I am a concerned citizen who has been following the state of the broadcast industry since 2006, when I joined Wikipedia's WikiProject Television Stations while following how stations around the country transitioned from their affiliations with UPN and the WB to new affiliations with the CW and MyNetwork TV. This sparked in me a fascination with the entire broadcast industry, and I have been monitoring how the industry has evolved and its interaction with other media issues ever since. My comments are in response to the comments of Free Press and others.

While the National Association of Broadcasters and the many individual broadcasters that have commented on this proceeding make many important points about the impact of the ownership rules on the broadcast industry, I believe that they have taken a narrow and short-sighted view of their own interests, and following their recommendations would ultimately only worsen the sad state of the broadcast industry. Both this distorted view of their interests and the continued decline of the broadcast industry in general and the values the commission purports to promote in it in particular are the result, direct and indirect, of numerous commission policies that are currently not within the scope of this review, but which must be assessed as much as the commission's ownership rules for how they influence competition, diversity, and localism in the broadcast space, including the retransmission consent regime and the upcoming incentive auctions.

Promoting Diversity, Exploiting Loopholes, or Both?

On February 8th, 2013, as part of a press release on the sale of the stations of Barrington Broadcasting Group, it was announced that the license assets of two of the stations would be sold to Howard Stirk Holdings, "a newly formed entity owned and controlled by Armstrong Williams", an African-American political commentator and talk show host. The CEO of the company acquiring most of Barrington's stations proclaimed that "We are pleased to advance the diversity efforts of the FCC and create a path for minority ownership in the broadcast space through Howard Stirk Holdings." That CEO was David Smith, head of the Sinclair Broadcast Group ("Sinclair").[1]

That the sale of these stations to Mr. Williams would be touted as advancing the efforts of the FCC towards increasing diversity and promoting minority ownership, only for Mr. Williams to then turn around and outsource the stations right back out to Sinclair, the poster child for using joint sales and other agreements to circumvent ownership rules, would seem to make a mockery of the notion of using JSAs to promote minority ownership. Indeed, the relevant portion of the press release reads in part that "the license assets of four stations will be purchased by Cunningham Broadcasting Corporation and Howard Stirk Holdings", Cunningham being the most infamous of the shell corporations that have brought JSAs and their related agreements into such disrepute.

Yet if pressed, Sinclair would likely paint this as a situation where the JSA is working exactly as it should. Without knowing how much control Mr. Williams has over the stations in question, or how much of their advertising revenue he takes in, it's impossible to know whether Sinclair is really "creat[ing] a path for minority ownership in the broadcast space" or simply trying to circumvent ownership rules. Indeed it's not clear how much there would be for him *to* control. At least in the case of WEYI-TV, the NBC

[1] "Sinclair Broadcast Group Announces Agreement to Purchase Barrington TV Stations; Steven Pruett To Be Named Chief Operating Officer of Chesapeake TV Subsidiary", retrieved from http://www.prnewswire.com/news-releases/sinclair-broadcast-group-announces-agreement-to-purchase-barrington-tv-stations-steven-pruett-to-be-named-chief-operating-officer-of-chesapeake-tv-subsidiary-193984551.html.

affiliate in Flint, MI, the station produces its own newscast that Mr. Williams might exercise some control over, but in the case of WWMB, the CW affiliate in Myrtle Beach, SC, pretty much the entire schedule consists of syndicated programs, the CW network schedule, and a 10 PM newscast produced by Sinclair-owned ABC affiliate WPDE-TV. Most of the syndicated programs and CW programming were likely acquired by Barrington, with any future negotiations likely to be handled by Sinclair.

What does it mean to "own" a television station in this day and age? Clearly it's not enough to simply own the license, but if it's not that, what is it? It can't be producing a newscast or other local programming, considering how many stations offer nothing of the sort and how many other stations outsource their news to other stations even when they don't "own" or otherwise control them.[2] Is it collecting advertising revenue from the station – certainly an important aspect – even if you exert no control over the programming? Is it actively negotiating the advertising space on the station? Is it controlling what programming appears on the station – which often amounts to negotiating for syndicated programming and a network affiliation? Is it operating the master control for the station – something many stations have taken to automating?

It is in this context that we should consider Commissioner Pai's visit earlier this year to WLOO in Jackson, MS, which was acquired by historically-black Tougaloo College in 2012. Pai explains how general manager Pervis Parker touted the station's ability to broadcast in high definition, air high-school sports, provide hands-on experience for Tougaloo students, and produce local programming, and hopes to launch a local news magazine and produce original content for the regional Soul of the South network, all made possible by the station's JSA with Fox affiliate WDBD, without which the station might not even be on the air. Were the station forced to drop its JSA, Mr. Parker fears, it would need to sacrifice local programming to hire a sales staff and might not be able to survive an equipment failure with the need to purchase more equipment.[3]

How can the commission distinguish "good" JSAs, like that governing WLOO, from "bad" ones, like the ones Sinclair engages in, and in which category does Howard Stirk Holdings fall? Mr. Smith claims that Sinclair takes only 30% of the revenues of the stations it holds JSAs with, with the rest going to the actual owners, which would imply that *most if not all* of Sinclair's JSAs are of the "good" kind, with only the ones with Cunningham truly serving the purpose of circumventing ownership rules.[4] Nexstar Broadcasting ("Nexstar"), another company notorious for its use of JSAs to circumvent duopoly rules,

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[2] Although some have called even this practice uncompetitive. See Comments of the United Church of Christ, et al., in the matter of MB Docket 14-50 (2014 Quadrennial Regulatory Review), 6 Aug 2014, e.g. pp. 10-11, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751451, and Comments of Free Press in the matter of MB Docket 14-50 (2014 Quadrennial Regulatory Review), 6 Aug 2014, e.g. p22, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751507. (Hereafter, all comments of all parties are in the matter of MB 14-50 unless otherwise noted.) The case seems to be unconvincing, however, considering how many stations do not have any news at all, meaning news-sharing arrangements are more likely than not to increase the total amount of news available to a market.

[3] "Commissioner Pai Statement on WLOO TV Meeting", 5 Mar 2014, retrieved from http://www.fcc.gov/document/commissioner-pai-statement-wloo-tv-meeting.

[4] Williams, Juan, "The Feds Target a Black TV Station Owner", Wall Street Journal, 10 Mar 2014, A15. As documented by Free Press, Cunningham's management structure is virtually nonexistent and Sinclair has tied its fortunes as closely as possible to the family that runs the company; see Turner, S. Derek, "Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation", Oct 2013, updated Mar 2014, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751508.

claims that *no* sharing arrangement can completely simulate a duopoly, because they cannot achieve efficiencies from having lower overhead from a single corporate structure, reduced loan payments from having one instead of two, and other duplicated expenses from having two corporate structures, implying even the worst "bad" JSA is, in some sense, better than a straight duopoly.[5] Yet at this point JSAs have fallen into such disrepute that Wikipedia basically assumes any station in a JSA is being controlled by the senior partner in the JSA as though they were actually co-owned, while the broadcast television information website RabbitEars.info lists ownership information in the form of an "operator" and a "licensee", as though being a station's "licensee" were meaningless if the station was actually "operated" by someone else, including WLOO in both cases.[6] (It's worth noting that WDBD is owned by American Spirit Media, itself primarily an owner of stations it outsources to Raycom Media, in this case NBC affiliate WLBT through a shared services agreement.)[7] Media-consolidation critic Free Press would seem to concur, painting Howard Stirk Holdings as just another shell corporation of Sinclair's.[8]

It shouldn't be that complicated; if a station's "license assets" or "non-license assets" are being sold to some entity, or if a company has a presence in a number of markets but has JSAs with the same larger company in every one, or if a station has a skeleton staff at best with virtually all functions handled by another station, or if a company reports to the Securities and Exchange Commission its ownership of a station it claims not to own to the FCC, the agreement is probably being used to circumvent ownership limits, and if the vast majority of the profits are accruing to the operating entity, it almost certainly is.[9] But it's not always clear when this is the case, and the answer to these questions is not always yes/no, but some shade of gray.

