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

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 HAWAI`I
PROMETHEUS RADIO PROJECT
MEDIA MOBILIZING PROJECT

Angela J. Campbell
Andrew Jay Schwartzman
Eric G. Null
Aaron Mackey
Institute for Public Representation
Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535
Counsel for UCC, et al.

Dated: September 8, 2014

Table of Contents

Summary

The FCC has broad statutory authority to administer the Quadrennial Review under Section 202(h). Broadcasters' claim that this provision contains a "presumption in favor of deregulation" has been rejected by both the Third and D.C. Circuits, In doing so, both circuits have also held that the public interest standard is the appropriate standard for FCC determinations of whether to retain, modify, or repeal a regulation. This standard does not pose an "impossible" burden as the NAB argues, but is appropriately flexible and provides the FCC sufficient latitude to make its "necessary in the public interest" determinations.

In the *Further Notice of Proposed Rulemaking* ("FNPRM"), the FCC gives proper consideration to the record regarding non-broadcast media such as the Internet and cable, but reasonably and correctly concludes the growth of other media is not relevant in this proceeding. UCC, *et al*. argue that Internet and cable news sources simply do not respond to local needs in the same or similar ways as broadcasters. Further, studies have shown and parties have not refuted that most online local news originates from traditional media sources.

UCC, *et al*. agree with the FCC that the local television duopoly rule remains in the public interest. It follows that the FCC must insure that the rules are properly forced and not evaded. SSAs, which have been used to circumvent the media ownership rules and the local television rule in particular, should be made attributable and disclosed immediately. The FCC has established a regulatory need for the disclosure, and it should reject attempts to cast doubt on that need. Disclosure of mere lists of SSAs is insufficient, does not serve the same purpose, and would not bring about the same benefits as full disclosure; that suggestion must also be rejected. Further, the FCC has ample public interest and record-keeping authority to require disclosure of SSAs and should not hesitate to use that authority. It should move swiftly to require disclosure and immediately analyze and review the agreements to establish an attribution standard in the 2014 Quadrennial Review.

The proposed affiliation swap rule in no way implicates the First Amendment. It is a content-neutral regulation of competition in the local marketplace; its primary concern is the structural make-up of the local broadcast television market. The rule does not refer to content at all, much less single out specific content for special treatment. UCC, *et al*. argue the FCC's authority for the proposed affiliation swap rule comes from its broad authority to regulate in the public interest, and not exclusively from Section 310(d) as argued by Raycom.

UCC, *et al*. strongly believe the failing/failed station waiver should not be relaxed. The waiver is meant to be used only in extreme circumstances where a failing or failed station cannot find a suitable out-of-market buyer. In that limited case, the FCC will grant a waiver and will approve the purchase of a station by a direct, local competitor to prevent the station from going dark. NAB's arguments to relax the rule should be rejected. Not only does a relaxed rule further subvert the local television duopoly rule and the recently-enacted JSA rule, but it will raise even more barriers to entry to the local broadcasting market and will have a detrimental impact on station ownership by women and people of color. In particular, UCC, *et al*. disagrees that the three-year negative cash flow requirement should be relaxed. Broadcast revenues are cyclical, and reducing the three-year requirement to a one-year requirement would allow a station that is not actually failing to be sold to an in-market buyer in a non-election year. This would not serve the public interest.

UCC, *et al*. disagree with the FCC and various broadcast commenters; UCC, *et al*. believe the radio cross-ownership rules remain necessary to promote viewpoint diversity. Many commenters repeat the errors made by the FCC in the FNPRM by conflating localism (the production of programming that meets local needs, such as local news) with viewpoint diversity (the representation of multiple viewpoints in the same local market). Relaxing the cross-ownership rules will encourage consolidation. Viewpoint diversity suffers when there is increased consolidation without regard to whether the stations provide local news. There are many examples that exemplify this, including the very examples used by broadcasters for the apparent purpose of showing that station combinations promote viewpoint diversity. Newsroom sharing, such as has been the case with KPNX-TV the *Arizona Republic* in Phoenix, directly undermines viewpoint diversity. UCC, et al. disagree that repealing cross-ownership rules will promote investment in those combinations; the marketplace suggests otherwise, given the recent divestitures of major newspaper and TV brands including Media General, Gray, Tribune Company, Gannett, and E.W. Scripps.

Last, the FCC must address station ownership by women and people of color. No commenters claimed that such ownership was sufficient as it currently stands. Proposals to fix the problem, however, varied. UCC, *et al*. continue to believe that race- and gender-neutral proposals will not solve the problem. The small-business definition of eligible entity was found arbitrary and capricious because the FCC could not prove a connection between ownership by women and people of color and small businesses, and thus proposals for its reinstatement are similarly flawed. Other proposals suffer from the same problems because many require a definition of "qualifying business" that would have to support ownership by women and people of color. Commenters have not proposed definitions that would encourage anything but the status quo. Relaxing the media ownership rules even further would simply exacerbate the problem by allowing entrenched incumbents to purchase more stations and take away more opportunities from woman and people of color. The FCC must get serious about this issue now by determining the most effective tools for increasing such ownership and develop a record to support its actions.

COMMENTS

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 Project ("UCC, *et al*.") file these reply comments in response to the comments to *Further Notice of Proposed Rulemaking, 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371 (rel. Apr. 15, 2014) ("FNPRM").

I. Section 202(h) provides the FCC with broad authority and NAB's attempt to cast it in a deregulatory light should be rejected.

NAB begins its comments with an effort to confuse the FCC by suggesting that the FCC does not have broad discretion in administering the Quadrennial Review. It advances the position that Section 202(h) of the Telecommunications Act of 1996 "'carries with it a presumption in favoring of repealing or modifying the ownership rules,' as the D.C. Circuit Court of Appeals has twice held."[2] It "acknowledge[s], of course, the less stringent formulation offered by the Third Circuit" in *Prometheus Radio Project v. FCC* ("*Prometheus I*"), and suggests that there is a conflict between the circuits.[3]

There is no such conflict. The "presumption" to which NAB referred was in fact relating to the remedy to be afforded only after a determination that a particular FCC rule was no longer "necessary in the public interest." In its comments, NAB quotes from the initial *Fox* decision

---

[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] NAB Comments at 3 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 ("*Fox I*"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"), and citing *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002)).

[3] *Id.* (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (D.C. Cir. 2004) ("*Prometheus I*")).

