Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF FREE PRESS

Corie Wright
Free Press
1025 Connecticut Ave, NW
Suite 1110
Washington, DC 20036

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SUMMARY

Free Press respectfully submits these comments in response to the Notice of Proposed Rulemaking (NPRM) issued in the Federal Communications Commission's 2010 Quadrennial Review of its media ownership rules. This proceeding marks the fifth periodic media ownership review undertaken by the Commission since the passage of the Telecommunications Act of 1996. The Commission's last two media ownership orders were rejected by the U.S. Court of Appeals for the Third Circuit in *Prometheus I* and *Prometheus II.* In both cases, the court rejected FCC attempts to relax its media ownership rules as arbitrary and capricious or otherwise inconsistent with the notice requirements of the Administrative Procedure Act. The court has twice directed the FCC to address persistently and appallingly low levels of ownership of broadcast stations by women and people of color, and to assess the impact of Commission rules on ownership opportunities for underrepresented groups.

The Commission's track record with regard to appellate review of its media ownership proceedings is not a particularly successful one. If the agency hopes to change that pattern in the 2010 Review, the NPRM has set it off to a bad start.

Significantly, the NPRM fails offer specific proposals to address, or data in response to, the Third Circuit's remand of the eligible entity definition. The NPRM instead states the Commission will undertake 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, including female and minority ownership." Despite a clear mandate from the Third Circuit in both *Prometheus I* and *II*, the Commission appears to once again ignore the court's instruction to address diversity issues concurrent with the present quadrennial review. The *Prometheus II* order directs the FCC to complete the

diversity actions required on remand *prior to the completion* of the 2010 Review, not to postpone until the 2014 Review as the Commission now proposes to do. If the FCC continues down the path laid out in the NPRM, it will – *for a second time* – have disregarded the court's explicit instruction.

What is more, while the FCC has proposed relaxing the newspaper-broadcast cross ownership rule and eliminating the radio-television cross ownership rule, it has not provided an assessment of the impact such changes would have on levels of female and minority ownership. Nor has the FCC provided a complete picture of the current status of female and minority ownership, despite having implemented changes to its ownership reporting forms three years ago. The FCC cannot continue to avoid the court's direct instruction to address broadcast ownership by women and people of color. The Commission has established an unfortunate pattern of avoiding, by deferral, critical questions on media ownership diversity. The court is not likely to look favorably on the result should the Commission do so yet again.

Instead, the Commission must make diversity a central focus of this Quadrennial Media Ownership proceeding and complete the diversity measures required by the court on remand before it concludes the 2010 Review. To accomplish this it must do the following:

> (1) Assess the market structures that are more likely to foster ownership by women and people of color, and evaluate the potential impact of media ownership rule changes on ownership opportunities for such owners;
>
> (2) Conduct the research required to support targeted measures to promote ownership of broadcast stations by underrepresented groups, while guarding against further erosion of media ownership among these groups that could occur if the FCC were to prematurely relax existing media ownership limits.

The prematurity of relaxing the rules in light of this judicial directive, with the potential for jeopardizing existing diversity levels, is by itself a legal and policy reason sufficient to maintain existing limits. But even if that were not enough, there is substantial evidence that the

FCC media ownership rules continue to play a necessary and integral role in promoting competition and independence among the most popular and important local information sources.

While new media technologies may offer the promise of supplemental news services, they have not come close to replacing the local news gathering and information programming of broadcast television, radio, and newspapers. Thus, when promulgating its ownership rules, the Commission must take into account the public's reliance on broadcasters and newspapers as the primary sources for information that individuals need in order to learn about their local communities and participate effectively in local affairs, including democratic processes.

Moreover, 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*. As the Commission's own research shows, and as discussed in greater detail below, the sources of local news available online are virtually identical to those available offline. The websites of local TV stations and local newspapers remain the dominant sources and destinations for local news available in the virtual world, just as TV stations and local newspapers do in the real world.

Free Press urges the Commission to abandon its proposal to relax its newspaper broadcast cross-ownership (NBCO) rule. A nearly identical relaxation of this rule adopted in 2007 (and vacated by the Third Circuit on notice grounds) was roundly rejected by the public and policy makers. The NBCO rule remains necessary to promote access to independent and diverse local news sources, and allowing more cross-ownership leads to a curtailment of local news at the market level. Nor is cross-ownership necessary to "save" the newspaper industry. The vast majority of newspaper companies maintain solid profits. In any case, to the extent that the newspaper industry does face challenges to its entrenched business model, those challenges will not be resolved by cross-ownership. If anything, much of the consolidation that has occurred in recent years has put newspapers in a worse financial position as consequence of over-leveraged debt. To service this debt, these companies have cut jobs and reporting; and many of the cost savings generated by these so-called efficiencies have been used to enhance profits, not to generate more or better local news coverage. The FCC should not reward these bad business decisions by allowing these companies to consolidate even more, thereby continuing the cycle of debt service, layoffs and news cuts.

Similarly, Free Press urges the FCC to approach with caution its proposal to repeal the radio/television broadcast rule. Evidence suggests that consolidation disproportionately affects opportunities for women and people of color to become and remain broadcast stations owners. It is especially important not to reduce entry points for these groups in the radio industry, with its relatively low barriers to entry at least as compared to television ownership.

Free Press supports the FCC's conclusion that it should retain its other media ownership limits, including the local radio rule and local television rule. These rules remain necessary to promote the public's access to independent and competing sources of local news and information.