That Mr. Parker would need to hire a sales staff if the JSA were dissolved implies that he has none at the moment and would need to hire one even if the JSA were simply reduced to 15% - or even 30% - of the station's inventory – in other words, WLOO isn't handling any negotiations for advertising. It's also extremely doubtful that WLOO would be able to negotiate for syndicated programming or its MyNetwork TV affiliation on its own. Both of these would seem to fail the Media Bureau's tests to scrutinize any arrangement to "jointly acquire programming or sell advertising", and it's not clear that, on balance, they shouldn't.[10] Pai notes that "Mr. Parker is no rubber stamp for WDBD", but it's not clear how much that actually means; does he have any say in what syndicated programming appears on the

[5] Comments of Nexstar Broadcasting, Inc., 6 Aug 2014, p18, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751433.

[6] "WLOO – Wikipedia, the free encyclopedia", http://en.wikipedia.org/wiki/WLOO, retrieved 8 Sep 2014; "Sinclair Broadcast Group – Wikipedia, the free encyclopedia", http://en.wikipedia.org/wiki/Sinclair_Broadcast_Group, retrieved 8 Sep 2014; Trip Ericson, "A Number of New Features", RabbitEars Blog, 15 May 2011, retrieved from http://www.rabbitears.info/blog/index.php?post/2011/05/15/A-Number-of-New-Features; "RabbitEars TV query", http://www.rabbitears.info/tvq.php?request=items&call=WLOO&arch=, retrieved 8 Sep 2014.

[7] Comments of the Communications Workers of America, 5 Aug 2014, pp. 13 and 15, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521750371, refers to American Spirit as Raycom's "alter ego".

[8] Free Press, "Sinclair Abandons Shell Company in Television Ownership Ruse", 30 May 2014, retrieved from http://www.freepress.net/press-release/106323/sinclair-abandons-shell-company-television-ownership-ruse.

[9] Many of these tests are suggested by the Comments of the Communications Workers of America, pp. 9-10, and the Comments of the United Church of Christ, et al., p4.

[10] Federal Communications Commission, "PROCESSING OF BROADCAST TELEVISION APPLICATIONS PROPOSING SHARING ARRANGEMENTS AND CONTINGENT INTERESTS", DA 14-330, 12 Mar 2014.

station, or in what time slots they appear?[11] The JSA does apparently give WLOO leeway to produce its own programming, but does WDBD have veto power over what programming is produced, or in any way help to produce it (having already provided much of the equipment that allows the station to go on the air in the first place)? Does the JSA encompass WDBD negotiating for retransmission consent on WLOO's behalf – something the chairman is already on record as opposing regardless of the degree of control one station has over the other or regardless of what positive outcomes such an agreement may foster?

The Bureau has suggested that "an assignable option to purchase a station at less than fair market value may counter any incentive the licensee has to increase the value of the station, since the licensee may be unlikely to realize that increased value."[12] It's not clear, however, whether the programming Mr. Parker or Mr. Williams would like to place on their stations are motivated by a desire to "increase the value of the station", but rather by a desire to serve the public interest by serving underserved communities, regardless of whether there is any financial benefit to be realized from them. In other words, sharing arrangements may promote diversity and other values the commission values even when they might be serving as an end-run around duopoly rules, precisely because there isn't any financial profit from them. Explicitly exempting sharing agreements that meet those values raises the specter of "blackwashing" the use of shell companies by putting minorities in charge of them, in a manner similar to the Sinclair-Howard Stirk deal, but it may not be clear that that's a bad thing.[13]

Pai summarizes by saying that "Tougaloo and Mr. Parker are independent innovators whose JSA gives them the breathing space to create something where nothing would exist otherwise." Whether or not something would "exist otherwise" is an open question; there are cases where stations have gone off the air in the last decade, even ones owned by large groups and affiliated with prominent networks, and Jackson is a small enough market that WLOO could have easily shut down if something were to happen to it, without anything to replace it. It is worth noting, however, that American Spirit originally sold WLOO to Tougaloo for $1 at the same time it acquired it and WDBD; in other words, were it not for ownership restrictions American Spirit (or Raycom) would likely have acquired the station outright without selling it to another party.[14] Before then, the station, then WUFX, was owned by Vicksburg Broadcasting and was already associated with WDBD, owned by Jackson Broadcasting.

According to Fox News analyst Juan Williams (no relation to Armstrong), over the past ten years the number of black-owned television stations has dwindled from 21 to the three just discussed.[15] As recently as four years ago, to impose the same 15% cap on revenues controlled by JSAs as in radio would

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[11] Free Press has raised the concern that the terms of a sharing agreement may nominally give "'ultimate' decision-making control [to] brokered stations when in practice, that is not the case" (Comments of Free Press, p24).

[12] Federal Communications Commission, op. cit.

[13] Another case of "blackwashing" may be Nexstar's proposal to spin off three stations to Marshall Broadcasting Group (see Malone, Michael, "Nexstar Plans Sale of Three Fox Affiliates for $58.5 Million", Broadcasting and Cable, 6 Jun 2014, retrieved from http://broadcastingcable.com/news/local-tv/nexstar-plans-sale-three-fox-affiliates-585-million/131616).

[14] Seyler, Dave, "TV dealings in the Jackson MS market", Television Business Report, 1 Aug 2012, retrieved from http://rbr.com/tv-dealings-in-the-jackson-ms-market/.

[15] Williams, op. cit. WJYS in Chicago may also count as an African-American-owned television station, one not involved in any sharing agreement and black-owned for most if not all of its history; see Torres, Joseph, and S. Derek Turner, "A Sorry Moment in the History of American Media", Free Press, 20 Dec 2013, retrieved from http://www.freepress.net/blog/2013/12/20/sorry-moment-history-american-media, cited in Comments of Free Press, p15.

have seemed like a simple, commonsense move, if one that failed to take into account both the smaller number of stations in a television market compared to a radio market and the larger concentration of market share in a few stations. Now, however, it's not clear that it will even have the desired effect; the commission already imposed a similar cap on arrangements for control of airtime in the 90s, and the shared services agreement has already become notorious for its own role in potentially circumventing ownership limits, yet the commission only proposes keeping an eye on them and treating them on a case-by-case basis. For the commission to continue chasing whatever specific type of agreement is currently in vogue would seem to be a fool's errand, causing collateral damage on the very goals the commission seeks without necessarily having an impact on the abuses they seek to eliminate. The best thing the commission has done on this front has been to simply put the terms of such agreements out in the open, alongside the Media Bureau's order to look at all sharing arrangements regardless of their specific type.[16] At the least, I would hope that the commission would be willing to look at the content of sharing arrangements, not their nominal types, in determining whether or not to make them attributable.

Failing that, I propose an alternative, one that better promotes the commission's values of diversity and competition without putting the commission in charge of paternally dictating what arrangements should be allowed and which should not be, as the commission's waiver process and the National Association of Broadcasters' compromise proposal would.[17] I would go back to the regime in place before 2001 that completely disallowed duopolies, but in exchange, allow mostly unregulated sharing arrangements. The only restrictions would be that any arrangement involving more than the sharing of news equipment could not link two of the top three stations in a market, and any chain of such arrangements could not encompass more than a certain share of the market, excluding the largest station in the chain, with said cap being somewhere substantially less than one-third and preferably less than one-fourth. That's it, with the possible exception of ruling out particularly obvious forms of shell companies.

What Killed Localism?

That statistic cited earlier – that over the past ten years the number of black-owned television stations has dropped from 21 to just three, none of which were among the previous 21, all of them acquired within the past two years, and all of them dependent on sharing arrangements with larger, white-owned station groups – should give the commission pause. Among the purposes of the commission's ownership restrictions is to promote localism and diversity. The commission should therefore take a long, hard look at why they seem to have been so unsuccessful as to leave both values apparently on life support.

We will assume, for the moment, that there was in fact a time when localism thrived on America's airwaves, as opposed to now when the vast majority of programming on most English-language general-entertainment commercial stations can be broken down into the buckets of network programming, syndicated programming, news, and infomercials, with only the third category being produced by the station itself. We will also assume that to the extent there was such a time, its demise was not caused by intentional deregulatory moves by Congress or the commission, or that if it was those moves were themselves reactions to, aided by, or accelerated larger market forces that would then be implicated in the death of localism.