("*Fox I*"), and also refers to the D.C. Circuit's *Sinclair* decision, but ignores the fact that the *Fox I* decision was subsequently modified on rehearing, and NAB does not even mention the D.C. Circuit's later *Cellco* decision that definitively clarified the scope of Section 202(h).[4] The *Fox* rehearing decision ("*Fox II*"), which came after the *Sinclair* decision was issued, clarified the language upon which NAB relies.[5] The D.C. Circuit discussed this sequence in *Cellco,* stating that

> [t]he court's observation in *Fox I* about the presumption created by the 1996 Act only came after the court had concluded that the Commission's explanation for its action could not withstand arbitrary and capricious review, and the question became the selection of the appropriate remedy for the court to impose: vacate the regulation or remand the case to afford the Commission another opportunity better to explain its action. *Id.* at 1044, 1048. While *Sinclair* piggybacked on *Fox I*, the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations when considering a substantive challenge to the adequacy of the Commission's determinations. *Sinclair*, 284 F.3d at 159; *see also id.* at 171 (Sentelle, J., concurring and dissenting in part).[6]

Far from creating a conflict, the Third Circuit in *Prometheus I* cited the D.C. Circuit's holdings favorably:

> the *Cellco* Court rejected suggestions that the Commission's interpretation was inconsistent with its prior decisions in *Sinclair* and *Fox*. As noted above, *Sinclair* did not expressly adopt any particular definition of "necessary" and *Fox I*'s suggestion of a heightened standard was expressly retracted by *Fox II*, 293 F.3d at 540. *Cellco* limited *Fox I*'s statement that "necessary" implied a presumption in favor of modification or elimination of existing regulations, *see* 280 F.3d at 1048, to the context in which it was made: discussing whether vacating or remanding the national television ownership rule was the appropriate remedy. *Cellco*, 357 F.3d at 98. And while *Sinclair* apparently endorsed this language from *Fox I*, see 284 F.3d at 159, the *Cellco* Court characterized

---

4 *Cellco P'ship v. FCC,* 357 F.3d 88 (D.C. Cir. 2004).

5 *Fox*, 293 F.3d at 541.

6 *Cellco*, 357 F.3d at 98.

> *Sinclair* as merely "piggyback[ing]" on *Fox I* without "adopt[ing] a general presumption in favor of modification or elimination of regulations when considering a substantive challenge to the adequacy of the Commission's determinations." *Cellco*, 357 F.3d at 98.[7]

NAB further argues that, regardless of whether there is a presumption in favor of deregulation, the FCC adopts an "impossibly high[] standard of standard of review to its existing cross-ownership rules."[8] It implies, without expressly stating, that the FCC either must find that an existing rule is "essential" or must repeal or modify the rule. NAB further says that "[i]t is plainly impossible for parties to advocate successfully for repeal or modification of the broadcast rules when the Commission's standard of review is so heavily weighted in favor of retaining the rules."[9] Both the Third Circuit and the D.C. Circuit, however, have held that the traditional public interest standard, which gives the FCC broad latitude, is the correct standard. Both further held that the term "necessary" in Section 202(h) does not mean "essential" or "indispensible," but rather "convenient," "useful" or "helpful." Thus, in *Prometheus I*, the Court said

> interpreting §202(h)'s first sentence to require the Commission to review its rules to determine whether they are indispensable in the public interest would lead to incongruous results when compared to the instruction in §202(h)'s second sentence, which requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." For the "determine" instruction to be meaningful, "necessary" must embody the same "plain public interest" standard that Congress set out in the "repeal or modify" instruction. Lastly, as explained by the *Cellco* Court,

[7] *Prometheus I*, 372 F.3d at 393.

[8] NAB Comments at 7 (citation omitted). The case cited for this proposition, *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991), is inapposite. In that case, the administrator for the Drug Enforcement Administration, in deciding whether to recategorize marijuana as a Schedule II drug, said that it would first have to take into account, among other things, the "[g]eneral availability of the substance and information regarding the substance and its use." *Id.* at 938. Because marijuana was a Schedule I drug, and thus tightly regulated and controlled, this standard was "impossible" to meet. The media ownership context is not the same; broadcasters do not need to meet a standard that is impossible because it is illegal. A high standard is not an impossible one.

[9] NAB Comments at 7.

> the "convenient," "useful," or "helpful" definition of "necessary" is not foreclosed to the Commission by any judicial precedent, including *Fox* and *Sinclair*. So in interpreting the Commission's obligation under §202(h) to review its broadcast media ownership rules to determine whether they are "necessary in the public interest," we adopt what the Commission termed "the plain public interest" standard under which "necessary" means "convenient," "useful," or "helpful," not "essential" or "indispensable."[10]

Court precedent is congruous. The FCC has broad authority to retain, modify, or repeal its media ownership rules.

II. The FCC has given proper consideration to non-broadcast media and has correctly decided that the existence of non-broadcast media does not necessitate relaxation or repeal of the media ownership rules.

In their comments, broadcasters discussed at great length the changed media landscape. NAB, for example, argued that consumers receive their news from a plethora of sources, including online sources, and consumers now curate their own news and, as a result, do not need to rely on broadcasters.[11] Nexstar claimed the media environment is now "hypercompetitive."[12] Stainless argued that it is inconsistent for the FCC to recognize the growth of the Internet in other proceedings but to ignore the very same growth in the FNPRM.[13]

UCC, *et al*. believe that the FCC has properly considered the growth of the Internet and other non-broadcast media in the 2014 Quadrennial Review.[14] The FCC found that "[t]he

[10] *Prometheus I*, 372 F.3d at 393-394.

[11] NAB Comments at 18-28.

[12] Nexstar Comments at 11.

[13] *See* Stainless Comments at 2-3.

[14] The FCC has broad authority in making market-based findings. In *Prometheus I*, the Third Circuit stated, in reference to whether non-broadcast media represented "voices," that "we leave it for the Commission to demonstrate that there is ample substitutability from non-broadcast media to warrant [the media ownership rules.]" 373 F.3d at 415. The *Prometheus I* court agreed with the FCC at the time that the Internet was "limited . . . as a source of local news." *Id.* In *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*"), in response to the same argument from NAB, the court again agreed with the FCC, stating that the FCC has not "ignore[d] the 'explosion[] of media outlets in the industry; it simply concluded that, despite these changes, the rule remained 'necessary in the public interest to protect competition.' " 652

proliferation of broadband Internet connections . . . have changed the ways in which many consumers access . . . programming. Yet traditional media outlets are still essential to achieving the Commission's goals of competition, localism, and viewpoint diversity. . . ."[15] The FNPRM discussed the growth of non-broadcast media in, for example, paragraphs 2-6 and 19-25, and found that "the overwhelming majority of local news content available online originates from newspapers and local broadcast television stations."[16] This finding is consistent with Media Ownership Study 6 in the 2010 Quadrennial Review, which found that most sources of local news on the Internet came from television broadcasters and newspapers themselves, not from independent, Internet-only local news websites.[17] No commenters have presented contrary evidence. Further, the fact that the FCC has changed other rules in response to the growth of the Internet does not mean that the Commission's conclusions here are arbitrary. It merely reflects that the growth of the Internet is relevant in some contexts and not others.