We also encourage the Commission to adopt an attribution policy that prohibits the "covert consolidation" by local TV stations entering into resources sharing arrangements such as shared services agreements, news sharing, and joint ventures. Such arrangements undermine the competition-promoting benefits of the local duopoly rules. While outright media consolidation in local TV markets adversely impacts competition and diversity, covert consolidation achieves a more insidious yet equally adverse effect. In many communities, the end result is a TV dial where most of the news on one channel is essentially a duplicate – or even an exact copy – of what airs on a putatively competing station. The corrosive effects that these practices have on editorial independence and journalistic integrity should concern the public, regulators, and industry professionals.

Unfortunately, in the absence of more proactive attention by the Commission to the problems raised by such arrangements, stations are entering into these deals with increasing alacrity. Free Press has identified almost 80 television markets where various types of deals are in place, involving more than 200 stations in total, and with new deals beings announced with alarming frequency. The FCC can no longer tacitly approve such practices through inaction. If it walks like a duopoly and talks like a duopoly, then the Commission should treat an arrangement as a duopoly for the purpose of the local television ownership rule. The FCC must change its attribution policies to address the anti-competitive effects of resource sharing agreements and it must do so promptly. Furthermore, the FCC should not grandfather existing arrangements that do not comply with a new attribution policy, but should require broadcasters to come into compliance with rules changes within a reasonable period of time.

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COMMENTS OF FREE PRESS

Free Press respectfully submits these comments in response to the Federal Communications Commission (FCC or Commission) Notice of Proposed Rulemaking in the above referenced dockets, which was released on December 22, 2011.[1] Free Press is a nonpartisan, nonprofit organization working to reform the media by promoting diverse and independent media ownership, strong public media, quality journalism, and universal access to communications. Free Press has participated extensively in previous iterations of the Commission's review of its broadcast media ownership rules, and was a petitioner in *Prometheus II*, the recent court case striking down the FCC attempt to relax the newspaper broadcast cross ownership rule in the last quadrennial media ownership review.

The Supreme Court has determined that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[2] The

[1] *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, MB Dkt No. 09-182, FCC 11-186 (Dec. 22, 2011) ("2011 NPRM").

[2] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Commission's media ownership rules play an integral role in furthering this goal by ensuring that local communities continue to have access to independent, varied and competing news, information, and viewpoints from broadcast stations and daily newspapers – the overwhelmingly dominant sources of local news and information. Conversely, relaxing these important protections, with the resulting loss of independence and competition from one of these important media outlets through a merger, runs counter to that goal. 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.

Background

The proceeding marks the fifth periodic media ownership review undertaken by the Commission since the passage of the Telecommunication Act of 1996.[3] Initially, Congress required the Commission to review its ownership rules every two years.[4] That was later amended to provide for a quadrennial review of the rules.[5]

In the first biennial review, which commenced in 1998, the FCC relaxed the dual network rule.[6] However, prior to completing the 1998 Biennial Review, the Commission also substantially relaxed the local TV ownership and radio/TV cross-ownership rules in a separate local television ownership proceeding.[7] Because the 1998 review was not completed until 2000

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[4] *Id.* § 202(h), 110 Stat. at 111–12.

[5] 2004 Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 *et seq.* (2004). This legislation also lowered the FCC's national television ownership limit to 39 percent (down from the 45 percent cap the FCC adopted in the 2002 Review) and excluded the statutorily mandated 39 percent cap from the Commission's future periodic ownership reviews.

[6] *Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule*, Report and Order, 16 FCC Rcd 11114 (2001).

[7] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903 (1999).

(when the FCC was scheduled to begin its second biennial review), the 2000 Biennial Review recommended some revisions to the media ownership rules but essentially retained the existing limits, including the relaxed the dual network, local TV ownership, and radio/TV cross ownership rules that had been adopted less than one year prior.[8]

Broadcasters appealed the FCC's decision to retain the national television station ownership rule and the cable/broadcast cross ownership rule in the 2000 Biennial Review.[9] They also challenged the local TV ownership rule.[10] These challenges were both heard by the U.S. Court of Appeals for the D.C. Circuit, which remanded the local TV ownership rule[11] and the national television ownership rules[12] and vacated the cable/broadcast cross ownership rule.[13] The remanded national and local television ownership caps were merged into the FCC's 2002 Biennial Review, pursuant to which the Commission released an order that relaxed virtually all of its multiple ownership rules and raised the national TV ownership cap to 45 percent.[14] Congress, expressing consternation at the Commission's decision to relax the rules so much in that 2002 Biennial Review, adopted bi-partisan legislation that set the national TV ownership cap at 39 percent and excluded the cap from the FCC's consideration in subsequent media ownership

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[8] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Report and Order,14 FCC Rcd 12903 (1999) ("1999 TV Order"); *2000 Biennial Regulatory Review*, Report, 16 FCC Rcd 1207 (2001).

[9] *Fox Television Stations Inc. v. FCC*, (*Fox I*), 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, *Fox II*, 293 F.3d 537 (D.C. Cir. 2002).

[10] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

[11] *Id.* at 152.

[12] *Fox I*, 280 F.3d at 1033.