[16] Federal Communications Commission, op. cit.
[17] Smith, Gordon, letter to Commissioner Mignon Clyburn, Mar 20 2014, retrieved from http://www.nab.org/documents/newsRoom/pdfs/032014_JSA_compromise_letter.pdf.

Looked at in this way, there are two major forces that can be implicated in the demise of localism, the larger one of which is the rise of cable television. Cable threatened localism in a variety of ways. On a basic level, it flooded America with a vast new landscape of channels to compete for the advertising dollar. Most of these channels were national in scale, resulting in a homogenization of the American television experience and also allowing cable to collect more money overall than any individual station, and as they took advantage of the dual revenue streams of advertising and subscription revenue, made it more difficult for local television stations, even with their greater popularity, to compete. Once cable also started attracting quality original entertainment as good or better than that available on broadcast, unburdened by the numerous restrictions the commission placed on broadcast stations, this put a further crimp on local stations' ability to compete and magnified cable's national stature and revenue base. Slow to embrace the retransmission consent regime intended to help level the playing field with cable and only able to even approach cable's potential audience in combination with other stations, local stations increasingly found locally-produced programming cost-prohibitive, and large agglomerations of station groups inexorably forced smaller ones out of the market.

Thus, contrary to the claims of the cable industry, it is not the retransmission consent regime that was responsible for broadcast station consolidation, but the environment that necessitated the regime.[18] If anything, the retransmission consent regime contributed to consolidation in the broadcast industry because, rather than allow the broadcast industry to survive on its own merits, it forced broadcasters to play by the cable industry's rules.

The other force that contributed to the decline of localism was the 1986 launch of the Fox network and the 1995 launch of UPN and the WB. Before then, the affiliates of the Big Three major networks were complemented in markets across the country by a variety of eclectic and innovative independent stations, which aired a combination of reruns, original syndicated programming, cheap movies, and locally-produced programming, often including local sports teams. Independent "superstations" such as WTBS-Atlanta and WGN-Chicago played a key role in the growth of cable television, and provided programming so close to on par with the major networks that few of them surrendered their schedule to the Fox network when it launched.

Nonetheless, Fox still took control of primetime away from many of the strongest independent stations, and while its relatively bare-bones schedule kept its affiliates mostly independent in spirit, nonetheless they were in fact independent no more. One particular Fox innovation would end up robbing stations of all affiliations of their unique identity: many Fox stations began branding as "Fox (channel number)", de-emphasizing their call letters, a practice that quickly became standard across the country. As Fox stations discovered the value of 10 PM newscasts and morning shows that competed with the national shows on the Big Three networks, and as Fox introduced sports and kids' shows, Fox stations came to resemble network affiliates more and more.

The launch of UPN and the WB, however, had a more substantive impact on independent stations; for one thing, very few markets *had* any independent stations left once UPN and the WB got through with them, and those that joined the new networks inevitably adopted the branding convention pioneered by Fox. Moreover, while once syndication could boast such popular original scripted shows to attract

[18] Frederick, Brian, "Guest Blog: How Come 'Free' TV Costs Us All So Much?", Broadcasting and Cable, 19 Jun 2014, retrieved from http://www.broadcastingcable.com/blog/bc-dc/guest-blog-how-come-free-tv-costs-us-all-so-much/131886.

audiences to independent stations as *Baywatch* and the *Star Trek* franchise, soon scripted shows became all but absent from syndication, becoming the province of UPN and the WB. Outside of primetime, many UPN and WB stations became home to such "trash TV" shows as *Jerry Springer* when they weren't airing old TV shows and movies. All three new networks gave formerly-independent stations primetime commitments that precluded them from airing local sports as regularly as they might have in the past, though larger forces were likely responsible for the march of local sports almost entirely to cable during the 90s and 2000s.[19]

By the time UPN and the WB shut down and merged to form the CW in 2006, many of the once-independent stations that had joined them were not particularly looking forward to returning to independence. The dependence of English-language general-entertainment stations on network affiliation, against all logic, can be seen in the existence and nature of the enigmatic entity known as MyNetworkTV. Launched by News Corporation (and now owned by its spin-off 21st Century Fox) to fill time on the UPN affiliates it owned after the CW merger and as a consolation prize for other stations left behind by the merger, MyNetworkTV experimented with a variety of formats before, in 2009, announcing that it would no longer be a "network" but a "programming service",[20] allowing stations to opt out of their contracts if they did not want to continue with MyNet in its new identity,[21] and for most of the time since then its schedule has consisted entirely of syndicated programming, usually off-network reruns, that would be available to stations via other means without the presence of MyNet. Nonetheless, very few stations took MyNet up on its offer, even in markets such as Cincinnati and Hawaii where the CW had been reduced to second-class citizen status on a digital subchannel of a larger station while MyNet inhabited a main channel, and the vast majority of stations airing MyNet programming continue to use the "My" branding and logo,[22] even though that association amounts to little more than ten hours a week of programming not substantially unique from the rest of their schedules. Such is the state of the modern broadcast television industry: station owners would rather let someone else step in to fill even a measly ten hours a week in primetime rather than have to come up with something innovative themselves, and are so desperate to have a "network" to brand their station with, rather than have to come up with something on their own, that they will associate with a "network" with no meaning to the average viewer and that doesn't even claim to be a "network" itself even as the rest of the industry continues to treat it like one.

Questioning the Commission's Priorities

[19] The impact of this march should nonetheless not be underestimated. See Comments of Thomas C. Smith, 6 Aug 2014, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751517, and Wick, Morgan, "When and how did broadcast television lose the battle to cable?", MorganWick.com, 18 Aug 2014, retrieved from http://sports.morganwick.com/2014/08/when-and-how-did-broadcast-television-lose-the-battle-to-cable/.

[20] Rosenthal, Phil, "My Network TV says it's 'blowing up traditional network model,' becoming program service", Chicago Tribune, 9 Feb 2009, retrieved from http://newsblogs.chicagotribune.com/towerticker/2009/02/my-network-tv-says-its-blowing-up-traditional-network-model-becoming-program-service.html; Albiniak, Paige, "EXCLUSIVE: MyNetwork TV Gets Renewal", Broadcasting & Cable, 11 Feb 2011, retrieved from http://www.broadcastingcable.com/news/news-articles/exclusive-mynetwork-tv-gets-renewal/111621.

[21] It is important to note that I cannot find a reliable source for this and so it may not be accurate, as is the reference to it in the next sentence. See Mrschimpf, "WPXX-TV: Difference between revisions – Wikipedia, the free encyclopedia", 6 Oct 2009, retrieved from https://en.wikipedia.org/w/index.php?title=WPXX-TV&diff=next&oldid=317561124.

[22] Wikipedia has identified only 17 that do not ("MyNetworkTV – Wikipedia, the free encyclopedia", https://en.wikipedia.org/wiki/MyNetworkTV, retrieved on 8 Sep 2014).

With all this established, we can return our attention to how the Commission's ownership rules fit into this picture. It is clear that the Commission's ownership goals were undermined by forces that did not directly have anything to do with the ownership rules, even if they were aided by other Commission regulations. Nonetheless, the foregoing still puts the Commission's priorities in stark relief.