Thus, the FCC did not ignore non-broadcast media; it analyzed the record and reasonably concluded that non-broadcast media outlets still do not represent independent sources of local news. This is in part because online local news comes primarily from broadcasters who, as stated by one group of broadcast commenters, provide a "unique local service that is unavailable elsewhere."[18]

F.3d at 459.

[15] *2014 Quadrennial Review, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371, ¶2 (2014) ("FNPRM") (emphasis added) (citation omitted).

[16] FNPRM, at ¶2.

[17] Matthew Hindman, Media Ownership Study 6, *Less of the Same: The Lack of Local News on the Internet*. "[T]here is little evidence in this data that the Internet has expanded the number of local news outlets." *Id.* at 11.

[18] Comments of Coalition of Smaller Market TV Stations at 6; *see also* FNPRM, at ¶23.

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

The FCC has tentatively concluded, correctly, that the local television rule remains necessary in the public interest. First, NAB was incorrect when it argued the FCC has not defined "competition" for purposes of the Quadrennial Review. Second, the FCC should not allow broadcasters to circumvent the local television rule through use of various loopholes. Third, the FCC should retain the current failing/failed station waiver standards.

A. The FCC has already defined competition for purposes of the Quadrennial Reviews.

NAB argued that there is "no plainly understandable – and perhaps more important, an accurately measurable – definition of competition."[19] It argued that the term has become an "empty construct," and has become a "talisman[] incanted to maintain the status quo despite clear evidence of a need for change."[20]

This statement is simply wrong. The FCC has clearly identified what competition is and the benefits expected from competition in local markets:

> [T]he "eight voices" test will ensure that each market includes four stations affiliated with the four major networks in each market (i.e., ABC, NBC, CBS, and Fox), plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network. Preserving the independent ownership in each local market of four stations that are neither owned by or affiliated with a major network nor commonly owned with a network affiliate in that market *will help to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming*. Recognizing the vital competitive role played in local television markets by stations that are not owned by or affiliated with the major networks' stations, we believe that it is important that there be a sufficient number of such stations that are truly independent of the major network stations in each market and that will therefore vigorously compete with each of the major network stations for viewers. Such vibrant

---

[19] NAB Comments at 40.

[20] *Id.*

> competition will improve the programming aired by both independent stations and major network stations.[21]

Thus, the FCC is concerned with more than the price of advertising or television viewership; it is concerned with ensuring the existence of markets where multiple stations compete to provide "dynamic and vibrant alternative fare" and as a result, multiple stations compete to serve local needs—a justification that was upheld in *Prometheus II*.[22] Accordingly, non-broadcast media outlets could be deemed competitors to broadcasters if those outlets begin to provide "dynamic and vibrant alternative fare" that includes independent local news and programming. Nevertheless, commenters have failed to provide evidence that cable and Internet programming responds to local needs in the same or similar way that broadcasters do.

Thus, competition has been defined rationally and the local television rule remains necessary to promote the important competition rationale.

B. Broadcasters should not be allowed to continue exploiting loopholes in the local TV rule.

Because the local television rule is necessary in the public interest, the FCC must take action to prevent broadcasters from circumventing the ownership rules through shared service agreements ("SSAs") and affiliation swaps.

1. SSAs are used to circumvent the ownership rules and should be attributed.

UCC, *et al*. disagree with NAB that full disclosure of SSAs is unnecessary and unrelated to a regulatory need. The FCC should require SSA disclosure as soon as possible.

[21] *2006 Quadrennial Review, Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, ¶99 (2008) (emphasis added) (citations omitted).
[22] *Prometheus II*, 652 F.3d at 459.

a. The proposed SSA disclosure definition is reasonable.

UCC, *et al*. believe the proposed SSA definition for purposes of disclosure is reasonable, and disagree with NAB's argument that the proposal is not tied to a regulatory problem.[23] UCC, *et al*. also believe that whether the rule overlaps with other rules is irrelevant.

In requiring SSA disclosure, the relevant regulatory problem and proposal to fix that problem could not be clearer. Several 2010 Quadrennial Review commenters raised serious questions about SSAs and their implications for the FCC's localism, competition, and diversity goals.[24] The FCC, however, determined that "[c]onsideration of these issues is impeded because so little is known about the content, scope, and prevalence of sharing agreements."[25] The FCC decided to "define SSAs broadly enough to capture all types of resource sharing and collaboration that may take place between stations as the best means to inform the public and the Commission about the scope of any joint activities between stations."[26] With this information, the FCC will be able to make an informed decision about whether and how to regulate sharing agreements.[27] Thus, the FCC has identified a problem, its own lack of knowledge of these agreements, and the solution is to require disclosure of these agreements to acquire that knowledge. The newly-disclosed agreements will likely provide the basis for future regulation, though the FCC does not need to predict the specific regulation it might impose before it studies the agreements.

There is no alternative way for the FCC to find this information. No independent database of SSAs exists. Even NAB's own economists relied on SSAs voluntarily disclosed to them, though those broadcasters remained anonymous.[28] Outside of those agreements, NAB's

---

[23] NAB Comments at 95.
[24] FNPRM, at ¶328.
[25] *Id.* ¶328.
[26] *Id.* ¶329.
[27] *Id.* ¶329.
[28] NAB Comments, Attachment A at 13-14.

economists relied on (1) agreements used in station transactions requiring FCC approval, and (2) agreements made public in SEC filings. Dates on which the agreements became effective were not identified for agreements used in FCC-approved transactions, making timing determinations difficult for the study's authors. NAB's economists actually had access to more information than the FCC does. This information asymmetry makes it impossible to independently verify the adequacy of NAB's study, and therefore should not provide the basis for a change in the FCC's analysis or rules.

