

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

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

REPLY COMMENTS OF FREE PRESS

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SUMMARY

Free Press respectfully submits these reply comments in response to the Federal Communications Commission's Further Notice Proposed Rulemaking released April 15, 2014.¹ We respond to the flawed arguments of a number of industry commenters who erroneously argue that changes to the media landscape have rendered the Commission's media ownership rules unnecessary to protect the public's access to diverse and competing sources of local news and information.

These arguments ignore the realities of the marketplace, the unique relationship between broadcasters and the public, and the Commission's broad mandate to protect competition, diversity, and localism. Were the agency to adopt the policy proposals of these commenters, it would threaten the availability of independent viewpoints and news coverage. It would also adversely impact the Commission's longstanding goal of encouraging competition and diversity through media ownership by new entrants, including women and people of color.

Free Press supports the Commission's proposal to retain the local television ownership rule in light of its continued importance in today's media ecosystem. While online platforms may offer the promise of supplemental news services, they have not come close to replacing the local news gathering and information programming of traditional outlets like broadcast television and newspapers. Therefore, in reviewing its ownership rules, the Commission must consider the public's reliance on broadcasters and newspapers as the primary sources for information that individuals need to learn about local affairs and participate in the democratic process.

¹ *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 (2014) (“FNPRM”).

The Commission's media ownership rules ensure that the public has access to diverse, independent and competing sources of local news both on and offline. Industry commenters greatly overstate the degree to which the most popular news sites fulfill the public's local information needs. The websites of local TV stations and local newspapers remain the dominant primary sources for local news available online and off.

Free Press also urges the Commission to reject the nagging calls of broadcasting and newspaper conglomerates to relax the newspaper broadcast ownership rule. The Commission should assess waivers on a traditional case-by-case basis, but without presumptions that invite gamesmanship by broadcasters and encourage more detrimental consolidation in local markets.

In order to ensure that local ownership restrictions are properly enforced, the Commission should also act swiftly to require disclosure of shared services agreements ("SSAs") and to make those arrangements that effect de facto transfers of control attributable.

Finally, the Commission should be mindful that it cannot justify relaxing any of its rules because it has punted yet again on the Third Circuit's diversity remand. In the 2010 Quadrennial Review cycle,² the Commission committed to measures "in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity." Despite this, the Commission has not lifted a finger to meaningfully address diversity issues. If the Commission again fails to study the impact of its rules on diverse ownership or relaxes any rules before doing so, it will again run afoul the court's explicit mandate.

² *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, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011).

Free Press echoes the calls of other public interest commenters who have been committed to promoting ownership diversity for over a decade. The Commission should make diversity a central focus of this Quadrennial Review proceeding and complete the diversity measures required by the Third Circuit's remand.

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I. The FCC's Media Ownership Rules are Necessary to Protect Access to Competing Sources of Local News and Information

Civic participation and effective democracy require a robust media. For this reason, the Commission's media ownership limits exist to preserve and promote competition, diversity, and localism among the sources of local news and information the public relies on most: broadcast stations and local newspapers.

In their initial comments, broadcasting and publishing conglomerates reassert arguments that media ownership limits are no longer necessary because the media landscape has radically changed due to competition from multichannel video providers and the Internet.³ For the most part, these arguments fail to consider the degree to which Americans still rely on traditional newspaper and television stations for local news. Moreover, broadcasters' conception of the media marketplace narrowly focuses on the profit-maximizing aspect of broadcasting to the exclusion of its valuable public service function. The Commission should reject industry's stale arguments and weight the public interest concerns, rejecting broadcaster requests that are based solely on their failure to realize the gains to which they apparently believe they are entitled.

A. The Local TV Ownership Limits Continue to Be Necessary to Ensure the Public's Access to Competing Sources of Local News

The Commission is right to propose retention of its local television ownership rules, including the eight voices test and the existing numerical limits and the prohibition of mergers

³ See, e.g., Comments of the National Association of Broadcasters, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 9-31 (filed Aug. 6, 2014) ("NAB Comments"); Comments of Sinclair Broadcast Group, Inc., MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 2-4 (filed Aug. 6, 2014) ("Sinclair Comments"); Comments of the Coalition of Smaller Market Television Stations, MB Docket Nos. 14-50, 09-182, 07-294, at 6 (filed Aug. 6, 2014) ("CSMTS Comments"); Comments of Nexstar, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 8-10 (filed Aug. 6, 2014) ("Nexstar Comments"); Comments of Morris Communications, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 4-5 (filed Aug. 6, 2014) ("Morris Comments").

among the top-four stations in a market. As described in our initial comments, even though Americans may turn to a variety of media to meet their entertainment and information needs, local television remains the top source for local news.⁴ The local TV ownership rule continues to ensure that there is sufficient competition and diversity among these sources to produce the richest pool of news possible.