This history casts further doubt on the validity of the legalization of duopolies, and therefore provides further support for the alternative I suggested earlier. In particular, the rather arbitrary thresholds the Commission sets for a duopoly to be legal, which has the effect of restricting duopolies only to larger markets, appears in this light to be rather suspect, if not completely backwards.[23] The Commission ostensibly imposes such thresholds in order to preserve competition and a diversity of voices in smaller markets, but the reality is that smaller markets simply can't support too many station owners, and the alternative is more likely to be losing stations, and the choice that comes with them, entirely.[24] The smallest market to have four different owners of full-power stations is #180 Marquette, MI – and one of those stations is WZMQ, which airs programming from Me-TV, This TV, and MyNetworkTV – to say nothing of CBS affiliate WJMN's status as a "semi-satellite" of Green Bay's WFRV. The smallest market to have four different owners of full-power stations each carrying one of the four major networks is #150 Odessa-Midland, TX – and once Nexstar forms a sharing arrangement between the ABC and Fox affiliates there that status will move to #140 Medford, OR. #185 Grand Junction, CO, has all four major networks on one full-power station each, but in Grand Junction's case the Fox affiliate is owned by Mission Broadcasting, which is to Nexstar what Cunningham is to Sinclair, owner of the market's CBS affiliate, and the ABC affiliate has a sharing arrangement with the Gray Television-owned NBC affiliate.[25]

Big markets are more able to support the diversity of voices the Commission seeks to foster, but the legalization of duopolies in those markets limits the number of voices and allows big companies to reach exponentially more people, crowding out smaller voices on the stage where they might have the most impact and best survive.[26] The Commission ostensibly wants to preserve a multitude of local news

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[23] "Arbitrary" both in the common sense and in the strict legal sense required for a regulation to be unlawful under Section 706 of the Administrative Paperwork Act, as ruled by the DC Circuit with regard to the "eight-voices" test in 2002 (reversed by the Third Circuit in 2011 – Comments of Sinclair Broadcast Group, Inc., 6 Aug 2014, pp. 6 and 8, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751382) and as argued with regard to the "top-four" test by CBS in 2010 (Brief for Petitioners CBS Corporation and CBS Broadcasting Inc. in the case of Prometheus Radio Project, et al., v. Federal Communications Commission, United States Court of Appeals for the Third Circuit, 08-3078, 17 May 2010, pp. 29-30 et seq., retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751056). The "eight voices" test is more obviously arbitrary (as noted by the Comments of the National Association of Broadcasters, 6 Aug 2014, pp. 39 and 55-56, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751016) but an examination of the reasoning for the "top four" test shows it to be as much so, as explained by the Comments of the National Association of Broadcasters, pp. 50-55, and as summarized below.

[24] Comments of the National Association of Broadcasters, pp. 38-39 and 55-58; also Comments of Nexstar Broadcasting, Inc., pp. 15-19. Many of the reasons for this are laid out by the Comments of the Coalition of Smaller Market Television Stations, 6 Aug 2014, esp. p11, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751177.

[25] Author's analysis of stations' respective Wikipedia articles. All market ranks from Nielsen Media Research, "Local Television Market Universe Estimates", retrieved from http://www.nielsen.com/content/dam/corporate/us/en/docs/solutions/measurement/television/2013-2014-DMA-Ranks.pdf. Mission is referred to as Nexstar's "alter ego" in Comments of the Communications Association of America, p14.

[26] See Comments of Free Press, p8.

options, yet here is the complete list, to my knowledge, of English-language stations not affiliated with one of the Big Four that produce their own news separately from a Big Four station, once all currently-proposed affiliation changes are final:[27]

- WPIX New York
- KTLA Los Angeles
- WGN Chicago
- KDAF Dallas-Fort Worth
- KRON San Francisco
- KIAH Houston
- KTVK Phoenix
- KWGN Denver
- KPLR St. Louis
- WCCB Charlotte
- WISH Indianapolis
- XETV San Diego (licensed in Mexico)
- KUSI San Diego
- WJXT Jacksonville

Of these, the only station that is neither owned by Tribune Broadcasting nor involuntarily lost a Big Four affiliation sometime in the last 20 years is KUSI.[28] Jacksonville is the only market outside the top 30, but

[27] Author's analysis of stations' respective Wikipedia articles. Papper, Bob, "More stations producing local news; first increase in nine years", RTDNA, 16 Jun 2014, retrieved from http://www.rtdna.org/article/more_stations_producing_local_news, claims to have found 44 non-Spanish-language stations not affiliated with a Big Four network that produce their own news, in addition to 16 PBS stations not considered here, but I was unable to ascertain whether he even published the complete list anywhere; in any case, it's not clear how many of these shut down or outsourced in the time after Papper conducted his survey, how many can be considered full-fledged news departments (given some of the affiliations listed, my suspicion is no more than 37), or even how many simply broadcast in a language that isn't English or Spanish.

[28] WPIX, KTLA, WGN, KDAF, KIAH, KWGN, and KPLR are all owned by Tribune Broadcasting. KRON involuntarily lost its affiliation with NBC in 2002 (Goodman, Tim, "The new KRON makes a weak first impression", SFGate.com, 2 Sep 2002, retrieved from http://www.sfgate.com/default/article/The-new-KRON-makes-a-weak-first-impression-2886414.php; McCollum, Charlie, "NBC Drops Television Channel in Bay Area, Calif., for San Jose Station", Knight Ridder/Tribune Business News, 18 Feb 2000, retrieved from http://www.highbeam.com/doc/1G1-59555162.html, cited in "KRON-TV – Wikipedia, the free encyclopedia", http://en.wikipedia.org/wiki/KRON-TV, retrieved 8 Sep 2014). KTVK involuntarily lost its ABC affiliation in 1994 as part of a larger affiliation shift (Meisler, Andy, "Murdoch's Raid Brings a Shuffling of TV Stations in Phoenix", New York Times, 29 Aug 1994, retrieved from http://www.nytimes.com/1994/08/29/business/murdoch-s-raid-brings-a-shuffling-of-tv-stations-in-phoenix.html). KTVK is the only station to lose its affiliation prior to networks beginning to demand "reverse compensation" from affiliates. WCCB involuntarily lost its Fox affiliation in 2013 after Fox acquired WJZY and WMYT from Capitol Broadcasting (Halonen, Doug, "WCCB Charlotte To Lose Its Fox Affiliation", TVNewsCheck, 28 Jan 2013, retrieved from http://www.tvnewscheck.com/article/65069/wccb-charlotte-to-lose-fox-affiliation). WISH involuntarily lost its CBS affiliation earlier this year, effective at the start of 2015 (Crundwell, Jason, "Breaking down the CBS Indianapolis affiliation switch", JasonCrundwell.com, 11 Aug 2014, retrieved from http://jasoncrundwell.com/2014/08/11/breaking-down-the-cbs-indianapolis-affiliation-switch/). XETV involuntarily lost its Fox affiliation in 2008 (Peterson, Karla, "Fox switching affiliates in S.D.", U-T San Diego, 25 Mar 2008, retrieved from http://www.utsandiego.com/uniontrib/20080325/news_1n25tv.html). Finally, WJXT did not quite lose its affiliation involuntarily; it opted not to renew its affiliation contract with CBS in 2002, at which point

Jacksonville's ABC station is co-owned with its NBC station, while the CBS and Fox affiliates are commonly operated under a sharing arrangement, so even with WJXT there are only three separate news operations in the market. Philadelphia, the fourth-largest market, has the same number of separate news operations as South Bend, the #96 market.[29]

Duopolies in big markets can also have more of a national impact: most of the English-language general-entertainment commercial stations in the largest markets that are not affiliated with one of the Big Four stations, including the top five, are owned by one of three companies: Tribune Broadcasting, CBS, and Fox, two of which own Big Three networks themselves and so have no interest in fostering their own competition, and which also own the two networks (or at least, network-like entities) that emerged from the demise of UPN and the WB: the CW, 50% owned by CBS, and MyNetworkTV, wholly owned by Fox. CBS has no interest in the CW in any way becoming a threat to its main network, and neither does Fox with MyNetworkTV; certainly neither of them has any incentive in helping CW or MyNet stations they *don't* own to challenge their main network stations. UPN and the WB might have plausibly claimed to aspire to competing on par with the major networks; the CW's ownership interests preclude them from doing the same, and MyNet doesn't even pretend to try.

As an example – far from the most pertinent one – the affiliate associations of NBC and CBS note that the current dual network rule gives affiliates leverage against their networks when friction arises between them, including in the matter of divvying up retransmission consent revenue, rather than allowing an owner of one network to preclude an affiliate from moving to another one owned by the same company.[30] One can infer that, if the affiliate associations are correct, this is already the case for CBS affiliates that might consider moving to the CW, or Fox affiliates that might consider moving to MyNetworkTV. Indeed, shortly after the deadline for initial comments, LIN Media-owned WISH-TV, until the end of this year the CBS affiliate in Indianapolis, learned that it will lose said affiliation to Tribune-owned WTTV, currently the CW affiliate. WTTV will not only not surrender its CW affiliation to any other party, but will keep the entire schedule built around it on a digital subchannel.[31] It is difficult to say with certainty that CBS' ownership of the CW played any role in WISH not getting any opportunity to affiliate with it, or for that matter that it played any role in the network's move to WTTV to begin with. What is clear, however, is that WISH will demonstrably suffer as a result of the transaction, possibly more so than if it were able to affiliate with the CW – and so, for that matter, more demonstrably, and more pertinently to the present point, will the CW, unable to move to an established and strong station in the market with a substantial local news presence, instead being "demoted" to a secondary channel.