The logic of NAB's argument is exactly backwards: NAB seems to argue that before the FCC can require disclosure, it must tie the practices—of which the FCC does not know—to a regulatory violation that may not exist yet. It is logical that before the FCC determines how to attribute these agreements, it would require disclosure to allow for review and analysis.

Whether the proposed disclosure requirement overlaps with other rules is irrelevant. Agreements are either disclosed or not disclosed. For example, a JSA that has to be disclosed under the JSA disclosure rule does not need to be disclosed again under the SSA proposal. The FCC should not relax its proposal simply because a broader rule may overlap with a narrower rule.[29]

The FCC's proposal actually simplifies and streamlines the disclosure process. Currently, broadcast stations must decipher complicated disclosure rules to determine whether their agreements must be disclosed.[30] With the proposed rule, no such analysis would be required: if stations share resources or one provides resources to another, that agreement must be disclosed regardless of whether it is attributable or whether it meets a certain threshold. This greatly simplifies the process while providing the public benefit of disclosure of these important agreements.

[29] Broadcasters could ask the FCC to repeal the current, complicated set of disclosure rules in exchange for the broader, simpler proposal.
[30] NAB analyzed some of these issues in its comments. NAB Comments at 99-100.

b. Requiring broadcasters merely to list their SSAs is not sufficient.

NAB argued that the FCC must consider alternative rules, and proposes that instead of full disclosure, the FCC should require disclosure of only aggregate lists of sharing agreements.[31] This alternative would not serve the proposed rule's intended purpose.

As an initial matter, the FCC is under no obligation to consider alternatives: "the fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational."[32] As already discussed above, it is quite rational for the FCC to identify an area where it lacks information and then seek additional information through disclosure. Moreover, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) ("*State Farm*") does not support NAB's assertion. *State Farm* requires agencies to consider only "significant alternatives," that "appear[] to serve precisely the agency's purported goals."[33] NAB's aggregate list proposal is not a significant alternative that would serve precisely the agency's purported goals. The problem the FCC identified is that "so little is known about the content, scope, and prevalence of sharing agreements."[34] The goal is to "improve[] understanding of how stations share services and resources."[35] Aggregate lists do not supply information about the "content [or] scope" of the agreements and would contribute little to the FCC's understanding of the agreements.

NAB's claim that the FCC's proposal might cause broadcasters to reveal sensitive business information is no reason to abandon the disclosure requirement. Under the Communications Act, the FCC may only grant or renew a broadcast license if it is in the public

---

[31] *Id.* at 104-05.

[32] *Association of Public-Safety Communications Officials v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996) (citing *Loyola University v. FCC*, 670 F.2d 1222, 1227 (D.C. Cir.1982)).

[33] *United Church of Christ v. FCC*, 779 F.2d 702, 707, 714 (D.C. Cir. 1985). The FCC is also not required to be "clairvoyant and to anticipate alternatives" not suggested in the proceedings. *Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987).

[34] FNPRM, at ¶328.

[35] *Id.*

interest. SSAs, as indicated by 2010 Quadrennial Review commenters and the FCC in the FNPRM, implicate the public interest in a significant way. The FCC needs to know about the content and prevalence of these agreements to determine whether a grant is in the public interest.[36]

NAB's proposal creates an impossible burden on the public. The FCC relies on the public to police broadcasters and to meaningfully participate in the license renewal process. NAB's aggregated list proposal cannot possibly provide the basis for a petition to deny a license renewal, which requires alleged facts that, if true, would constitute a prima facie rule violation of the station's public interest obligations.[37] The courts have long dismissed the idea that the public should be required to privately monitor stations to document a petition to deny: "this court [thinks] that reliance on . . . private monitoring [is] 'beyond belief.'"[38]

c. The FCC has authority to require SSA disclosure.

NAB, citing the 1942 case of *Stahlman v. FCC*, argued that the FCC lacks authority to enact its proposed SSA disclosure rule.[39] NAB further maintained that the record-keeping authority is not sufficient to uphold this broad disclosure requirement.[40]

The FCC has broad authority to require disclosure of SSAs, and that authority was reaffirmed early in the FCC's existence in *Stahlman*. Section 303(r) gives the FCC authority to carry out its public interest obligations under the Communications Act. Section 309(a) requires the FCC to determine whether a grant of license is in the public interest, convenience, and

---

[36] In the extreme case where actual competitive harm will result from disclosure of certain information, the licensee may seek confidential treatment.
[37] *UCC v. FCC*, 779 F.2d at 708.
[38] *UCC v. FCC*, 779 F.2d at 710 (citing *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1441-41 (D.C. Cir. 1983) ("That the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a prima facie case in [petitions to deny] seems almost beyond belief.")).
[39] NAB Comments at 102 (citing *Stahlman v. FCC,* 126 F.2d 124, 128 (D.C. Cir. 1942)).
[40] *Id.* at 101-102.

necessity. Whether a grant would be in the public interest requires analysis of any relevant SSAs, whether created as part of a transaction or transferred with the license. Without complete information, the FCC cannot make its fundamental public interest determinations.

The D.C. Circuit's 1942 opinion in *Stahlman* supports the FCC's authority to require broad SSA disclosure. At issue in the case was a hearing, called by the FCC, on certain topics regarding the association of newspaper owners and radio station owners. The FCC sought specific information from the owner of a Nashville newspaper:

> the past and present relations between the radio industry . . . and the newspaper industry and press services . . . with respect to the joint association of newspapers and radio stations. . . the arrangements made in the past for broadcasting of news, the part played by radio stations associated with newspapers in that respect, the availability of newspaper reports for broadcasts, the collection of news for radio broadcasting, and other related matters . . . .[41]

The court also stated that

> [i]n the Communications act . . . full authority and power is given to the Commission with or without complaint to institute an inquiry concerning questions arising under the provisions of the Act or relating to its enforcement. *This, we think, includes authority to obtain the information necessary to discharge its proper functions*, which would embrace an investigation aimed at the prevention or *disclosure* of practices contrary to the public interest.[42]

The court concluded that essentially all of the information requested was "clearly within the inherent powers of the Commission."[43] Moreover, it was "within the administrative powers of the Commission to initiate the proposed investigation for the purpose of ascertaining the facts for its guidance in making reasonable and proper public rules, for application to existing stations, and in the consideration of future requests."[44] Therefore, the *Stahlman* rationale supports the

---

[41] *Stahlman*, 126 F.2d at 126.
[42] *Id.* at 127 (emphasis added).
[43] *Id.* at 128.
[44] *Id.*

FCC's authority over disclosure because the FCC is obtaining information necessary to discharge its functions, including requiring disclosure of practices likely contrary to the public interest.