The local TV ownership rule also ensures that a baseline of diversity exists when people turn to the Internet for news. As we also noted in our comments, when people go online to meet their local news needs, they typically read stories that can be sourced back to traditional television (and newspaper) outlets.⁵ Sinclair seeks to undercut this fact by pointing out that none of the fifteen most popular news websites are local TV or newspaper sites. In doing so, Sinclair confuses the issue and contradicts itself. It is certainly true that people visit the sites of their local newspapers and TV stations, and it is also true that when popular sites like Yahoo! News and Google News report on local issues the original report can be traced back to a local outlet that employs journalists in the respective community.⁶

Thus, even though the FCC's rules were conceived to promote diverse media before the Internet existed, the rules have since developed the added benefit of ensuring some level of

⁴ See Comments of Free Press, MB Docket Nos. 14-50, 09-182, 07-294, at 9 (filed Aug. 6, 2014) ("Free Press 2014 Comments") (citing American Press Institute, "How Americans get their news," Mar. 31, 2014, <http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/>).

⁵ See Free Press 2014 Comments at 9 (citing Pew Research Center's Project For Excellence In Journalism, *How News Happens: A Study of The News Ecosystem of One American City* (Jan. 11, 2010), http://www.journalism.org/analysis_report/how_news_happens).

⁶ Yahoo! News is the most popular news website according to the rankings submitted by Sinclair. Visiting news.yahoo.com reveals that the site does have a section dedicated to local news that is tailored to the user's geographic location. Notably, each story in the local section links to a report from a traditional local news site. For example, when a user in Washington, D.C. visits the local section of Yahoo! News, the page displays articles from local outfits including FOX 5, WTOP Radio, the Washington City Paper, the Gazette, and the Washington Post.

diversity among the most popular online news sources. Because the vast majority of Americans still get most of their local news from traditional outlets, media ownership limits remain necessary to ensure that these primary sources are not consolidated in the hands of a few owners.

Several industry commenters rely heavily on broadcast television's competition with new media for advertising dollars to advocate for relaxation of the local television ownership rule.⁷ Nexstar, NAB, and others claim that common ownership would lead to "efficiencies" better enabling broadcasters to compete with new media, along with cost-savings that would result in better programming. This argument discounts the special relationship between broadcasters and the public, and disingenuously implies that savings will be reinvested in local broadcast stations.

Industry commenters forget that broadcast television is not a purely commercial endeavor. A conception of broadcasting driven solely by competition for ad revenues neglects media's role in community, culture, and democracy. There is a unique trust that exists between broadcasters and the public. Broadcasters also build their business using the public's airwaves, with licenses initially granted free of charge for the vast majority even of commercial stations. In return, broadcasters are obligated to serve the public's needs responsibly. This, and not just profit maximization is the principle that governs the FCC's oversight of broadcasting.

Moreover, industry claims that so-called efficiencies of consolidation will lead to more local news have not borne out. Make no mistake, consolidation has been occurring,⁸ but the reinvestment in local news that broadcasters promise has not. Broadcasters have little economic

⁷ See, e.g., Nexstar Comments at 15; NAB Comments at 57-58; CSMTS Comments at 7-11.

⁸ Consolidation via Joint Sales Agreements ("JSAs" and SSAs) has swept the broadcast industry in recent years. That NAB uses the presence of SSAs as a proxy for concentration in its comments and accompanying advertising study demonstrates that the Commission already allows for common ownership in violation of the duopoly rule, and yet that this *de facto* common ownership has not solved the scale and competition problems broadcasters claim arise from local television ownership limits.

incentive to produce more local news from their gains. Given pressures from Wall Street, broadcasters are more likely to take cost-savings as dividends. And even if broadcasters were to reinvest savings in content, there is no guarantee that they would invest in local programming. The Coalition of Smaller Market Television Stations suggests that local programming is expensive to produce and tends to generate less advertising revenue,⁹ so in that case there would be less incentive to provide it than to provide cheaper, more “advertiser-friendly” programming.

Free Press supported in our initial comments here a return to a single-license rule. Allowing only one license per-owner, per-market would promote competition in larger markets where duopolies currently exist and free-up stations for purchase by new (and potentially diverse) entrants. What is more, given the multicasting benefits of the digital transition, stations can now air multiple streams on the same 6 MHz of spectrum (or less) previously required for a single channel. Multicasting eliminates the need to acquire an additional TV station, so a single license rule also would encourage more efficient use of broadcast spectrum.