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the affiliation moved to the UPN affiliate, which became a secondary affiliation of the co-owned Fox affiliate (Basch, Mark, "TV-47 to become new CBS affiliate", Florida Times-Union, 23 Apr 2002, retrieved from http://jacksonville.com/tu-online/stories/042302/met_9216411.html).

[29] Author's analysis of stations' respective Wikipedia articles. In fact, if #109 Fort Wayne's WPTA and WISE are considered separate (they are linked by a sharing agreement, and until March 2013 simulcast their newscasts), that market also has the same number of news operations as Philadelphia. I also didn't count several smaller markets where a station's news is not produced by another station in the market, but is produced by or is even a (partial or full) simulcast of a station in another market.

[30] Comments of the CBS Television Network Affiliates Association, 6 Aug 2014, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751249; Comments of the NBC Television Affiliates, 6 Aug 2014, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751297.

[31] Crundwell, op. cit.

In other words, if "a crop of independent stations throughout the nation is [not] effectively competing with – and putting any significant competitive pressures upon – major network affiliated stations in the market", it is because the Commission's rules preventing one company from owning two of the top four stations in a market, as well as the rules preventing two of the top four networks from merging, rules intended to preserve the competition between the four major broadcast networks, ultimately have the effect of ensuring that there will not be a fifth.[32] The commission is concerned about one firm having a disproportionate local market share compared to other firms, yet rather than produce a regulatory standard based on actual market share, the commission produces one based on the assumption that *present* market conditions point to the supposed existence of a "natural break" between the shares of the fourth and fifth largest station in every market, both overgeneralizing and failing to require the actual existence of one – and in fact, empirical evidence suggests any such "natural break" may occur at some other point – and perpetuating such a break where it does exist.[33] It would be understandable that the commission would not want to wade into something that can so easily change over time as market share, were it not that the "top four" test already requires such, with the commission effectively ignoring the possibility and not requiring a breakup if both stations enter the top four.[34]

If the commission were not to adopt my suggestion to forbid duopolies entirely and allow mostly unregulated sharing arrangements instead, I would suggest that it at least replace the numerous arbitrary numerical-based thresholds – no duopolies if there are less than eight competitors afterward, no duopolies between two of the top four stations – and replace them with a "dynamic cap" system, where the second station a company owns or controls in a market counts as half that market's value towards the national cap, the third station counts as one-third, etc., as well as adopting the local market-value cap from the earlier suggestion, or, if the commission is really concerned about the existence of a "natural break", establish a quantifiable test of the existence of one and allow that test to be applied by market on a case-by-case basis. In this case, only stations broadcasting in the same language would count as a duopoly for this purpose, encouraging investment in underserved communities.[35] This is probably more in keeping with the spirit of Section 202(h) of the Telecommunications Act of 1996 than my earlier proposal,[36] and would serve the purpose of more

[32] Comments of the National Association of Broadcasters, p56.
[33] Ibid., pp. 50-55.
[34] Federal Communications Commission, "Review of the Commission's Regulations Governing Television Broadcasting", 1999, cited in Comments of Raycom Media, Inc., 6 Aug 2014, pp. 2-3, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751308. See also Comments of the American Cable Association, 6 Aug 2014, pp. 4-5, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751474. The Commission has proposed pre-emptively preventing such moves by policing "affiliation swaps" involving the Big Four broadcast networks, but besides not addressing the underlying issues with the "top four" rule and instead doubling down on it, such would effectively also double down on protecting the current major-network quadopoly, among other issues to be elaborated on in "The Looming Incentive Auctions" section below.
[35] This would, for instance, allow NBC Universal to continue using its considerable resources to serve the Hispanic community with its Telemundo network, while also potentially forcing Univision to potentially divest itself of one of its two networks that make up two of the top three Spanish-language networks, thus providing Spanish-language consumers additional choice.
[36] As noted by nearly every broadcast group to comment to the Commission, Section 202(h) directs the commission to "repeal or modify any regulation it determines to be no longer in the public interest", suggesting that the quadrennial review process cannot be used to introduce new regulations, but can be used to modify existing ones, possibly even in a way that ultimately increases the regulatory burden. See, e.g., Comments of the National Association of Broadcasters, p3.

directly and comprehensively addressing the goals the commission seeks to achieve while ideally preserving all Americans' access to a full slate of broadcast television programming.

The Competitive Landscape

Multiple conflicting parties have suggested that the Commission's regulations have not kept pace with the explosion of options for the consumption of video content over the past few decades. When it comes to must-carry and retransmission consent reform, it is the cable operators decrying the special treatment broadcasters supposedly receive.[37] When it is the commission's ownership regulations, it is broadcasters decrying their inability to take advantage of economies of scale.[38]

As one might expect, neither party is completely correct. As we have just demonstrated, the Commission's rules may have aided and abetted the decline of broadcast television in the face of cable, but it certainly was not because their ownership rules were too tight; if anything the legalization of duopolies accelerated broadcasting's decline by removing the incentive for many stations to compete. Broadcast spectrum is still a scarce resource; although broadcast stations can offer multiple channels through the use of subchannels, the fact that broadcasters must share over-the-air spectrum with numerous other uses (to say nothing of avoiding interference with other stations) means they can never do so to the same extent as cable channels (to say nothing of the commission's restrictions on content that prevent broadcasters from specializing to the degree cable channels do, especially their "educational/informational" mandate).

The "position…broadcast television occup[ies] within the larger United States information delivery/entertainment landscape"[39], at this point, would seem to be little more than as a subset of the larger universe of cable channels, albeit by and large the most popular subset – but this is far from guaranteed to last and cable channels are fast closing; the most popular show on television among the lucrative 18-49 demographic[40] and the most popular non-NFL annual sporting event[41] are both on cable – a subset that delivers its content to anyone not subscribed to cable or other MVPDs in what must come off as a form of welfare. Even from this perspective, it makes sense to foster competition within that subset, rather than allow a small number of companies to dominate that subset – and thus, the

[37] See, e.g., Frederick, Brian, "Guest Blog: There Is No Freedom in 'Free' TV", Broadcasting and Cable, 11 Jun 2014, retrieved from http://broadcastingcable.com/blog/bc-dc/guest-blog-there-no-freedom-free-tv/131705.
[38] See, e.g., Mago, Jane, Statement for House of Representatives Committee on Energy and Commerce Subcommittee on Communications and Technology Hearing on "Media Ownership in the 21st Century", 11 Jun 2014, retrieved from http://docs.house.gov/meetings/IF/IF16/20140611/102308/HHRG-113-IF16-Wstate-MagoJ-20140611.pdf. Of course, this point has also been made repeatedly by broadcasters in the comments to this proceeding; see, e.g., Comments of the National Association of Broadcasters, esp. p38 et seq.
[39] Comments of Stainless Broadcasting, L.P., et al., in the matter of MM Docket 09-182 (2010 Quadrennial Regulatory Review), 17 Mar 2014, p5, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751231.
[40] Schneider, Michael, "America's Most Watched: The Top 50 Shows of the 2013-14 TV Season", TV Guide, 6 Jun 2014, retrieved from http://www.tvguide.com/news/most-watched-shows-2013-2014-1082628.aspx.
[41] Paulsen, "2013 Ratings Wrap: NFL Dominates List of Most-Watched Sporting Events", Sports Media Watch, 31 Dec 2013, retrieved from http://www.sportsmediawatch.com/2013/12/2013-ratings-wrap-nfl-dominates-list-of-most-watched-sporting-events/; Paulsen, "Halftime: The 50 Most-Watched Sporting Events of 2014 (So Far)", Sports Media Watch, 17 Jul 2014, retrieved from http://www.sportsmediawatch.com/2014/07/halftime-the-50-most-watched-sporting-events-of-2014-so-far/; Wick, Morgan, "The 200 Most-Watched Live Events of 2013", MorganWick.com, 30 Jun 2014, retrieved from http://sports.morganwick.com/2014/06/the-200-most-watched-live-events-of-2013/.

attention of anyone who does not subscribe to cable – and justify it because of all the cable channels owned by other companies that the consumer must pay extra for. But broadcasting has never existed solely as a form of welfare to the poor, and especially with concerns about rising cable bills and the rise of Internet-delivered content in recent years, free over-the-air broadcasting is, and has always been, available to all as an alternative to a cable subscription. A vibrant, competitive marketplace for over-the-air television makes "cutting the cord" and going without a cable subscription more viable and attractive.