Section 303(j), which affords record-keeping authority to the FCC, provides a separate basis for broad disclosure of SSAs. It gives the FCC broad authority to require stations to disclose records relating to programming, which are implicated in SSAs. The court in *UCC v. FCC* stated bluntly that "[t]here is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate."[45]

It is without question the FCC has authority to require disclosure of SSAs.

2. The affiliation swap rule is simply an extension of the top-four prohibition, and the FCC has authority to prevent them.

Raycom opposed the FCC's rule preventing affiliation swaps on at least two grounds. The first is that there are First Amendment implications to preventing two stations from swapping network affiliation. The second is that the FCC does not have authority to prevent affiliation swaps because the rule operates outside the FCC's authority under Section 310(d). UCC, *et al*. disagree.

a. The affiliation swap rule does not regulate content and therefore does not implicate the First Amendment.

The affiliation swap rule does not censor or regulate content and thus does not implicate the First Amendment. The rule is a content-neutral regulation of competition in local broadcasting markets. The proposed rule states that "any party that has control over two top-four stations in the same DMA as a result of [swapping affiliations will] be in violation of the top-four prohibition and [will be] subject to enforcement action."[46] On its face, the rule makes no

[45] *UCC v. FCC*, 779 F.2d at 707. Section 308(b) also provides the FCC relevant authority. It gives the FCC authority to require licensees or applicants to disclose facts "bearing on the question whether their licenses should be revoked." *Kay v. FCC*, 396 F.3d 1184, 1185 (D.C. Cir. 2004).

[46] FNPRM, at ¶49.

reference to content. Indeed, as the Third Circuit found in *Prometheus II*, "[the media ownership] rules apply regardless of the content of programming."[47] The rule targets only a mechanism with which stations circumvent the top-four prohibition. The FCC has a strong interest in closing this loophole because the top-four prohibition "remains necessary to promote competition in the local television marketplace."[48] Just as the top-four rule does not violate the First Amendment, neither does the affiliation swap rule.

The FCC is allowed to recognize and interest itself in the activities of broadcasters.[49] Indeed, the Supreme Court upheld the constitutionality of the FCC's regulation of the relationship between networks and affiliates more than 70 years ago.[50] The FCC, in this case as with previous cases, "is not ordering any program or even any type of program to be broadcast."[51] The FCC is also free to impose "very real restraint[s] on licensees" when a rule is designed "to open up the media for those whom the First Amendment primarily protects – the general public."[52] Preventing affiliation swaps accomplishes this end by preventing multiple top-four networks from coming under the same owner in a local market, which would present

[47] *Prometheus II*, 652 F.3d at 465. The courts have also upheld the top-four rules generally: *Prometheus II*, 652 F.3d at 460-61 (citing *Prometheus I*, 373 F.3d at 417-18, also upholding the top-four rule).
[48] FNPRM, at ¶41.
[49] *National Ass'n of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975) ("Commission surely cannot do its job . . . without interesting itself in general program format and the kinds of programs broadcast by licensees.").
[50] *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).
[51] *Id.* at 537.
[52] *Id.* at 531-32. *See also Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 478 (2d Cir. 1971) ("To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . . Thus, while the rule may well impose a very real restraint on licensees, . . . as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects – the general public.").

serious localism, diversity, and competition concerns that the top-four prohibition is designed to prevent.

Courts have consistently held that the FCC can take affirmative efforts to promote diversity of programming.[53] What is of interest to the FCC in preventing affiliation swaps is not whether *American Idol* or *The Voice* is on Fox or NBC, nor does the FCC claim that one or the other serves the market better; the FCC cares only that both Fox and NBC are top-four broadcasters and that one owner does not end up controlling both through an affiliation swap.

b. The FCC has authority to regulate affiliation swaps.

The FCC should also reject Raycom's argument that the affiliation swap rule is an "end run around the plain language of Section 310(d)" because, as Raycom claims, Section 310(d) gives FCC authority over only license transfers and assignments.[54]

The authority to regulate affiliation swaps does not come from Section 310(d), which concerns license transfers and assignments. It comes from the FCC's authority to have media ownership rules in the first place. The FCC requires licensees to have certain structural characteristics, which includes ownership limitations. Affiliation swaps are simply an attempt to get around the top-four prohibition. The FCC has authority to enforce its rules and to prevent station owners from owning two top-four stations in the same market, no matter how the owner acquired the affiliations.[55]

---

[53] *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 595-96 (1981) ("The Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. . . . Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference."), *upholding Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order*, 60 FCC2d 858 (1976) ("The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio . . . .").

[54] Raycom Comments at 2.

[55] The FCC could also require early filing of license renewal applications for stations that swapped affiliations. *See* 47 CFR §73.3539(c).

Raycom also argues that the FCC stated in 1999 that owners will not be forced to divest if commonly-owned stations become top-four stations subsequent to a transaction. It would be irrational to interpret that language as endorsing affiliation swaps given that they accomplish the exact same end that the top-four prohibition was intended to prevent. As the FCC stated in adopting the top-four prohibition, "[t]he 'top four ranked station' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns." [56] Affiliation swaps, which explicitly allow two of the largest stations in a market to combine, present exactly those concerns.

The FCC has ample authority to prevent affiliation swaps.

C. The FCC should not relax the failing/failed station waiver.

UCC, *et al*. also disagree with NAB's argument that the FCC should relax the failing/failed station waiver to "help financially struggling stations to maintain a significant local presence."[57]

The failing station waiver is designed to "ensure that all out-of-market buyers, including qualified minority and female broadcasters, have notice of, and the opportunity to bid for, a station before it is combined with an in-market station. . . . Station licensees that successfully sell a station to an out-of-market buyer do not require a failed/failing station waiver . . . ."[58] The multiple, separate waiver requirements ensure that out-of-market buyers are given this opportunity.

UCC, *et al*. believe that the current failing/failed station rule showing is appropriate. Without strict rules, in-market owners will have more opportunities to buy stations that are not

[56] *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, 14 FCC Rcd 12903, ¶66 (1999) ("*1999 Order*").
[57] NAB Comments at 59.
[58] FNPRM, at ¶300 n.917.

necessarily failing with the goal of removing competing stations from the market.[59] Further, relaxing the rule privileges existing owners over new entrants, and would significantly increase the barriers to entry. A failing station waiver with a low burden defeats the purpose of the local television ownership rule. Additionally, an easy failing station waiver undermines the purpose of the JSA attribution rule as well. It would also further reduce station ownership opportunities for women and people of color.