[13] *Id.*

[14] *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership* Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003).

reviews.[15] It also extended the period of time between ownership reviews from two years to four.[16]

In the meantime, consumer and industry groups both appealed the 2002 Biennial Review Order and the challenges were heard this time by the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC* (*Prometheus I*).[17] Concluding that the FCC had not provided reasoned analysis sufficient to support the relaxed limits adopted in the 2002 Biennial Review, the Third Circuit remanded the 2002 Biennial Review rules to the FCC for further consideration, retaining jurisdiction.[18] Notably, the court also determined that the FCC's failure to consider the impact of rule changes on ownership opportunities for women and minorities was arbitrary and capricious, and it directed the FCC to consider proposals to advance ownership by underrepresented groups at the same time that the Commission responded to the Court's remand order.[19]

The FCC then folded the remanded 2002 Review into the 2006 Quadrennial Review, which was initiated in the summer of 2006.[20] One year later, the FCC issued a second, separate Notice of Proposed Rulemaking requesting comment on proposals to encourage ownership of broadcast outlets by socially and economically disadvantaged business, including those owned

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[15] 2004 Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 *et seq* (2004).

[16]. *Id*.

[17] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("Prometheus I").

[18] *Id.* at 381.

[19] *Id.* at 421, n.59; *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 465 (3d Cir. 2011) ("Prometheus II") ("[W]e held that the 2003 Order had arbitrarily repealed the Commission's only rule—the failed station solicitation rule ('FSSR')—directed at enhancing minority ownership, while also failing to consider the effects of its other rules on minority and female ownership more broadly.")

[20] *2006 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834 (2006).

by women and minorities.[21] In December 2007, the FCC adopted a Report and Order and Order on Reconsideration, which concluded its 2006 Quadrennial Review and 2002 Biennial Review on remand and which relaxed the previous ban on newspaper-broadcast cross ownership but retained all the other rules.[22] The FCC did not address the diversity issues remanded by the Third Circuit in the 2006 Review Order. Instead, in 2008 it adopted a Report and Order and Third Further Notice of Proposed Rulemaking.[23] Petitions for Review of both the 2006 Review Order and the 2008 Diversity Order were filed by public interest groups, including Free Press,[24] and industry groups, and the consolidated cases again were heard by the Third Circuit, in *Prometheus II*.[25]

In the summer of 2011, the U.S. Court of Appeals for the Third Circuit rejected for a second time the Commission's decision to relax its ownership rules.[26] It agreed with the public interest petitioners that that the Commission failed to meet the notice and comment requirements of the Administrative Procedure Act, and rejected and remanded the decision to relax the

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[21] *2006 Quadrennial Regulatory Review*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 14215 (2007).

[22] *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008) ("2006 Review Order").

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

[24] The Public Interest Petitioners in *Prometheus II* are Free Press, Media Alliance, Prometheus Radio Project, and The Office of Communication for the United Church of Christ. A Petition for Reconsideration of the 2006 Review Order was also filed by Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes, and National Hispanic Media Coalition. *Common Cause et. al.*, Petition for Reconsideration, filed MB Dkt 06-121 (Mar. 24, 2008). The Commission has never acted on the petition for reconsideration.

[25] *Prometheus II,* 652 F.3d 431.

[26] *See id.*

newspaper-broadcast cross ownership rule.[27] It rejected claims by industry petitioners that the Commission should have relaxed its media ownership limits further, and also rejected arguments that the FCC's media ownership limits are unconstitutional.[28]

The court also agreed with Free Press and the other public interest petitioners that the FCC had once again abdicated its duty to address diversity concerns, including longstanding low levels of broadcast media ownership by women and minorities. The court rejected as arbitrary and capricious the Commission's decision to adopt a revenue-based eligible entity definition, finding that "[t]he Commission has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women."[29] **I**t also rejected the FCC's decision "to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business ('SDB'))."[30] It chastised the Commission for failing to address proposals "offering race- and gender-neutral means to increase opportunities for minority and female ownership put forward by UCC and Free Press."[31] And, as it had done once before in *Prometheus I*, the court instructed the FCC on remand "to consider the effect of its rules on minority and female ownership"[32] and to address the SDB definition issue in the context of the 2010 review "so that [the FCC] may adequately

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[27] *Id*. at 437-38.

[28] *Id.* at 456 (upholding the Commission's decision to retain the radio-television cross ownership rules), 459 (upholding the Commission's decision to retain the local television rule), 463 (upholding the Commission's decision to retain the local radio rule, including the AM/FM subcaps), 464 (upholding the Commission's decision to retain the dual network rule), and 464-5 (rejecting industry arguments that the ownership limits are not constitutional).

[29] *Id.* at 471.

[30] *Id.* at 438.

[31] *Id.* at 469.

[32] *Id.* at 471-72.

justify or modify its approach to advancing broadcast ownership by minorities and women."[33] The panel retained jurisdiction over the remanded issues.[34]

In the instant NPRM the Commission now seeks comment on each of its media ownership rules and on the issues remanded by the Third Circuit. The FCC has renewed its previous proposal to relax the newspaper-broadcast cross ownership rule (rejected and remanded by the Third Circuit on notice grounds).[35] It also proposes to eliminate the radio-television cross ownership rule, while generally retaining the limits set by its other media ownership rules, including the local television and local radio rules.[36] The Commission also seeks comment on whether and how to address attribution issues when broadcasters enter into resource sharing arrangements with other in-market stations.[37] Significantly, the NPRM does not offer specific proposals to address the Third Circuit's remand of the eligible entity definition, but instead states that the Commission will undertake 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, including female and minority ownership . . . "[38]

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[33] *Id.* at 438.
[34] *Id.* at 472.
[35] *2011 NPRM* at ¶89.
[36] *Id.* at ¶¶119, 26, 61
[37] *Id.* at ¶194.
[38] *Id.* at ¶158.

