newspaper/television cross-ownership on viewpoint diversity.”¹⁷⁹ They also agree with tentative conclusion that full power television stations and major newspapers are the only “voices” that should be included within the definition of major media voices¹⁸⁰ and that the “four factor test” should not be utilized.¹⁸¹

Whatever waiver standard the Commission adopts, UCC *et al.* stress that it is essential that members of the public have an opportunity to comment on whether a waiver would be in the public interest. The public cannot participate if it is not aware of a waiver request. The Commission properly acknowledges the need for public comment.¹⁸² However, it does not explain how the public will be apprised of any waiver requests. Public interest commenters have already provided detailed suggestions for what is necessary for adequate notice.¹⁸³

The FNPRM also appropriately recognizes that there is a problem when a newspaper publisher purchases a broadcast station in the same area and public has no opportunity to comment on the waiver request until many years later, after the operations have been merged.¹⁸⁴ For this reason, UCC *et al.* support the proposal to require that such waiver requests be filed with the Commission, put on public notice, and acted upon prior to any acquisition.

¹⁷⁹ *Id.* at ¶152.

¹⁸⁰ *Id.* at ¶181.

¹⁸¹ *Id.* at ¶184.

¹⁸² *Id.* at ¶153.

¹⁸³ *See, e.g.*, Mar. 5, 2012 Comments of Media Access Project and Prometheus Radio Project, at 6-10, 2010 QR, MB Dkt. 09-182.

¹⁸⁴ FNPRM, at ¶153.

Conclusion

The Commission must act quickly to require disclosure of SSAs in ways that help the public and the Commission assess the validity and prevalence of these agreements. The Commission must also improve its collection and analysis of data in order to comply with the Third Circuit's remand. Last, the Commission should not relax any of its media ownership rules at this time, especially given the likely significant impact of the incentive auction.

Respectfully submitted

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