UCC, *et al*. are particularly opposed to NAB's proposal to reduce the three-year negative cash flow requirement to one year. Broadcasting is a cyclical business. In particular, revenue is high in years with elections and comparably lower in years without elections. Thus, allowing stations to prove only one year of negative cash flow would allow a station that is not actually failing to be purchased by another in-market station during a non-election year.

The FCC should not relax the failing/failed station rule.

IV. The cross-ownership rules are necessary to promote diversity.

Numerous commenters supported repealing the FCC's radio-television, radio-newspaper, and newspaper-television cross-ownership rules.[60] The comments should be rejected because they either rely on the same flawed analysis the FCC set forth in the FNPRM or are based on logical or factual errors.

[59] "A 'failing' station standard . . . will involve . . . [a determination of] when a station is struggling to such an extent that permitting it to merge with another station will not undermine our competition and diversity goals and may in fact promote them." *1999 Order*, 14 FCC Rcd at 12939.

[60] *See, e.g.* Comments of Bonneville International Corp. and The Scranton Times, L.P. ("Bonneville Comments"); Newspaper Association of America ("NAA Comments"); NAB Comments; Delmarva Broadcasting Co. ("Delmarva Comments"); Morris Communications Company, LLC ("Morris Comments"); Stephens Capital Partners ("Stephens Comments").

1. Commenters fail to understand the rationale supporting the radio cross-ownership rules.

Commenters such as Bonneville argued that the newspaper/radio cross-ownership restriction should be repealed because its viewpoint diversity rationale has been undercut by the reality "that radio stations do not produce significant amounts of news."[61] But as UCC, *et al*. argued in its comments, the FCC and commenters are wrongly conflating two distinct concepts — localism and viewpoint diversity — to justify repeal of the rule.[62] The FCC's analysis is fundamentally flawed because whether radio stations produce local news (localism) is completely distinct from whether there is viewpoint diversity, which is more broadly concerned with whether there are multiple voices present in communities.[63] The distinction is important in this context because the FCC's justification for the cross-ownership restriction is viewpoint diversity, not localism.[64] The amount of news produced by radio is not determinative in assessing whether the radio/newspaper cross-ownership rule remains necessary to promote viewpoint diversity. Therefore, to the extent that commenters rely on decreasing radio news production to argue for repeal of the rule, those arguments must be rejected for failing to properly comprehend what viewpoint diversity entails.[65]

The proper inquiry into whether the radio cross-ownership rules should be maintained is therefore whether eliminating the rules would result in fewer voices available in communities. Repealing the rule would allow for consolidation among radio stations and television stations or newspapers, which by its very definition decreases the number of voices in communities. Thus,

---

[61] Bonneville Comments at 5-7; *see* Morris Comments at 10-14; Delmarva Comments at 2-3; Stephens Comments at 3.
[62] UCC, *et al*. Comments at 30-39.
[63] *Id.* at 33-37.
[64] FNPRM, at ¶114 (citing *2002 Biennial Review Order*).
[65] Bonneville's reliance on FCC statements regarding radio station's declining contributions to local reporting therefore miss the point of viewpoint diversity. Bonneville Comments at 4. Similarly, Bonneville's reliance on surveys of radio station's declining production of local news must also be rejected. *See* Bonneville Comments at 5-6.

the rationale for maintaining the rules remains strong. The FCC should therefore reject commenters' calls to eliminate the rule and reverse its own tentative conclusions that doing so would be in the public interest.

2. Arguments touting benefits of cross-ownership are illogical.

Broadcast and media commenters advocating for repeal of the FCC's cross-ownership rules argued that relaxing or repealing them will create greater efficiencies but will not impact viewpoint diversity.[66] The arguments are illogical or unsupported by changes in the media industry.

a. Viewpoint diversity suffers when consolidation increases.

Newspaper Association of America ("NAA") pointed to several cross-owned television and newspaper operations to argue the benefits of repealing the cross-ownership rules while also stating that viewpoint diversity would not suffer because each outlet would "have independent editors and news directors who control the tone and direction of the news content."[67] But this claim is illogical, as the very purpose of cross-ownership is to consolidate operations under one owner, which directly results in a reduction in viewpoints. In fact, NAA's assertions are belied by its own examples; in Phoenix, KPNX-TV and the *Arizona Republic* share a newsroom.[68] In South Bend, Indiana, the South Bend Tribune, a CBS affiliate, and two radio stations "share valuable information as they investigate and gather news throughout the day,"[69] and "exchange daily story budgets early in the day" and reporters "share leads and news tips."[70]

Thus, despite NAA's claim that combined newspaper/broadcast organizations share only administrative and newsgathering resources, consolidation has extended into the newsrooms of

---

[66] NAB Comments at 70-72; NAA Comments at 11-18; CBS Comments at 7-8.
[67] NAA Comments at 3-10, 15.
[68] *Id.* at 3 ("In January 2011, KPNX and the *Republic* moved into a shared newsroom.").
[69] *Id.* at 6.
[70] *Id*.

jointly owned media outlets. The reality of how cross-owned newspapers and broadcast stations function directly undercuts commenters' arguments that relaxing the cross-ownership rules would not diminish viewpoint diversity. To the contrary, their own examples demonstrate that cross-owned operations combine newsrooms, decreasing the number of voices available in a community.

b. The current state of the industry undercuts the efficiency and investment arguments.

Commenters also argued that repealing the cross-ownership rules will create investment opportunities that will lead to an infusion of capital for both broadcast and newspaper industries.[71] The assumptions that combined print/broadcast media ventures will attract new investment are undercut by the reality that several large newspaper/TV companies, including Media General, Gray Gannett, Tribune Company, and E.W. Scripps — have divested or will soon be spinning off their print assets.[72] Gannett's divestiture of its newspaper holdings, in particular, refutes speculation that repealing the cross-ownership rules will create viable economic models or attract new investment, as the company operates one of the largest cross-owned newspaper/television combinations in Phoenix.[73] Further, the cross-ownership of the *Milwaukee Journal Sentinel* with television and radio stations WTMJ will soon end, as E.W. Scripps is purchasing Journal Communications and will then spun off the print assets into a new company.[74]

---

[71] NAB Comments at 83-84; Stephens Comments at 3-4.