I. The Notice of Proposed Rulemaking Does Not Respond To The Third Circuit's Mandate To Address Diversity Issues In The 2010 Review

The Commission's track record with regard to appellate review of its media ownership proceedings is not a particularly successful one. If the agency is hoping to change that pattern in the 2010 Review, the NPRM has set it off to a bad start.

Despite a clear mandate from the Third Circuit in both *Prometheus I* and *II*, the Commission appears to be once again ignoring the court's instruction to address diversity issues concurrent with the present quadrennial review. If the FCC continues down the path laid out in the NPRM, it will – *for a second time* – have disregarded the court's explicit instruction. In *Prometheus II*, the Third Circuit stated:

> Despite our prior remand [in *Prometheus I*] requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue.[39]

Thus, in remanding parts of the 2006 Review Order the Third Circuit instructed the Commission to:

- "[C]onsider the effect of its rules on minority and female ownership"[40]
- 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"[41]
- "[S]ynthesize and release existing data [on female and minority ownership] such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review."[42]

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[39] *Prometheus II*, 652 F.3d at 471.

[40]. *Id.*

[41] *Id.* at 438, 471.

[42] *Id.* at 471 n.42.

But instead of conducting studies and collecting the requisite data in the course of the 2010 Review, the NPRM states that the Commission intends to defer its consideration and analysis of these issues once again:

> [W]e plan to undertake the following actions 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, including female and minority ownership: 1) Continue to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services we license; 2) Commission appropriately-tailored research and analysis on diversity of ownership; and 3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership.[43]

Free Press is encouraged that the FCC has initiated this process by soliciting such initial research. We hope it will lead to sustainable policies to promote a fairer and more competitive media marketplace by making sure that every person, regardless of color or gender, has a meaningful opportunity to serve the public and succeed in the broadcast industry.[44]

However, while the plans outlined in the NPRM are very welcome and essential, they are improperly put off for a later date and a subsequent ownership review. The *Prometheus II* order directs the FCC to complete the diversity actions required on remand *prior to the completion* of the 2010 Review – not to postpone until the 2014 Review, as the Commission now proposes to do.[45] What is more, while the FCC has suggested relaxing the newspaper-broadcast cross ownership rule and eliminating the radio-television cross ownership rule, it has not provided an

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[43] *2011 NPRM* at ¶158.

[44] *Federal Communications Commission Request for Quotation For a Study Examining The Critical American Information Needs Of The American Public*, Public Notice (rel. Feb. 6, 2012).

[45] "We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and *remand for it to do so before it completes its 2010 Quadrennial Review*." *Prometheus II*, 652 F.3d at 471 (emphasis added).

assessment of the impact such changes would have on levels of female and minority ownership. Nor has the FCC provided a complete picture of the current status of female and minority ownership, despite having implemented changes to its ownership reporting forms three years ago.[46]

The Commission's stated rationale for deferral to the 2014 Review is that "the data currently in the record of this proceeding are not complete and are likely insufficient either to address the concerns raised in *Prometheus II* or to support race- or gender-based actions by the Commission." This approach is entirely backwards. If the Commission presently lacks the requisite data and research to address the court's concerns, it should defer a decision in the 2010 Review until it can effectively address them – not the other way around. Indeed, in *Prometheus II* the court already chastised the FCC for relying on similarly flawed logic to justify FCC failure to consider diversity issues in the last media ownership review:

> Stating that the task is difficult in light of *Adarand* does not constitute "considering" proposals using an SDB definition. The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor**.** We are encouraged that the FCC has taken steps in this direction and *we anticipate that it will act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review*.[47]

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[46] *See infra* at section II(A)(1). *See also Promoting Diversification of Ownership in the Broadcasting Services*, Report & Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896 (2009) (adopting reforms to the FCC Broadcast Ownership Reporting form (Form 323)) ("2009 Diversity Order").

[47] *Prometheus II*, 652 F.3d at 471 n.42 (emphasis added).

In any event, the court is already well aware of the FCC's existing data and research deficiencies and expressly directed the FCC to address those deficiencies in the course of the 2010 Review:

> [T]he Commission appears yet to have gathered the information required to address these challenges, *which it needs to do in the course of its review already underway.* As ownership diversity is an important aspect of the overall media ownership regulatory framework, *we re-emphasize that the actions required on remand should be completed within the course of the Commission's 2010 Quadrennial Review of its media ownership rules*.[48]

Unfortunately, the 2010 NPRM appears to have "in large part punted yet again"[49] on addressing the diversity issues that have now been twice remanded by the court – the very thing the court instructed the Commission not to do.

Proposing to relax the media ownership rules without analysis or consideration of the impact such changes may have on minority and female ownership and, moreover, lacking even the proper data regime to monitor the effects of such changes, is inconsistent with reasoned agency decision-making. It also suggests a disregard for diversity issues that contradicts the FCC's statutory mandate[50] and stated goal of "promoting diversity of ownership among broadcast licensees and expanding opportunities for minorities and women to participate in the broadcast industry."[51]

In sum, the proper course of action, both as a legal and policy matter, is to conduct such research for the purpose of informing the FCC's decisions in the present review – not delaying

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[48] *Id. at* 472 (emphasis added and internal citation omitted).

[49] *Id*. at 471.

[50] *See* 47 U.S.C. § 257(b) (directing the Commission to "promote the policies and purposes of [this Act] favoring diversity of media voices" in carrying out its responsibilities under Section 257(a) of the Communications Act to eliminate market barriers for entrepreneurs and small businesses).