Broadcasters have already begun taking advantage of multicasting technology. Sinclair Broadcast Group announced that it would return its license and employ multicasting technology in three markets where it is prohibited from acquiring a second station.¹⁰ The Coalition of Smaller Market Televisions argues that “when the duopoly rule drives stations off the air, it clearly is no longer serving the interests of localism, diversity, or competition”¹¹; but Sinclair’s actions – and its comments – rebut this argument and demonstrate clearly that nothing drove these stations off-air.

⁹ CMSTS Comments at 3.

¹⁰ See Harry A. Jessell, “Sinclair Giving Up 3 Stations to Appease FCC,” *TVNewsCheck* May 29, 2014; Michael Malone, “Sinclair to Acquire KSNV Las Vegas for \$120 Million,” *Broadcasting and Cable*, Sept. 3, 2014.

¹¹ CMSTS Comments at 11.

Sinclair argues that the Commission must not truly be concerned with competition if it permits multicasting. The broadcasting giant says “If the Commission finds it acceptable to multicast two networks in a given market, why should ‘competitive concerns’ stand in the way of Sinclair owning both stations outright? It simply makes no sense if the Commission is truly concerned about competition.”¹²

Sinclair’s statements substantiate Free Press’s suspicion that the company’s move to turn in its licenses was a calculated one.¹³ Sinclair implicitly concedes that multicasting in those markets has the same practical effect as co-owning two stations – giving the entity that controls both of them the ability to thwart local competition by retaining affiliations. It is fair to conclude that the nation’s largest broadcaster views multicasting as a viable business model and one that is preferable to facing competition from other licensees who would demand the network affiliation if Sinclair were to sell the stations. Most importantly, Sinclair’s admission demonstrates that tightening local ownership limits would not threaten broadcaster’s ability to do business in the digital era.

B. Relaxing the NBCO Rule Would Adversely Affect Access to Diverse and Independent News Sources

Free Press supports retention of the newspaper-television cross ownership ban and cautions against a waiver standard that would presume certain combinations are in the public interest – specifically, making that presumption for combinations involving stations ranked outside of the top-four in a DMA and those that would leave at least eight voices.

The public interest is best served by a pure case-by-case waiver approach to any such proposed cross ownership scenarios. We noted in our initial comments that the Commission’s

¹² Sinclair Comments at 9.

¹³ See Lauren M. Wilson, “The Latest Twist and Turn in Sinclair’s Quest to Buy Allbritton,” Free Press Blog, June 3, 2014.

traditional waiver standard is best suited to effect the purpose of the rule,¹⁴ while pre-set presumptions merely would invite gamesmanship on the part of broadcasters to concoct deals that neatly aligned on their face with the Commission’s standard – but without a meaningful assessment of the combinations’ actual harm to competition, localism, and diversity.

Industry commenters continue to rely on a number of studies¹⁵ commissioned during the 2006 media ownership review to claim that newspaper/broadcast cross-ownership increases local news production.¹⁶ As outlined in Free Press’s comments and reply comments in the 2010 Quadrennial Review, these studies have been discredited by peer reviews and by subsequent research.¹⁷

The industry-cited studies err by limiting their focus to the impact that cross-ownership had on news production at the station-level, as opposed to local news output at the market-level. An examination of output at the market-level demonstrates that the presence of a newspaper-television combination leads to an overall drop in local news production by other TV stations in the market by about 25 percent.¹⁸ This decline supports the theory of “crowding out.” In markets without a cross-owned entity, local television stations generally follow the lead of the local newspaper. Because these papers are independently owned, individual local TV newsrooms have relatively equal access to the newspaper’s reporters and editors. Cross-ownership throws off this

¹⁴ See Free Press 2014 Comments at 11.

¹⁵ *FCC Seeks Comments On Research Studies On Media Ownership*, MB Docket No. 06-121, Public Notice, 22 FCC Rcd 14313 (2007). NAA and NAB rely specifically on two studies from the 2006 Quadrennial Review: Daniel Shiman, *The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming* (2007) (“Study 4”); and Jeffrey Milyo, *Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (2007) (“Study 6”).

¹⁶ NAA Comments at 3; NAB Comments at 76.

¹⁷ See, e.g., Comments of Free Press, MB Docket Nos. 09-182, 07-294, at 50-51 (filed Mar. 5, 2012) (“Free Press 2012 Comments”).