[72] David Carr, *Print is Down, Now Out: Media Companies Spin Off Newspapers, to Uncertain Futures*, N.Y. Times (Aug. 11, 2014).

[73] Angela Gonzales, *How Gannett's split of broadcast, publishing could affect Arizona Republic, Channel 12 in Phoenix*, Phoenix Business Journal (Aug. 5, 2014), http://www.bizjournals.com/phoenix/news/2014/08/05/how-gannetts-split-of-broadcast-publishing.html?page=all.

[74] Bill Glauber, *Journal, Scripps Deal Announced*, Milwaukee Journal Sentinel (July 30, 2014), http://www.jsonline.com/business/news31-b99321641z1-269303021.html.

Media companies are showing that combining print and broadcast operations do not create enough efficiency or attract sufficient investment to make cross-owned media outlets viable. Although commenters continue to speculate that removing the rules will encourage investment in cross-owned media, the market's actions show that this is unlikely to occur.

V. The FCC must address the lack of station ownership by women and people of color.

No commenter questioned that women and people of color are vastly underrepresented in broadcast station ownership. Moreover, commenters that addressed this issue uniformly agreed that the FCC needs to do more promote racial and gender diversity in broadcast station ownership. Even industry commenters agreed that the lack of ownership by women and people of color was a serious problem that should be addressed by the FCC. NAB, for example, states that it "fully agrees with the Commission that increasing broadcast ownership opportunities for minorities and women is an important public policy goal" and observes that "it is indisputable that women and minorities own broadcast stations in disproportionally small numbers."[75]

Unfortunately, experience shows that the race-neutral proposals NAB endorses will not be effective. Relaxing the current limits without having effective policies in place would only exacerbate the extreme disparities. Thus, the FCC must, as *Prometheus II* directed, move forward to develop and defend effective, race- and gender-conscious policies to increase the diversity of station ownership.

A. Race-neutral proposals have not been and are not likely to be effective.

Unfortunately, the solutions proposed by NAB are unlikely to increase ownership opportunities for women and people of color. NAB argued that "incentives-based, race-neutral measures which relax certain licensing, auction, transactions and construction policies are the

[75] NAB Comments at 89, 90. Morris Communications similarly "recognizes and shares the Commission's concern with finding a solution to the real problem of disproportionately low female and minority broadcast ownership." Morris Comments at 44.

surest path to increase minority and female ownership in the broadcasting industry."[76] It then reiterated its support for incentive-based proposals that it has made in the past.[77]

1. A relaxed attribution standard would not be appropriate.

NAB proposed "reinstating a relaxed attribution standard for qualifying businesses to improve their ability to secure financing."[78] Under the FCC's current attribution rules, an interest holder whose equity and debt together exceed 33% of a station's total asset value and the interest holder also serves the same market or supplies 15% or more of the programming is considered to be an owner for purposes of applying the ownership limits.[79] This is known as the equity/debt plus ("EDP") rule.

In 2008, the FCC created an exception to the EDP rule to ameliorate "financing problems that small businesses, including those owned by women and minorities," by making it easier for them to attract investors.[80] Under this exception, an interest holder is allowed to exceed the 33 percent threshold without triggering attribution if the investment would enable an "eligible

---

[76] NAB Comments at 88-89.

[77] *Id.* at 93-94. Morris cross-references these same proposals. Morris Comments at 44, n.150 (citing Morris Ownership Reply Comments at 5-6 (Jan. 4, 2013)).

[78] NAB Comments at 93.

[79] 47 CFR 73.3555 n.2.i.

[80] *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Notice of Proposed Rulemaking*, 23 FCC Rcd 5922, 5931-37 ¶¶17-34 (2008) ("*2008 Diversity Order*"); *see Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896, 5907, ¶19 (2009) ("*323 Order*"). "Eligible entities" are those "that [qualify] as a small business under the Small Business Administration's size standards for their industry grouping . . . at the time the transaction is approved by the FCC." 47 CFR §73.3555 n.2(i)(2)(ii). The new EDP threshold allowed a non-attributable owner combined equity and debt holdings up to 50 percent, or if "the total debt of the interest holder in the eligible entity . . . [did not] exceed 80 percent of the asset value of the station being acquired by the eligible entity[.]" *2008 Diversity Order*, 23 FCC Rcd at 5936, ¶31. Those who invested in an eligible entity beyond the normal EDP threshold were not attributed unless they exceeded the newly established eligible entity EDP threshold. The eligible entity exception to the general EDP rule was limited to situations where it is necessary to acquire a broadcast station. *Id.*

entity" to acquire a station. An "eligible entity" is defined as a small business under the SBA's definitions.

In *Prometheus II*, the Court found this definition of "eligible entity" arbitrary and capricious because the FCC failed to show "a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women."[81] Thus, in July 2011, the Media Bureau issued a Public Notice suspending the use of "eligible entities."[82]

In comments in the 2010 Quadrennial Review, UCC, *et al*. urged the FCC to assess the effect of the small business definition of eligible entities on the ownership of broadcast stations by women or people of color.[83] But in the FNPRM, the FCC "concede[s] that we do not have an evidentiary record demonstrating that this standard specifically increases minority and female broadcast ownership."[84] The FNRPM does not explain why it has no evidentiary record, however, it may be because the FCC does not require "non-attributed" owners to file ownership reports. The reporting rules adopted in May 2009 originally required entities with non-attributable interests under the EDP rule to file biennial ownership reports (Form 323).[85] However, the FCC eliminated this requirement in October 2009 in response to NAB's petition for reconsideration alleging inadequate notice.[86] At the same time, the FCC issued a Fifth

[81] 652 F.3d 431, 471 (3d Cir. 2011).
[82] *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance in the Asssignment of Broadcast Stations Construction Permits to Eligible Entities*, 26 FCC Rcd 10370 (MB 2011).
[83] Mar. 5, 2012 Comments by UCC, *et al.*, at 29-32, *2010 QR*, MB Dkt. 09-182.
[84] FNPRM, at ¶267. The FCC proposes to reinstate the EDP rule for the purpose of promoting small business ownership, not for promoting ownership by women and people of color. *Id.* n.87.
[85] The FCC adopted this requirement because it found this data necessary "to measure the extent of minority and female ownership of broadcast outlets and assess the need for and effectiveness of any policies designed to promote minority and female ownership." *323 Order*, 24 FCC Rcd at 5905-08, ¶12.
[86] Petition for Reconsideration of the National Association of Broadcasters at 3 n.7, MB Dkt. No. 07-294, filed June 26, 2009 ("*NAB Petition*").