[51] *2011 NPRM* at ¶148.

such work until the next one. The FCC cannot continue to avoid the court's direct instruction to address broadcast ownership by women and people of color. The Commission has established an unfortunate pattern of avoiding by deferral many critical questions about media ownership diversity. The court is not likely to look favorably on the result should the Commission do so yet again.

A. The Commission Should Not Conclude The 2010 Review Until It Has Addressed the Diversity Issues On Remand

The FCC must undertake and complete actions to address the court's diversity remand before it finishes the current quadrennial review — or risk being overruled for a third time on the same grounds. While the NPRM has put this proceeding on the wrong track, the Commission can still correct its course.

To this end, the Commission should make diversity a central focus of the 2010 Quadrennial Media Ownership Review and complete the diversity measures required by the remand before it concludes this proceeding. To accomplish this it must do the following: (1) Assess the market structures that are more likely to foster ownership by women and people of color, and evaluate the potential impact of media ownership rule changes on ownership opportunities for such groups; (2) conduct the research required to support targeted measures to promote ownership of broadcast stations by underrepresented groups, while guarding against the further erosion of media ownership among these groups that could occur if the FCC were to prematurely relax existing media ownership limits.

1. The FCC Should Assess How Market Structure Promotes Or Impedes Ownership By Women and People Of Color – Including The Potential Impact Of Any And All Media Ownership Rule Changes

The FCC has affirmed that "promoting diversity of ownership among broadcast licensees and expanding opportunities for minorities and women to participate in the broadcast industry are important parts of our mission under the Communications Act."[52] In order for the FCC to fulfill this mandate, the FCC must consider how market structures in the broadcast industry affect ownership opportunities for new entrants. It must also evaluate how changes to existing broadcast ownership rules could impact minority and female broadcast station ownership levels and opportunities. Indeed, the Third Circuit's instruction to complete work on diversity initiatives within the context of the 2010 quadrennial review is premised on the recognition that changes to the FCC's media limits may impact ownership levels and opportunities among underrepresented groups. The Commission also should conduct research to determine if race and gender-based measure are necessary to promote ownership opportunities for such groups.

We impress upon the Commission the importance of conducting such assessments. Free Press and myriad other groups have made this point repeatedly since the commencement of the 2006 Review. Unfortunately, the Commission has continually and consistently ignored our concerns – to the detriment of the quality of its overall decision-making, as well those decisions' ability to withstand appellate review. The FCC should not repeat this mistake in the 2010 Review.

For example, in the 2006 Review, the Commission ignored substantial evidence in the record about the dearth of minority and female ownership and its detrimental effect on diversity; failed to address record evidence suggesting that broadcast media consolidation raises barriers to

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[52] *Id*. at ¶ 148.

entry for minority and female would-be owners; and failed to analyze the impact of relaxing the NBCO rule on existing and would-be ownership by women and people of color. Free Press and other groups identified and reported significant defects in the way the FCC collected and tallied its female and minority ownership data through its "Form 323: Ownership Report for Commercial Broadcast Stations."[53] These flaws resulted in data that were incomplete, unreliable, and not searchable or aggregable. These findings were confirmed by the FCC's own media ownership studies as well as a GAO Report.[54] As a consequence of these data flaws, the FCC lacked even a basic understanding of which broadcast stations were owned by minorities and females.[55] Despite the flaws in the FCC's own data collection practices, Free Press laboriously produced an accurate broadcast ownership census by-hand, reviewing thousands of documents, and confirmed that "[w]omen and people of color are vastly underrepresented in broadcast station ownership. . . . and are extremely vulnerable to the pressures of local media market concentration and consolidation."[56] Free Press subsequently conducted two studies: *Out of the Picture* and *Off the Dial,* both of which documented that competition, not consolidation, will lower barriers to entry and help underrepresented groups sustain successful broadcast businesses.[57]

Despite the evidence amassed and submitted by Free Press, the FCC did nothing to remedy its female and minority ownership data flaws during the 2006 Quadrennial Review.

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[53] In 1998, the FCC amended the Broadcast Ownership Form 323 to require the provision of information on race and gender. *1998 Biennial Regulatory Review*, Report and Order, 13 FCC Rcd 23056, 23095 (1998).

[54] *See 2009 Diversity Order*, 24 FCC Rcd at 5900-01

[55] *See* Comments of Free Press, filed MB Dkt 06-121 (Oct. 1, 2007) at 3.

[56] *Id*.

[57] S. Derek Turner, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (2007) ("Out of the Picture"); S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (2007) ("Off the Dial").

Indeed, the 2006 Review Order completely ignored these data problems. Nor did the 2006 Review Order address Free Press's finding regarding the negative impact of consolidation on diversity levels. The FCC's subsequent 2008 Diversity Order finally acknowledged that "several commenters and FCC study authors have expressed concern about the Commission's data collection process and have proposed revisions to the Form 323 to enhance its utility in measuring current levels of minority and female broadcast ownership."[58] However, the FCC adopted no remedy, and instead merely put the matter out for further comment.[59]

The FCC did not adopt changes to its ownership data collection processes until May 2009. Citing Free Press's earlier research, the 2009 Diversity Order recognized that "the overall level of minority and female ownership in the broadcast industry remains dismal"[60] and directed the Media Bureau to revise the Form 323 filing process so that the ownership data would be accurate, complete and "incorporated into the database that is searchable, and can be aggregated and cross-referenced."[61] It also adopted several important reforms to Form 323, including expanding the class of entities required to file the form. As a consequence the Commission now requires all full power commercial broadcast stations and all low power television stations that are commercial broadcast licensees to file the new form biennially.[62] The 2009 Diversity Order undertook no analysis of the impact of any of the FCC's media ownership limits on levels of minority and female ownership.