¹⁸ See Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, Federal Communications, filed MB Docket No. 06-121 (filed Nov. 14, 2007).

balance. Cross-owned TV stations are able to leverage their exclusive access to the local newspaper to shut out competitors from stories they would otherwise report. Consequently, those stations pare down their news operations, which leads to an overall decline in the amount of local news produced in the market and in the number of independent producers of local news.

NAB and NAA also continue to cite to FCC Study #4 commissioned for the 2010 Quadrennial review to support the notion that cross-ownership leads to more local news in local media markets, even after Free Press had demonstrated that they study confirms the opposite. That study's author qualified his finding that "on average a cross-owned television station produces nearly 50 percent more local news"¹⁹ with a note that even where this is a station-level increase in the provision of local news, the increase "does not spill over to the market level, [which] may be evidence that cross-owned stations are 'crowding out' the news of non-cross-owned stations."²⁰

NAA's anecdotal evidence from seven markets suffers from the same pitfalls as the above-mentioned studies. NAA claims that as a result of cross-ownership, local TV stations and newspapers in Phoenix, Dayton, South Bend, Milwaukee, Cedar Rapids, Atlanta, and Spokane were better equipped to cover certain news stories. In each market, NAA only points to station-level coverage. There is no mention of how well other TV stations or newspapers in each market covered the same events and no analysis of the total output of news pertaining to any events.

NAA also makes several observations that are easily explained by the realities of the broadcast business, and that simply undermine its position on relaxing ownership rules. For instance, the NAA cites coverage of some of the biggest local and national news stories of the

¹⁹ NAA Comments at 3 (citing Jack Erb, FCC Media Ownership Study 4, *Local Information Programming and the Structure of Television Markets*, at 27-28 (May 20, 2011)).

²⁰ Erb, *Local Information and the Structure of Television Markets*, at 48.

past four years as evidence of the benefits of cross-ownership. It's safe to assume that the local TV stations and newspapers identified by NAA would have dedicated significant resources to the tragic shooting of Congresswoman Gabrielle Giffords, a fire that claimed 19 firefighters' lives, the local university's (Notre Dame in South Bend) trip to the football National Championship game, and the war in Iraq whether or not they were cross-owned. NAA would also like the Commission to believe that cross-ownership is responsible for stations covering severe weather, sports, and election night results.²¹ All of these endeavors are routine for the broadcasting business and there is no evidence that in the absence of cross-ownership, there would be a want for such coverage.

Finally, NAA touts common sense realities of the media marketplace as cross-ownership benefits as well. The trade group boasts that Schurz Communications "has far more reporters on the ground in South Bend than any other media outlet."²² Of course this is true. Schurz owns the only major newspaper in the area, the CBS affiliate and two radio stations. It is difficult to conceive how it would be possible for another media outlet to compete with those numbers or how one company dominating the talent pool for available journalists is a positive outcome. NAA also implies that the national media's failure to accurately report Congresswoman Gifford's condition in the wake of her tragic shooting is support for cross-ownership because Gannett's *Arizona Republic* and KPNX were on the ground and did not rely on rumors as national media outlets did. However, the *Republic* and KPNX did not have an edge over national media because they are cross-owned. They had an edge over national media simply because their reporters were already in Arizona. If anything, that the national media failed to accurately report the facts surrounding Congresswoman Gifford's shooting highlights the reality that national

²¹ NAA Comments at Section IA-IG.

²² *Id.* at 6.

news is not a substitute for local coverage and, therefore, local limits on ownership remain necessary to promote diversity, localism, and competition.

Free Press also stresses that contrary to the self-serving claims of industry, there is no basis for a finding that relaxing the NBCO rule would not harm ownership diversity.²³ Neither the Commission, nor any industry commenter, is in a position to make such a finding because they have not adequately and accurately studied the relationship between cross-ownership and levels of ownership by people of color and women. Because the Commission has not made this inquiry, relaxation of the NBCO rule is unjustified.

C. The FCC Should Not Allow The Public Interest Benefits of Local Ownership Limits To Be Undermined By Shared Services Agreements

Free Press supports the conclusion that local television ownership rules remain necessary in the public interest to ensure competition. This is precisely the reason the Commission also should ensure that television broadcasters' reliance on SSAs does not jeopardize the competitive benefits of the local television ownership limits.

The record in the 2010 Quadrennial Review and in license transfer proceedings that have come before the Commission over the last two years show that SSAs are being used with increasing frequency to circumvent the media ownership rules. Thanks to Free Press research, the Commission has some insight into the scope of this rule evasion problem²⁴ and has moved to require attribution of certain joint sales agreements. However, the public interest necessitates full disclosure from broadcasters so that the Commission can ensure it has the best information with which to make policy and so that the public may be aware of who is really controlling their airwaves.