The attitude that broadcast stations are just another kind of cable channel has already caused considerable damage to broadcasting as a medium, especially as it has left broadcasters themselves, especially the larger ones and those that operate actual cable channels, with less incentive to support their own ostensible medium. The question is not whether or not broadcast stations can compete in *content and advertising dollars* with cable outlets, but whether broadcasting can compete *as a technology* with alternative technologies for content providers – in other words, why one should operate as a broadcast station at all, for which the only answer at the moment seems to be "because Congress and the commission say so". This is not merely a theoretical question: in response to the advent of Aereo, a service that delivered free over-the-air signals to consumers using individual miniature antennas for each customer, at least two of the major broadcast networks threatened to pull their most popular programming if they could not get a court to rule that Aereo was a cable company subject to copyright payments, implying that the presence of high-quality popular programming on broadcast television is wholly dependent on the retransmission consent regime.[42] In order for broadcasting to effectively compete with other media offering the same services and types of content – in order for it to "remain 'a vital element' in the much broader media marketplace"[43] – it must be able to *differentiate* itself from those other media and present its own advantages, not play by the rules of another medium. As explained earlier, consolidation is the natural response to the fact that broadcasting has not been allowed to do so. Contrary to the exhortations of the group ostensibly representing the interests of broadcasters, not to mention their members, the commission's response should not be to make it easier – unless it actively wants to destroy broadcasting, or at least let it continue to wither away. The record is clear that while consolidation may make it marginally easier for broadcast stations to survive for a few more years, many of the savings end up going towards purchasing more stations, and the main effect is to reduce the amount of programming produced,

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[42] Fixner, Andy, "News Corp. to Take Fox Off Air if Courts Back Aereo", Bloomberg, 8 Apr 2013, retrieved from http://www.bloomberg.com/news/2013-04-08/news-corp-says-it-will-take-fox-off-air-if-courts-ok-aereo-1-.html; Musil, Steven, "CBS joins Fox in considering subscription-only model", CNet, 9 Apr 2013, retrieved from http://www.cnet.com/news/cbs-joins-fox-in-considering-subscription-only-model/. Though broadcasters eventually got the relief they sought from the Supreme Court (American Broadcasting Cos., Inc., et al., v. Aereo Inc., 573 U.S. 14-361 (2014)), the fact that Aereo not only exposed a hole in the retransmission consent regime but also how said regime curbs innovation, as well as the widespread support for Aereo's position among the public and consumer groups (e.g., Cox Jr., Bartees, "Public Knowledge Statement on Supreme Court's Aereo Ruling", Public Knowledge, 25 Jun 2014, retrieved from https://www.publicknowledge.org/news-blog/press-release/public-knowledge-statement-on-supreme-courts-aereo-ruling), shows that this is only the tip of a far larger iceberg.

[43] Comments of the National Association of Broadcasters, p11.

through duplication of news and entertainment programming across stations, and thus reduce the overall value of over-the-air television.[44]

The same argument applies to Internet video and general content, but the situation is more complex. For one thing, the markets for Internet and over-the-air video are not entirely congruent. For the most part, video over the Internet is available any time one requests it, while video on a broadcast channel – or a linear television channel more generally – is only available when it appears on the broadcaster's schedule. As such, it may not be entirely clear how much the Internet weighs on the necessity or desirability of restricting broadcast station ownership at all. Indeed, since any video a broadcaster (or cable channel) could offer could theoretically be offered online, on terms not set by an arbitrary schedule, it raises a question of what role broadcasting should play in the marketplace at all, if it even has one long-term – an especially important question with the broadcast incentive auctions looming, with the explicit goal of freeing up spectrum that will be used primarily to deliver Internet content.

This question has two answers, one created by the current rules laid out by Congress and the commission, and the other fundamentally rooted in technology. First, as with cable, broadcast television is available for free to anyone with the proper equipment, without subscribing to any sort of Internet service or being beholden to anyone delivering Internet to where you live. Second, while anything on the Internet must be delivered to each individual person that wants to consume it, something on a broadcast station is transmitted once and is available for anyone to snatch it out of the air. This makes broadcasting ideal for delivering content a large number of people want to consume at one time, specifically something live like a breaking news story or a sports event. At a time when the commission is embroiled in the heated debate over "net neutrality", both of these factors suggest a thriving broadcast television industry has a key role to play in ensuring a free, vibrant, competitive marketplace for video and other content, the one by ensuring the presence of at least a marginal alternative to the depredations of Internet service providers, the other by at least mitigating the highly disproportionate amount of Internet traffic devoted to delivering video, which only promises to become more disproportionate as the Internet video marketplace continues to mature.[45]

Indeed, the great irony of the incentive auctions is that the spectrum the wireless industry so covets will in all likelihood be used and needed for the delivery of video it's already being used for.[46] Even as they prepare for the spectrum bonanza offered by the incentive auctions, the largest wireless companies are implicitly recognizing the value of the technology of broadcasting for the delivery of high-demand video; both AT&T and Verizon have begun work on "LTE Broadcast" networks utilizing fundamentally the same one-to-many technology the broadcast industry has used for decades.[47] LIN Media has suggested that

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[44] As recognized by several commenters, e.g., Comments of the Communications Workers of America, pp. 12-16; and Comments of the Writers Guild of America, West, 6 Aug 2014, pp. 8-9, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751012. Re: purchasing more stations, Turner, p3.

[45] Wick, Morgan, "Want Net Neutrality? Support Broadcasting", RabbitEars Blog, 20 Jun 2014, retrieved from http://www.rabbitears.info/blog/index.php?post/2014/06/20/Want-Net-Neutrality-Support-Broadcasting.

[46] Comments of LIN Television Corporation d/b/a LIN Media, 6 Aug 2014, p4 et seq., retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521750990.

[47] Re: AT&T, Fitchard, Kevin, "AT&T will build an LTE-Broadcast network tailor-made for video", Gigaom, 24 Sep 2013, retrieved from http://gigaom.com/2013/09/24/att-will-build-an-lte-broadcast-network-tailor-made-for-video/; re: Verizon, Chen, Brian X., "Verizon Wireless Prepares Network for TV Broadcasting", New York Times, 31 Jan 2014, retrieved from http://bits.blogs.nytimes.com/2014/01/31/verizon-lte-multicast/.

either these companies should be subject to the same ownership restrictions as traditional broadcasters, or traditional broadcasters should be deregulated to the same extent these wireless companies are,[48] but considering that the use of LTE Broadcast is explicitly noted to be of use for presenting the Super Bowl[49], an event that has always aired on broadcast television, I can't help but wonder if the development of LTE Broadcast networks might not, to some degree, represent duplicative use of spectrum. Do we really need one set of spectrum to transmit video to traditional television sets and another set of spectrum to transmit the exact same video to mobile devices, even before noting the asymmetry of regulations applied to each?