With these data reforms implemented, Free Press had hoped that the Commission would use the new and improved data to assess the potential impact of media ownership limits and

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[58] 2008 *Diversity Order*, 23 FCC Rcd at 5954.

[59] *Id.* at 5954-55.

[60] *Id.* at 5897, n.2.

[61] *Id.* at 5903.

[62] *Id.* at 5904.

market structure on minority and female ownership in the 2010 Review. Unfortunately, none of the eleven studies commissioned by the FCC for the 2010 Review addresses the causal factors or market structures that might promote or impede ownership of broadcast outlets by women and people of color.[63]

Nor has the FCC itself produced an updated and complete census of the status of radio and TV ownership levels among women and people of color. The NPRM reports that "Commission staff has reviewed the 2009 biennial ownership filings of full power commercial broadcast television stations in order to determine the number of stations controlled by reported racial and ethnic categories."[64] It finds that "29 of these stations, or 2.1 percent, are minority owned," and that 36 stations, or 2.6 percent, are controlled by Hispanic or Latino owners.[65] "[N]on-Hispanic White owners control 1,021 stations, or 73.2 percent of the total stations."[66] The balance is owned by corporations or other entities that the Commission could not categorize by race or ethnicity. The Commission provided no new statistical analysis of radio ownership levels and provided no analysis of any broadcast ownership by women.[67]

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[63] One study, Study #7, seeks to examine whether diversity of owners by race promote overall radio listening, particularly for minority audiences by examining the link between minority ownership and minority-targeted programming data covering the period 2005-2009. Joel Waldfogel, *Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009* (2011). Unfortunately the study appears to rely on the flawed minority ownership data that Free Press had previously identified, and the as the peer reviewer notes, "[t]he questionable data on [minority] station ownership somewhat clouds conclusions that come from that analysis." *Study #7 Peer Review*.

[64] *Id.*

[65]. *Id.*

[66] *Id.* The Commission defines minority owners as including Black or African-American owners, American Indian or Alaska Native owners, Asian owners, and Native Hawaiian or Pacific Islanders. Latino and Hispanic owners are counted as a separate category. *Id.*

[67] *See Id.*

Additionally, the NPRM fails to provide any analysis whatsoever of the only figures it does offer. For example, combining the new TV ownership statistics of "minority" and Latino/Hispanic owners yields a total of 4.7 percent of full-power, commercial TV stations that are controlled by such owners. Free Press's study, *Out of the Picture 2007* found minority ownership levels of 3.2 percent. However, it is not yet known if there was an actual improvement in the level of minority ownership between 2007 and 2011, or if the recent figures simply represent the more complete accounting of ownership status afforded by the 2009 revisions to Form 323. While Free Press has not yet been able to properly compare the new Commission data (a full listing of the identified minority owners has not been made publicly available) to earlier data, it appears the new data captures several Hispanic single station owners that were not required to file Form 323 prior to the 2009 revisions. Until the new data is compared to the 2007 Free Press data (which we provided to the Commission) there is no basis for making any conclusions about the trends in minority television ownership. We are uncertain why the Commission did not perform this longitudinal analysis, as it has the Free Press data as well as the source material for that data (previously filed Form 323s). We are also uncertain why the Commission failed to conduct any analysis of female ownership at all, or radio ownership by either people of color or women. The Commission implemented the reforms to Form 323 in part to facilitate better analysis, and the fact that it has not conducted anything but the most cursory analysis is an indication that these policy concerns are still not a top priority at the agency.

2. Relaxing The Media Ownership Rules Would Adversely Impact Minority and Female Ownership And Would Likely Undercut The Potential Benefits Of Any Diversity Measures That The FCC May Adopt In The Future

In *Prometheus II*, the court remanded the Commission's adoption of a revenue-based eligible entity definition and rejected the Commission claim that "it was sensible to avoid constitutional difficulties that might create impediments to the timely implementation of its new rules, even though the constitutional issue had already been the subject of two rounds of notice and comment."[68] Instead the court determined that the "FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies it must get the data and conduct up-to-date studies."[69] The court stated that it anticipated that "such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review."[70]

Many groups have echoed the court's call for research. In a November 2011 letter to the FCC, the Leadership Conference wrote:

> Minority ownership in TV and radio has dropped substantially at a time when these populations are growing. The Leadership Conference conducted hearings in 2005 and 2007 on the importance of diversity in media, and the unanimous conclusion of media experts who participated in our hearings was that the FCC was doing an inadequate job of identifying and working to eliminate the barriers to participation of women and racial minorities in radio and television.[71]

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[68] *Prometheus II*, 652 F. 3d at 469 (internal quotation and citation omitted).
[69] *Id.* at fn 42.
[70]. *Id.*
[71] Letter from the Leadership Conference, filed MB Dkt 09-182 (Nov. 14, 2011) at 1.