²³ See Free Press 2014 Comments at 13.

²⁴ See S. Derek Turner, *Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation* (updated Mar. 2014).

1. The Proposed Definition of Shared Services Agreements and the Associated Disclosure Requirement is Appropriately Tailored

Free Press continues to support the Commission’s proposal to define SSAs broadly and to require public disclosure of all SSAs. A broad definition captures the varied forms that resource-sharing arrangements may take and thwarts attempts by broadcasters to game the system using new nomenclatures or contractual devices.

Broadcasters contend that the proposed definition of SSAs is overly broad and “not connected to any identifiable regulatory problem.”²⁵ This mischaracterization of the proposed definition stems from the fact that many large station group owners do not view using SSAs to effectuate *de facto* transfers of control as a “problem.” The proposed definition is indeed tied to at least two regulatory problems: (1) The Commission’s lack of information pertaining to the substance and breadth of sharing arrangements and (2) the agency’s resulting inability to evaluate the impact of these arrangements on its rules and policy goals.

In particular, the comments of the Coalition for Smaller Market Television Stations (“CSMTS”) highlight the inherent flaw in the argument that the Commission lacks the evidence to support a broad SSA definition. CSMTS contends that the Commission has “failed to offer a rational connection between the facts found and the choice made” and that its proposal “creates a new burden for SSAs with absolutely no rational justification.”²⁶ CSMTS conveniently ignores the reality that the paucity of data pertaining to SSAs is a direct result of their disclosure not being required.

NAB calls the Commission’s proposal “plainly unnecessary as to . . . agreements already subject to the Commission’s regulation and agreements that raise no attribution concerns.”²⁷

²⁵ NAB Comments at 95-96.

²⁶ CSMTS Comments at 17

²⁷ NAB Comments at 96.

This line of reasoning defies common sense. If an agreement is already subject to regulation, (for example, regulations governing JSAs or Local Marketing Agreements) it is precisely the type of agreement that conveys influence or contingent interests. Also, in theory, the Commission should already be aware of any agreements that are subject to its rules, so their inclusion under the proposed SSA definition as well would have no practical effect on parties to the agreement.

With respect to “agreements that raise no attribution concerns,” NAB argues that such agreements should also be exempt from disclosure. However the question remains, how can the Commission determine whether an SSA raises attribution concerns if it is not privy to the terms of the agreement? The answer is that the Commission cannot make such a determination. NAB asks the FCC to take broadcasters on their word that they are abiding by the Commission’s rules. This kind of open-ended mechanism is unworkable and unenforceable.

There is sufficient evidence on the record that broadcasters, and specifically several of NAB’s largest members, regularly use SSAs to circumvent the Commission’s local ownership limits and regularly mislead the Commission. In March, Mission Broadcasting filed a letter in the 2010 Quadrennial proceeding claiming that despite its reliance on SSAs, the shell corporation’s SEC filings demonstrated its independence from Nexstar Broadcasting. The truth was that those same SEC filings conveyed Mission’s total dependence on Nexstar. Under the tables cited by Mission in its March letter is the following: “Under these local service agreements, Nexstar has received substantially all of our available cash, after satisfaction of operating costs and debt obligations. We anticipate that Nexstar will continue to receive substantially all of our available cash, after satisfaction of operating costs and debt obligations.”²⁸

²⁸ See Mission Broadcasting, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2013, at p. F-6.

The Nexstar case is not an anomaly. Other NAB members like Sinclair routinely tell the FCC that the terms of their SSAs do not amount to transfers of control; yet reports to the SEC that the parties to those same SSAs are Variable Interest Entities, because the mega-broadcaster has the “power to direct” the sidecar’s activities that “most significantly impact their economic performance.”²⁹ This incongruence supports two conclusions: (1) Broadcasters cannot be trusted to self-report arrangements that run afoul of the Commission’s attribution standards; and

²⁹ See Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 000-26076, March 12, 2013.