In fact, the broadcast industry already recognizes that we do not. In 2009, the Advanced Television Systems Committee enacted the "ATSC M/H" standard, allowing broadcast stations to use their existing licenses to deliver content tailored to mobile devices.[50] Today there are over one hundred stations using the ATSC M/H standard,[51] most of them marketing the technology through the Mobile Content Venture (through the "Dyle" brand) or the Mobile500 Alliance.[52] However, at present the technology faces numerous obstacles; for one thing, only one device at present supports the technology natively,[53] with other devices requiring the purchase of an antenna dongle. Because the feed is separate from the main broadcast stream, rights need to be acquired separately, so many valuable programs are not on the service.[54] Most importantly, however, broadcasters' reliance on the retransmission consent regime makes them reticent to do anything that would make it easier for consumers to drop their cable subscriptions, giving them little incentive to adopt or promote the technology. Thus broadcasters would rather strike agreements with MVPDs to create "TV Everywhere" apps such as ABC's "Watch ABC" app to reach users of mobile devices than adopt the Mobile DTV technology.[55] Indeed the technology's boosters have touted the ability to stick a mobile DTV feed behind a TV Everywhere paywall to convince broadcasters to adopt the technology, an approach with disturbing implications for the future of free over-the-air television.[56] Mobile DTV has been painted as a stopgap and "bridge" to the next-generation "ATSC 3.0" standard being developed by broadcasters,[57] which is currently slated for 2016,[58] the same year the commission plans to complete the ownership review, so the long-term goal may be a single

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[48] Comments of LIN Television Corporation d/b/a LIN Media, esp. pp. 5-6.
[49] Fitchard, op. cit., and Chen, op. cit.
[50] National Association of Broadcasters, "ATSC Mobile TV Standard", retrieved from http://www.nab.org/mobiletv/atscStandard.asp.
[51] "Mobile DTV Service List", RabbitEars.info, retrieved from http://rabbitears.info/market.php?request=atscmph on 6 Sep 2014.
[52] National Association of Broadcasters, "About Mobile TV", retrieved from http://www.nab.org/mobiletv/aboutMobileTV.asp.
[53] "RCA 8" Mobile TV Tablet", Dyle.tv, retrieved from http://www.dyle.tv/devices/rca-8-mobile-tv-tablet/.
[54] Dodson, Andrew, "Mobile DTV and Its Many Business Models", TVNewsCheck, 14 Nov 2013, retrieved from http://www.tvnewscheck.com/playout/2013/11/mobile-dtv-and-its-many-business-models/.
[55] Lawler, Richard, "ABC officially relaunches its Player app as Watch ABC with live TV streaming", Engadget, 14 May 2013, retrieved from http://www.engadget.com/2013/05/14/watch-abc-launches-live-tv-streaming-philadelphia-nyc/.
[56] Dodson, op. cit.
[57] Ibid.
[58] Advanced Television Systems Committee, "ATSC Evaluating Detailed 'Physical Layer' Technical Proposals for Next-Generation ATSC 3.0 TV Transmission System", 2 Oct 2013, retrieved from http://www.atsc.org/cms/index.php/communications/press-releases/328-atsc-evaluating-detailed-physical-layer-technical-proposals-for-next-generation-atsc-30-tv-transmission-system.

standard for delivery to all devices of all sizes whether fixed or mobile, taking the decision to broadcast to mobile devices away from station owners and possibly precluding the imposition of a workable TV Everywhere paywall.

Regardless, it is clear that, properly nurtured, the broadcast industry has the potential to play a key role in the video marketplace of the future. As such, it is clear that the commission will still need to police broadcast television ownership for the foreseeable future. Some deregulation will likely be called for, but only if Congress and the commission learn from the mistakes of the cable era and allow broadcasting to be competitive enough to render excessive regulation unnecessary, as well as consider broadcasting's role as the one truly local medium for instant delivery of content. Congress and the commission should work to make broadcast television competitive with alternative technologies *on its own* – not with kludges such as the retransmission consent regime – as well as foster a competitive landscape within it.

The Zombie Crossownership Ban

On the topic of the newspaper crossownership ban, whatever purpose it ever served has outlived its usefulness, and it is now mostly serving to hasten the death of the newspaper industry (and to some degree, hindering broadcasters' ability to provide quality journalism). There is no good reason to restrict broadcast station owners' ownership of a news-gathering service defined by its distribution on paper of the same stories one could as easily read on the Internet.

That the dominant sources of news, especially local news, on the Internet remain the web sites of broadcast stations and newspapers, as noted by Free Press and the Communications Workers of America, only reflects their incumbent advantages and does not change that the Internet effectively neutralizes the differences between them and other sources of news and information such as blogs – especially as many newspapers have moved to Internet-only distribution.[59] More absurdly, Free Press also blithely claims that "the impending doom for newspapers…has not come to pass", flying in the face of common sense and numerous confirmations of precisely that trend going back over a decade that include Free Press' own statements of fact,[60] and attempts to claim that the trend of media companies spinning off their print enterprises from their broadcasting business to "plan for more profitable futures" backs up this point that the newspaper industry is alive and well, when their own source notes that, on the contrary, a major impetus for the trend is to prevent "financially squeezed newspapers" from "drag[ging] down the share price of companies with prospering TV, cable and digital divisions."[61]

The Writers Guild of America, West supports retaining the ban in order to preserve the number of sources of news and information serving a given market,[62] but does not even address the declining state

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[59] Comments of Free Press, pp. 1-2, 8-9; Comments of the Communications Workers of America, p4; Pryne, Eric, "Newspapers make move to online only", Seattle Times, 7 Mar 2009, retrieved from http://seattletimes.com/html/businesstechnology/2008823971_onlinepapers07.html.

[60] Comments of Free Press, p10. For example, see Free Press, "Defending Press Freedom", retrieved from http://www.freepress.net/quality-journalism, retrieved 8 Sep 2014.

[61] Edmonds, Rick, "Splitsville: Why newspapers and TV are going their separate ways corporately", Poynter, 31 Jul 2014, retrieved from http://www.poynter.org/latest-news/mediawire/260700/splitsville-why-newspapers-and-tv-are-going-their-separate-ways-corporately/, cited in Comments of Free Press, p10.

[62] Comments of the Writers Guild of America, West, pp. 10-11. The WGAW does note that most Internet news sites "simply aggregate content from traditional media sources" (p7).

of newspapers over the course of over a decade now in the wake of the Internet, which raises the specter that retaining the ban will result in a reduction of sources of news and information through shutting down as opposed to consolidation.[63] The Screen Actors Guild-American Federation of Television and Radio Artists is even worse, exhorting the commission to hold off media consolidation but only citing examples of it in television and radio, failing to explain how the cross-ownership ban relates to the examples of consolidation they cite or address the decline of the newspaper industry.[64] The United Church of Christ *et al* support the commission's tentative conclusions that the rule is still necessary and that "full-power television stations and major newspapers are the only 'voices' that should be included within the definition of major media voices" without preemptively parrying the arguments of those that would repeal the rule; I hope they will correct this in reply comments.[65] The Free Community Paper industry offers little analysis beyond the commission's own analysis, worries about "intra-industry consolidation" (implicitly within the newspaper industry), and dismissing the voices in favor of the ban's repeal as those "with the access to capital and the economies of scale to leverage cross-media acquisitions"; the same concerns about relying on local TV stations and newspapers' present domination of the local news landscape as above apply to them.[66] Perhaps the most convincing argument for retaining the ban is Free Press' argument that just because the ban hasn't been sufficient to overcome the numerous other obstacles to minority and female ownership in the broadcast market does not mean it is not effective.[67] However, given the diminished stature of newspapers it seems that at this point the ban would only ever have a miniscule effect on this front, certainly not enough to overcome the overall danger to the future of journalism, and considering how indirect an effect it would be with considerable collateral damage, it would be arbitrary and capricious to justify retaining the ban on those grounds alone.

The Looming Incentive Auctions

Regardless of what the future holds, any proposed changes to broadcast television regulations should take into account the upcoming broadcast incentive auctions and the tremendous changes likely to come upon the broadcast industry as a result. I do not believe the commission's crackdown on sharing arrangements was intended to push stations towards surrendering spectrum in the incentive auction, not least of the reasons why being that surrendered spectrum could end up making hash of the commission's ownership rules no matter what, for the commission's channel-sharing proposal implies that a single "station" is not guaranteed to occupy the same amount of spectrum as any other station.