Further Notice seeking comment on its proposal to require reporting by entities with non-attributable interests.[87] UCC, *et al*.'s comments supported requiring non-attributed owners to file Form 323 because without this information, it would be impossible to assess whether the exception was serving its intended purpose.[88] However, the FCC has yet to act on the Fifth Further Notice.

In sum, the FCC has failed to demonstrate a connection between the small business definition of eligible entity and the goal of increasing station ownership by women and people of color.[89] Nor has the FCC or NAB proposed an alternative definition for eligible entity that would advance that goal. Thus, readopting the EDP exception will not satisfy the remand order.

2. Transfer of grandfathered radio combinations to eligible entities is similarly inappropriate.

Another NAB proposal – to reinstate the policy that allowed the transfer of grandfathered radio station combinations to any entity provided the buyer assigns the excess station to a qualifying business – suffers from the same problem. Its success depends upon having a definition of "qualifying business" that is reasonably related to the goal of increasing ownership by women and people of color. NAB did not propose a definition; but if it intends that a qualifying business would be a small business, the FCC lacks an evidentiary record showing that use of this definition would increase such ownership,[90] as discussed above.

The FCC acknowledged UCC, *et al*.'s suggestion that it examine transactions involving grandfathered radio station combinations to assess whether they resulted in ownership by women

---

[87] *323 Reconsideration Order*, 24 FCC Rcd at 13042, ¶2. Although the Fifth Further Notice was released in October 2009, it was not published in the Federal Register until January 2013.
[88] Feb. 14, 2013 Comments of UCC, *et al*. at 5-6, *Promoting Diversification of Ownership in Broadcasting Services*, MB Dkt. 07-294.
[89] 652 F.3d 431, 471 (3d Cir. 2011).
[90] FNPRM, at ¶267. It nonetheless proposes readoption to promote small businesses.

or people of color, but it failed to explain why it has not done so.[91] Even if the FCC could show an evidentiary basis linking small business with minority and women-owned businesses, this policy would only be effective if the FCC maintained and enforced strict ownership limits so that companies would have an incentive to sell to small businesses.

3. The FCC should reject incubator and other proposals.

NAB also proposed that the FCC adopt an "incubator program."[92] Incubator programs allow a group owner to have controlling interests in some number of stations beyond the number otherwise permitted if it implements a program designed to ease entry barriers and provide assistance to qualified entities. In prior comments, UCC, *et al*. expressed concern that the incubator proposal would be meaningless in the absence of strict ownership limits.[93] UCC, *et al*. also share the FCC's concern that an incubator programming using a broad definition of qualified entities would be difficult for the FCC to administer, would create a giant loophole in the ownership rules, and would have little or no significant effect on ownership by women and people of color.[94]

While NAB listed a few other proposals, it proposes nothing new. Some proposals, such as allowing reversionary interest, create other problems. Other proposals, though benign, are unlikely to have a significant impact on ownership by women and people of color.

---

[91] FNPRM, at ¶266.
[92] NAB Comments at 92-93.
[93] In addition, MMTC's Proposal 2, Transfer of Grandfathered clusters and Proposal 8, Nonattributable EDPs, both depend on exceptions to the ownership limits. Without strong ownership limits, exceptions would rarely be necessary, thus rendering ineffective these means of promoting minority and female ownership.
[94] FNPRM, at ¶¶312-14.

B. The FCC should not aggravate the problem by relaxing the existing ownership limits.

NAB and others claimed experience has shown that broadcast ownership limits do not effectively promote ownership by women and people of color.[95] UCC, *et al*. agree that merely retaining existing limits does little to promote ownership by minorities and women. That is why UCC, *et al*. have consistently advocated for tightening the rules, for limiting the grandfathering of ownership arrangements inconsistent with the rules, and for limiting the use of waivers.

A recent event illustrates how strict enforcement of the rules can promote ownership by women and people of color. On August 27, Gray Television, "announced that it has entered into definitive agreements to transfer six full-power television stations to new owners who will provide increased ownership and programming diversity to the stations' local markets."[96] Gray, which already owned stations in each of these markets, had been operating these stations under sharing agreements and also held options to purchase them. Likely anticipating that the FCC would not relax its duopoly rule, Gray opted to sell the stations to socially disadvantaged enterprises, such as businesses controlled by women, people of color, or innovative new entrants, or non-profit entities. This example shows that there are well-qualified buyers controlled by women and people of color. Moreover, it demonstrates that strict adherence to ownership rules by, for example, attributing sharing arrangements that allow a single entity to operate two or more stations in the same market, will provide opportunities to women and people of color to purchase broadcast stations.

But even assuming for purposes of argument that retaining the current ownership limits do not help women and people of color acquire broadcast stations, repealing or relaxing the limits would make the situation worse. As UCC, *et al*. have explained repeatedly, any relaxation

---

[95] NAB Comments at 88.

[96] Press Release, Gray Television, Gray Selects Purchasers for All of Its Six Former Shared Services Stations, Aug. 27, 2014, http://www.gray.tv/index.php?page=press-releases&releaseid=1961513.

in the rules will only let the large owners grow at the expense of the smaller owners. To the extent that any women or minority owners remain, the increased concentration will make it virtually impossible for them to compete. Thus, at the very least, the FCC should not make the situation worse by relaxing any of the existing limits.

C. The Commission must determine the most effective tools for increasing ownership by women and people of color and develop the record necessary to defend its actions

Because race- and gender-neutral efforts have been ineffective, the FCC must proactively consider the adoption of race and gender conscious remedies. UCC, *et al*. agree with commenters such as Asian Americans Advancing Justice, Leadership Conference, NABOB, MMTC, Free Press, Byerly, SAG-AFTRA, CWA, and Writers Guild that the Commission should take concrete steps to develop effective, race-conscious policies, as discussed in more detail in a separate filing by the Office of Communication of United Church of Christ and Common Cause.

Conclusion

The FCC has broad authority to retain, modify, or repeal its media ownership rules, and it should use that authority to ensure broadcasters can no longer circumvent those rules. It should retain the cross-ownership rules, and must address the lack of station ownership by women and people of color.

Respectfully submitted

/s/

Angela J. Campbell
Andrew Jay Schwartzman
Eric G. Null
Aaron D. Mackey
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

Dated: September 8, 2014

Counsel for UCC, et al.