In determining whether we are the primary beneficiary of a VIE for financial reporting purposes, we consider whether we have the power to direct the activities of the VIE that most significantly impact the economic performance of the VIE and whether we have the obligation to absorb losses or the right to receive returns that would be significant to the VIE. We consolidate VIEs when we are the primary beneficiary. . . . All the liabilities, including debt held by our VIEs, are non-recourse to us except for Deerfield Media, Inc.’s (Deerfield) debt which we guarantee. . . . We own the majority of the non-license assets of the Cunningham stations and our Bank Credit Agreement contains certain default provisions whereby insolvency of Cunningham would cause an event of default under our Bank Credit Agreement. We have determined that the Cunningham stations are VIEs and that based on the terms of the agreements, the significance of our investment in the stations and the cross-default provisions with our Bank Credit Agreement, we are the primary beneficiary of the variable interests because, subject to the ultimate control of the licensees, we have the power to direct the activities which significantly impact the economic performance of the VIEs through the sales and managerial services we provide and we absorb losses and returns that would be considered significant to Cunningham. . . . We own the majority of the non-license assets of the Deerfield stations and we have also guaranteed the debt of Deerfield. Additionally, there is a lease in place whereby Deerfield leases assets owned by us in order to perform its duties under FCC rules. We have determined that the Deerfield stations are VIEs and that based on the terms of the agreements, the significance of our investment in the stations and our guarantee of Deerfield’s debt, we are the primary beneficiary of the variable interests because, subject to the ultimate control of the licensees, we have the power to direct the activities which significantly impact the economic performance of the VIEs through the sales and managerial services we provide and we absorb losses and returns that would be considered significant to Deerfield. . . . We have outsourcing agreements with certain other license owners, under which we provide certain non-programming-related sales, operational and administrative services. We pay a fee to the license owners based on a percentage of broadcast cash flow and we reimburse all operating expenses. We also have a purchase option to buy the License Assets. We have determined that the License Assets of these stations are VIEs.

(2) Noncompliance with local ownership limits is a significant regulatory problem that can be addressed by broadly defining SSAs and requiring their disclosure.

Other than license transfer proceedings, painstaking research by Free Press is the only means through which the Commission becomes aware of SSAs. Certainly, requiring television stations to place a copy of each SSA for the station in its public inspection file at its main studio and in the station's online public file is a helpful mechanism for achieving transparency. Adding SSAs to public files that already exist requires minimal effort and the benefits of transparency far outweigh any costs. Free Press agrees with CWA that a disclosure requirement is long overdue given the timeframe in which the Commission has been considering the proposal, and we likewise urge expediency.³⁰

2. The Commission Should Immediately Treat SSAs That Confer *De Facto* Transfers of Control as Attributable

Requiring the disclosure of SSAs is merely a first step in closing a loophole that has engendered years of runaway media consolidation. Knowledge of how SSAs confer agency and control will allow the Commission to determine which SSAs should be attributed for purposes of the ownership rules. Those agreements that confer significant influence over programming and station operation, and demonstrate contingent financial interest, should be attributed immediately.

Just as in past rounds of comments, nearly every industry commenter in this proceeding opposes attribution of SSAs. The Commission should reject these arguments. Given the harms to jobs, journalism and competition in local media markets that Free Press and other public interest

³⁰ See Comments of Communications Workers of America, The Newspaper Guild-CWA, and the National Association of Broadcast Employees and Technicians-CWA, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 7 (filed Aug. 6, 2014) ("CWA Comments").

commenters have demonstrated,³¹ the Commission can no longer tacitly endorse the systemic evasion of its rules through SSAs.

The record is replete with examples of SSAs that facially violate the Commission's local ownership limits by allowing one station to take over the news operation of another or shifting the economic risk and reward to one party.³² And as UCC *et al.* astutely pointed out, the Commission committed to considering attribution of SSAs in the 2010 Quadrennial Review.³³ It is unclear why the Commission has seemingly abandoned this commitment. In any event, Free Press urges the agency to correct course and adopt a set of criteria that identifies aspects of SSAs, which if met, would render the agreements attributable. To this end, we reiterate our support for the proposal advanced by UCC *et al.* in their 2010 comments.³⁴ This bright-line multi-factor test reveals those SSAs that are clearly intended to sidestep the rules and to undermine competition and localism in local communities.

Cracking down on unlawful SSAs will have the added benefit of promoting minority ownership. Commission inaction with regard to SSAs facilitated the decline of minority ownership levels. However, since the Commission banned JSAs, at least six stations reportedly have gone to independent, diverse owners.³⁵ Free Press is encouraged that should the Commission take the logical next step in curbing covert consolidation, ownership and operation of stations by people of color and women may continue to rise.

³¹ See Reply Comments of Free Press Reply, MB Docket Nos. 09-182, 07-294 (filed Apr. 17, 2012) at 29-33 ("Free Press 2012 Reply Comments"); CWA Comments at 16-20.

³² CWA Comments at 12-15;

³³ See Comments of UCC *et al.*, MB Docket Nos. 14-50, 09-182, 07-294, at 11 (filed Aug. 6, 2014).