As such, it is hard to see how channel sharing, the operation of digital subchannels, and restrictions on duopolies can coexist. A station owner that operates two stations could choose to surrender some spectrum and channel-share the two stations on the same frequency, or they could choose to simply surrender one license entirely and operate that station as a subchannel of the other station. The use of spectrum may be exactly the same between the two scenarios, but the latter scenario would render the owner completely free of any local ownership restrictions; they would not have to worry about any

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[63] As noted by, e.g., Comments of the National Association of Broadcasters, p16.
[64] Comments of the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), 6 Aug 2014, pp. 3-4, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751238.
[65] Comments of the United Church of Christ et al., p44.
[66] Comments of the Association of Free Community Papers et al., 6 Aug 2014, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751518.
[67] Comments of Free Press, pp. 12-13.

restrictions on sharing arrangements or coordinated retransmission consent negotiations, or about the stations being among the top four in the market, or about any loss of diversity of voices. The downside is that the owner would have the must-carry rights to only one station instead of two, but that would be irrelevant if both stations were in enough demand to demand carriage on cable systems (say, if they were both Big Four affiliates), as would presumably be the case if both stations were among the market's top four or were attempting coordinated retransmission consent negotiations. Without accounting for any of this, the Commission would seem to be tearing open a massive loophole in any ownership regulations it adopted. We are already seeing this in Sinclair's offer to turn in the licenses of WCIV Charleston, WCFT Tuscaloosa, and WJSU Anniston, to complete its acquisition of Allbritton Communications, while continuing to air their programming on digital subchannels.[68]

Perhaps, as suggested by Free Press in response to these moves, that's the point: to encourage companies to make use of the spectrum they have.[69] If so, however, it seems to be losing sight of the reason for ownership restrictions in the first place. Surely the goal should be to maximize the number of voices, not minimize the number of stations, and preferably to prevent companies from monopolizing control of the most valuable programming and leaving scraps for smaller owners, as Gray Television has done with several Midwestern stations by transferring their valuable programming to digital subchannels and selling the shells left behind to women and minorities, and as Sinclair proposes to do with one of the stations it either owns or plans to acquire in Las Vegas.[70] Certainly whatever goals the Commission and these groups seek aren't furthered by stations shutting down while the number of voices remains constant. In any case, under current rules it's entirely possible for one company to own two channels' worth of spectrum if the duopoly rules are met, and if duopolies are forbidden or tightened the effect is to discourage channel sharing (except, perhaps, among smaller stations) and allow larger owners to enjoy the benefits of a duopoly without being recognized as one.

The American Cable Association's proposals are a start, but their proposal to prevent station owners from affiliating with two of the top four networks in the same market would – besides the concerns raised by broadcasters of effectively policing broadcasters' content – only further the commission's existing protection of the current Big Four networks, and any modification of it would simply continue the commission's existing practice of arbitrary numerical thresholds.[71] Some other ideas to consider

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[68] Harrington, Clifford M., on behalf of Sinclair Broadcast Group, Inc., Letter to Marlene H. Dortsch, 29 May 2014, retrieved from http://broadcastingcable.com/sites/default/files/public/Sinclair-Allbritton-deal.pdf.
[69] Free Press, op. cit., and Comments of Free Press, p8 and note.
[70] Gray Television, Inc., "Gray Selects Purchasers for All of Its Six Former Shared Services Stations", 27 Aug 2014, retrieved from http://www.gray.tv/index.php?page=press-releases&releaseid=1961513; Sinclair Broadcast Group, Inc., "Sinclair Broadcast Group to Acquire KSNV (NBC) in Las Vegas, Nevada", 3 Sep 2014, retrieved from http://sbgi.net/site_mgr/temp/Vegas%20Close.pdf. See also "Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on Three More TV Stations Going Dark Under the FCC'S New JSA Policy", 24 Jun 2014, retrieved from http://www.fcc.gov/document/commissioners-pai-and-orielly-statement-fccs-new-jsa-policy, and Comments of Block Communications, Inc., 6 Aug 2014, pp. 4 and 12, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521751500.
[71] Comments of the American Cable Association, pp. 12-13. Note that Block Communications would impose a similar rule but include the CW and MyNetworkTV; see Comments of Block Communications, Inc., p11 et seq. Of course, this underscores the arbitrary nature of what is considered a "major" network; why would Block include the CW or "programming service" MyNetworkTV rather than, say, Ion Television, which has been known to draw viewership approaching or even exceeding that of the CW (see, e.g., Golum, Rob, "U.S. Television Prime-Time Ratings for Week Ended Aug. 24", Bloomberg, 26 Aug 2014, retrieved from

would be doing away with "subchannels" entirely and requiring every channel to be licensed as a separate station,[72] preventing one owner, in a market with *n* commercial channels, from owning two channels in the top *n*/2 (rounded down) (or alternately, preventing an owner of *x* commercial channels in a market with *n* channels from owning two in the top *n*/*x*, rounded up), or preventing one owner from owning more than one-eighth the total amount of spectrum available to commercial television stations in the market or one-half of a physical channel's width (whichever is larger). Whatever the answer, coming out of the incentive auctions the commission needs to have uniform ownership rules based on size of spectrum, not just the suddenly-fuzzy concept of a "station". Closely linked to this is a spectrum-management policy that allows the broadcast landscape as a whole to remain dynamic and vibrant, allowing new stations to be formed and, if stations are going to take up variable slices of spectrum, existing stations to be consolidated or split as circumstances change.

Conclusion

The commission's failure to complete the 2010 Media Ownership Review and decision to roll it into the 2014 Review, which will now be completed only in 2016, could prove to have far-reaching and potentially disastrous consequences, given how quickly the market is moving. The commission will attempt to complete the broadcast incentive auction before completing a review that would determine what ownership rules should apply to a post-auction landscape, and not only has it decided to treat certain types of JSAs as duopolies before completing the review that should ostensibly determine whether that is a wise decision or how to go about closing the JSA loophole if it should at all, it will require existing agreements to be wound down by the time it completes the review that should determine how JSAs are actually used.

The commission has not completed a review since the eve of the digital transition, and that review left some rules intact that were questionable even at the time (for example, the provenance of JSAs is hardly a new issue). Not only was the market for internet video in its fledgling stages (YouTube was only two years old), the retransmission consent marketplace was only starting to pick up, and the iPhone was released just that year and as such no one was even calling for incentive auctions. By the time the commission completes its next review, the broadcast industry will have gone through multiple upheavals – and if the commission is not careful, both the incentive auctions and the ownership review could end up crippling if not finishing off the broadcast industry at a time when it may be on the verge of being as relevant as it's ever been in the cable era.

As the commission proceeds with its ownership review, I hope it will take a holistic view of the effect its regulations or lack thereof has on the broadcasting landscape. Broadcasters are subject to numerous regulatory disadvantages compared to cable providers and networks, and have been effectively forced

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http://www.bloomberg.com/news/2014-08-26/u-s-television-prime-time-ratings-for-week-ended-aug-24.html, or Golum, Rob, "U.S. Television Prime-Time Ratings for Week Ended March 23", Bloomberg, 25 Mar 2014, retrieved from http://www.bloomberg.com/news/2014-03-25/u-s-television-prime-time-ratings-for-week-ended-march-23.html)?

[72] This would obviate the point made by both the ACA and Block (see previous note) that smaller markets may need multicast capabilities to provide all of the four major network affiliates. It would also go some distance to avoiding or rectifying the mistake some have identified in the Telecommunications Act of 1996 of granting incumbent station owners a parallel digital channel for free occupying the entire width of an analog channel; see Testimony of Ralph Nader before the Committee on the Budget, U.S. House of Representatives, 30 Jun 1999, retrieved from https://web.archive.org/web/20130404212429/http://www.nader.org/releases/63099.html.

to rely on retransmission consent to compete effectively with cable networks that are able to collect subscription fees from cable providers, while staring down the face of an incentive auction that could leave behind a robust, slimmed-down broadcast industry set for the long term, or end up finishing the entire industry off. Not all of these directly have to do with the commission's ownership policies, but they do mean that tightening ownership restrictions without doing the same for cable or providing relief that would better allow smaller station owners to survive would only deepen broadcasting's regulatory disadvantage to cable without necessarily doing much to slow down consolidation, while loosening them would result in a further homogenization of the airwaves, a further marginalization of women and minorities, and a further consolidation of stations in the hands of large corporations with little incentive to fight for the actual best interests of broadcasting – with the end result of making free over-the-air television even less competitive with cable. And carrying out the incentive auctions or ownership review without the other in mind could end up undermining the commission's ownership goals at best (and may already be doing so) and leave the industry incurably crippled at worst.

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