Similarly, in December 2011, Free Press joined with fifty organizations to urge the FCC to conduct this long-overdue research. In a joint letter to Chairman Genachowski we stated that

> [w]omen and people of color historically have been grossly underrepresented in ownership of radio and television stations — media forms that use the public airwaves and rank as our nation's most popular and influential outlets. . . . The continued absence of FCC action in the face of deep and intractable ownership disparities is unacceptable.[72]

It is clear that the FCC must conduct the research required to support targeted measures to address longstanding disparities in broadcast media ownership to satisfy the court, as well as its statutory mandate.[73]

But just as importantly, while it is doing so, the Commission must not undercut the potential benefits of such measures by allowing greater consolidation of broadcast outlets. Free Press research demonstrates that media consolidation makes it harder for new entrants and members of underrepresented groups to become – and remain – successful broadcast media owners.

In *Out of the Picture*, Free Press compiled the first accurate census and analysis of commercial television broadcast ownership by women and people of color. In addition to assessing the low representation of women and minorities in television ownership, the study uncovered a distinct relationship between the FCC's relaxation of media ownership rules and the decline in ownership diversity. Free Press tracked the ownership of 40 stations that were minority owned as of 1998, and compared it to their ownership status in 2007 to determine the effects, if any, of two changes to the broadcast television ownership rules: (1) Congress's

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[72] Letter from Free Press et al., filed MB Dkt 09-182 (Dec. 1, 2011) at 1.

[73] Free Press is heartened that the Commission has begun to initiate this important work, but as stated above, this research should be conducted and completed within the context of the 2010 Review.

decision to increase the national television ownership cap from 25 percent to 35 percent in 1996;[74] and (2) the FCC's decision in 1999 to permit local television duopolies.[75] Free Press identified 17 minority-owned stations that were sold to non-minority owners after 1998, noting that "[n]ine of these seventeen sales would not have been permitted under the old national ownership cap and duopoly rules. . . . Had these stations not been sold, minority ownership would be 20 percent higher than the current level."[76] Noting that "[p]ro-consolidation policies enacted by the FCC in the late 1990s had a significant impact on minority ownership, indirectly or directly contributing to the loss of 40 percent of the stations that were minority-owned in 1998," Free Press posited that "further industry consolidation will diminish the number of minority- and female-owned stations. If just a handful of female and minority-owned stations were lost to consolidation, these already anemic numbers would fall precipitously."[77] Indeed, the study offered econometric evidence that indicated that as markets become more concentrated, *ceteris paribus*, minority ownership declines.

Similarly, in *Off the Dial,* Free Press compiled the first (and to-date the only) *complete* assessment and analysis of female and minority ownership of full-power commercial broadcast radio stations operating in the United States. Assessment of minority ownership is particularly important in the radio field as radio is widely regarded as a critical entry point into the broadcast industry. The data reviewed by Free Press suggested that the level of consolidation in radio markets was closely correlated with the level of diverse ownership in those markets and that both

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[74] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
[75] *1999 TV Order*, 14 FCC Rcd 12903.
[76] *Out of the Picture* at 23.
[77] *Id.* at 4-5.

female- and minority-owned stations thrive in markets that are less concentrated. These data also revealed that:

- Markets with female and minority owners have fewer stations per owner on average than markets without them.[78]
- The level of market concentration is significantly lower in markets with female and minority owners. This holds true if the size of the market and the level of minority population in the market are held constant.[79]
- The probability that a particular station will be female- or minority-owned is *significantly lower* in more concentrated markets.[80]
- The probability that a particular market will contain a female- or minority-owned station is *significantly lower* in more concentrated markets.[81]

These results are especially significant because radio, with its comparatively lower barriers to entry and lower station prices, is considered an important entry point for new owners, including women and people of color. Based on this research, Free Press described

> consolidation and market concentration as one of the key structural factors keeping women and minorities from accessing the public airwaves. Before the FCC moves to further increase local market concentration by abandoning longstanding ownership rules, it should carefully consider the potential harms this shift in policy will bring to the underrepresented communities of this country.[82]

Free Press has also examined the potential effects on minority and female ownership of the FCC's proposed relaxation of the newspaper-broadcast cross ownership rule – a proposal that is virtually identical to the one advanced by former Chairman Kevin Martin in 2007.[83] In *Devil In the Details*, Free Press addressed the numerous problems presented by the proposed rule

[78] *Off the Dial* at 24.
[79] *Id. at* 29-31.
[80] *Id.* at 7.
[81]. *Id.*
[82] *Id.* at 9.
[83] *See* Kevin J. Martin, "The Daily Show," NEW YORK TIMES (Nov. 13, 2007) ("The Daily Show"); "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," FCC News Release (Nov. 13, 2007).

(many of which are reiterated in section II(B) of these comments), but also highlighted how this particular approach to relaxing the cross ownership rule would disproportionately target minority owners' stations for purchase.[84] The relaxed newspaper/broadcast cross-ownership rule would allow TV-newspaper combinations in the top 20 markets, so long as the combination only includes one television station that is ranked among the four top-rated channels in the market.[85] However, the data reveal that nearly half of the stations owned by people of color are in the top 20 markets, and none of these are among the top four stations in those markets. This means that stations owned by minorities would be disproportionately targeted for acquisition by newspaper owners seeking to purchase a station.[86]

Even if their stations are not bought outright, people of color and women will find it more difficult to compete in markets with cross-owned combinations. Free Press's analysis of FCC ownership data shows that women and people of color are more likely to be single station owners than their white, male counterparts.[87] This means that these smaller and single station owners will find it more difficult to compete with conglomerated TV-newspaper combinations for programming and advertising, and thus will have a harder time sustaining their businesses.