³⁴ See Free Press 2014 Comments at 26.

³⁵ See Michael Malone, "Gray TV Lines Up Minority/Female Owners for Six Stations," *Broadcasting & Cable* (Aug. 27, 2014).

II. The FCC Cannot Move Forward with Any Proposed Rule Relaxation Until it Addresses the Diversity Issues Remanded by the Third Circuit

Since 2012, Free Press has commented at length on the Commission's obligation to satisfy the Third Circuit's directive to address ownership diversity issues within the 2010 Quadrennial Review. As discussed above in these reply comments, we reiterate that current media ownership limits remain necessary and in the public interest. In any event, Free Press again stresses that the Commission cannot move forward with any proposed or industry-requested rule relaxations until it has followed the court's instructions on remand. The Third Circuit ordered the Commission to complete three tasks:

- “Synthesize and release existing data [on female and minority ownership] such that studies will be available for public review in time for completion of the 2010 Quadrennial Review.”³⁶
- “[C]onsider the effect of its rules on minority and female ownership.”³⁷
- Consider alternative proposals and definitions for the now-vacated revenue-based eligible entity definition (such as a socially disadvantaged business (SDB) definition “before it completes its 2010 Quadrennial Review.”³⁸

As of the date of the reply comments, the Commission has only released raw data on female and minority ownership, but has not attempted an analysis of that data. Furthermore, the Commission has not even undertaken the remainder of the tasks outlined by Third Circuit.

A. Public Interest Groups, Civil Rights Organizations, and Representatives of Diverse Broadcasters Have Demonstrated the Commission's Failures To Study the Impact of its Policies on Underrepresented Groups

Industry and public interest commenters alike agree that minorities and women are severely underrepresented in the broadcast industry and that the Commission should seek to

³⁶ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 n.42 (3d Cir. 2011).

³⁷ *Id.* at 471.

³⁸ *Id.* at 438, 471.

remedy this deficiency.³⁹ The Commission has said that it intends to take steps to encourage ownership by women and people of color, however the agency has yet to even take the first step. The Commission has not analyzed the types of market and ownership structures that are more or less likely to support entry or sustain successful broadcast business ownership by underrepresented groups. Furthermore, Free Press and others have recommended several ways in which the Commission can update and improve its data collection methods. A complete and up-to-date assessment of diverse ownership across the broadcast dial is the first step in satisfying the Third Circuit directive, followed by an examination of changes in those levels over time.⁴⁰

Free Press and other groups continue to stress the importance of conducting such analyses.⁴¹ Promoting ownership opportunities for people of color and women should be the focus of this review. A number of public interest commenters have made suggestions for studies the Commission may undertake as well as both race-neutral and race-conscious policies that the agency may implement to redress the dismal state of minority ownership. Free Press supports a thorough evaluation of all alternatives. The Commission can no longer sit on its hands in defiance of the court while consolidation threatens to erase minorities from the broadcast picture.

³⁹ See generally Comments of the National Association for Black Owned Broadcasters, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (filed Aug. 6, 2014) (“NABOB Comments”); Comments of Asian Americans Advancing Justice, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (filed Aug. 6, 2014) (“AAAJ Comments”); Comments of the Leadership Conference on Civil and Human Rights, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (filed Aug. 6, 2014) (“LCCR Comments”); see also Comments of Writers Guild of America West, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 14-15 (filed Aug. 6, 2014) (“WGAW Comments”); NAB Comments at 88; Morris Comments at 43.

⁴⁰ See Free Press 2014 Comments at 16-17.

⁴¹ Comments of the National Hispanic Media Coalition, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 13-16 (filed Aug. 6, 2014) (“NHMC Comments”), NABOB Comments at 9-13, LCCR at 2-3; WGAW Comments at 14-15; AAJC Comments at 14.

B. Allowing Further Consolidation of Local Media Markets Will Undermine Efforts to Improve Ownership Diversity

Relaxing the media ownership rules to allow for increased consolidation will not create ownership opportunities for historically underrepresented groups, it will diminish them. Furthermore, any strides seen from policies the Commission may adopt to enhance diverse ownership levels will be jeopardized by allowing more consolidation in local media markets.

Free Press has acknowledged that there are myriad factors contributing to the dismal state of broadcast ownership diversity. Data from the FCC's 257 Studies⁴² demonstrates that the primary factors influencing female and minority broadcast ownership include but are not limited to systemic discrimination in financing and access to capital and deals. However, Free Press's *Out of the Picture* and *Off the Dial* reports demonstrate that market consolidation also is chief among these factors, and that it even exacerbates other barriers to entry.⁴³

As markets become more concentrated, the cost of stations becomes artificially inflated and potential new entrants are driven away in favor of existing large chains. Concentration also has the effect of hobbling smaller and single-station owners in their efforts to negotiate for advertising and programming contracts. In its comments, NABOB described the pressure that consolidation has placed on minority radio station owners who, unlike large companies, could

⁴² Over a decade ago the FCC commissioned the so-called "Adarand Studies Series" which examined discrimination and barriers to entry for minorities across a host of communications industries. The following studies addressed discrimination and disparities in broadcast markets: Ivy Planning Group, "Whose Spectrum Is it Anyway?: Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing," at 14 (2000); KPMG, "History of Broadcast License Application Process" (2000); KPMG, "Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC" (2000); KPMG, "Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC" (2000); William D. Bradford, "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes," at 27 (2000). All available at http://www.fcc.gov/opportunity/meb_study/.

⁴³ Free Press 2012 Comments at 18-23.

not deliver minority audiences to advertisers as part of a group buy and at a discounted price. NABOB rightly concluded that because of this type of economic pressure, any further relaxation of the Commission's ownership rules would fuel the decline of diverse ownership.⁴⁴

On the other hand, NAB would like the Commission to accept the notion that because ownership limits have not been able to maintain or increase ownership levels, their elimination will not significantly impact minority ownership. NAB's logic is flawed. Given all the factors working against minority owners, the local ownership limits alone cannot be expected to promote or even maintain minority participation in the broadcast market. That doesn't mean that the converse is true, and that consolidation does not harm diverse ownership. In fact, the Commission has plenty of evidence that concentration adversely impacts minority owners. If it intends to enhance ownership opportunities for minorities and women, the agency must stop the bleeding and not allow for more consolidation.

Free Press notes that an analysis of ownership diversity would be useful even if it fell short of justifying race and gender-based policies. In fact, such analyses are not only required for reasoned decision-making in a quadrennial review, they are also mandated by the Third Circuit's decision in *Prometheus II*. Analyses of ownership diversity and market structure can help to inform race- and gender-neutral policies that can promote ownership diversity. Assessing what types of market structures are more likely to support new entrants and ownership by new, diverse and independent owners, and promulgating Commission policy to encourage or mirror those structures, does not implicate equal protection issues or require strict scrutiny.

⁴⁴ NABOB Comments at 13-14.

III. Broadcasters' Section 202(h) and Constitutional Concerns Remain Meritless

In their latest round of comments, broadcasters and newspaper publishers return to well-worn constitutional arguments and those concerning the implementation of the Communications Act. Specifically, they mistakenly claim that Section 202(h), the Communications Act provision that mandates periodic review of the ownership rules, requires the FCC to take only deregulatory actions.⁴⁵ They also rehash arguments that the Commission's media ownership rules are unconstitutional,⁴⁶ in spite of Supreme Court precedent to the contrary.

Free Press has already responded to these arguments in the 2010 Quadrennial docket.⁴⁷ The courts have affirmed that Section 202(h) is not a one-way deregulatory ratchet. Both the U.S. Court of Appeals for the District of Columbia Circuit and for the Third Circuit also have determined that in the context of 202(h), the term "necessary" means "convenient," "useful" or "helpful," *not* "indispensable."⁴⁸ The Third Circuit also rejected industry arguments that the media ownership rules violate the First Amendment or violate newspaper owners' rights to equal protection under the Fifth Amendment.⁴⁹ The Commission should not allow industry commenters to re-litigate these issues. Until the Supreme Court decides to reverse its longstanding precedent confirming the constitutionality of media ownership limits, the Commission and the industry remain bound by it.

⁴⁵ *See, e.g.*, NAB Comments at 3-4.

⁴⁶ *See* NAA Comments at 19; *see also* Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket Nos. 09-182, 07-294, at 27-28 (filed Mar. 5, 2012); Comments of CBS Corporation, MB Docket No. 09-182, at 4-5 (filed Mar. 5, 2012).

⁴⁷ *See* Free Press 2012 Reply Comments at 55-58.

⁴⁸ *See id.* at 55-56.

⁴⁹ *See id.* at 57.

CONCLUSION

Local media ownership limits, when properly enforced, ensure the public is served by diverse and antagonistic media sources. The Commission should immediately require disclosure and attribution of SSAs to better achieve these ends. The Commission also must address the diversity issues remanded by the Third Circuit and forgo relaxation of any media ownership rules at least until it has studied the impact of those rules on diverse ownership.

Respectfully Submitted,

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