Finally, this potential diversity loss from the proposed relaxed NBCO rule would be further compounded because, as demonstrated above, increased consolidation raises barriers to entry for minority ownership. Thus, even as existing minority owners are bought out by larger media groups, opportunities for people of color to enter the market and purchase stations of their own will also be decreased.

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[84] Free Press, *Devil in the Details: 10 Facts Kevin Martin Doesn't Want You to Know About His New Media Ownership Rules* (2007) at 13 ("Devil in the Details").

[85] *2011 NPRM* at ¶102.

[86] *Devil in the Details* at 13.

[87] *Out of the Picture* at 29.

In sum, allowing increased consolidation in local media markets will further diminish the already limited number of stations available for purchase, thus leaving women and people of color with fewer chances to become media owners and to promote diverse programming in local communities. Accordingly, Free Press cautions the FCC to avoid compounding low levels of ownership diversity by relaxing these important protections. It is not rational policymaking to assert that increasing diversity and broadcast ownership by women and people of color are important goals, then to ignore the detrimental effects that other rule changes would have on those goals.

II. The Record Does Not Support Relaxing Any Of The Media Ownership Rules In This Proceeding

Free Press urges the FCC to maintain its existing media ownership protections and to abandon its proposal to relax the cross-ownership rules. As explained above, the FCC must conduct the court's required diversity analysis prior to concluding the 2010 Review. More importantly, the Commission should not take any action that could further erode the already low level of broadcast ownership by women and people of color prior to establishing meaningful and effective policies to promote ownership by new entrants and underrepresented groups. As Free Press has shown in this and previous filings, consolidation remains a significant barrier preventing diverse owners from fully participating in the broadcast industry as owners.

The prematurity of relaxing the rules in light of this judicial directive , with the potential for jeopardizing existing diversity levels is by itself a legal and policy reason sufficient to maintain existing limits. Furthermore, there is substantial evidence that the FCC media ownership rules continue to play a necessary and integral role in promoting competition and independence among the most popular and important local information sources. They also encourage efficient, non-duplicative use of the radio spectrum – a limited, publicly owned resource.

As a threshold matter, Free Press takes exception to the NPRM's apparent suggestion that media ownership limits may only remain necessary because access to the Internet is not yet ubiquitous. The NPRM suggests that

> the media marketplace is in transition, particularly as a result of broadband Internet; but new media are not yet available as ubiquitously as traditional broadcast media. Our nation has not yet reached universal deployment or adoption of broadband. . . . Broadband adoption remains under 70 percent, meaning that tens of millions of Americans do not have access to news and other programming on the Internet.[88]

Increasing broadband deployment and adoption is a laudable goal that Free Press has long supported. But it is not necessarily the solution to every single problem that falls within the Commission's ambit. While the Internet is an amazing platform with seemingly boundless potential for innovation, to date, it has not significantly increased the number of independent outlets engaged in regular, reliable and sustainable local journalism. Nor is it clear that it will do so in the foreseeable future. Until that changes, not even 100 percent broadband penetration and adoption can alleviate the lack of competition and source diversity in local news.

While new media technologies may offer the promise of supplemental news services, they have not come close to replacing the local news and information programming function performed by broadcast television, radio, and newspapers. Thus, when promulgating its ownership rules, the Commission must take into account the public's reliance on broadcasters and newspapers as the primary sources for information that individuals need in order to learn

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[88] *2011 NPRM* at ¶4.

about their local communities and to effectively participate effectively in local affairs, including democratic processes.

Moreover, it is becoming increasingly apparent that 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*. As the Commission's own research shows, and as discussed further below, the sources of local news available online are virtually identical to those available offline.[89] Local TV stations and local newspapers, through their websites, remain the dominant sources and destinations for local news available in the virtual world, just as they do in the real world. Indeed, when it comes to local news, the Internet has proven so far to provide less of an original source for local news than an additional platform for the same incumbent media players that have always dominated local news markets.[90] Consequently, the Commission's media ownership rules remain one of the few viable and reasonable means to promote the government's substantial interest in competition and viewpoint diversity in local news and information and, what is more, they do so in a targeted, structurally-focused, and content-neutral way. To that end, Free Press agrees with the FCC's tentative conclusion in the NPRM to retain the vast majority of existing media ownership protections, including the local television and radio ownership rules.

However, Free Press disagrees with the Commission's proposal to relax its longstanding newspaper broadcast cross-ownership (NBCO) rule in favor of allowing such combinations in

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[89] *See* Matthew Hindman, *Study #6: Less of the Same: The Lack of Local News On The Internet* (2010) ("FCC Study #6") at 11.

[90] Indeed, the FCC recognized this in the 2006 Review when on remand from *Prometheus I* it determined that many of the media ownership protections it attempted to eliminate or relax in the 2002 Review remained necessary to promote competition and diversity. "Whereas the years immediately preceding 2002 were largely characterized by dramatic technological advancements, the current record reflects that many noteworthy developments appear more in the nature of technological and marketplace refinements than the advent of wholly new media." *2006 Review Order*, 23 FCC Rcd at 2014..

certain markets. Evidence suggests that the NBCO rule remains necessary to promote access to independent and diverse local news sources, and that allowing cross-ownership leads to a curtailment of local news at the market level. Moreover, cross-ownership is not necessary to "save" the newspaper industry. The vast majority of newspaper companies maintain solid profits that are envy of other business sectors. In any case, to the extent that the newspaper industry does face challenges to an entrenched business model, those challenges will not be resolved by cross-ownership. If anything, much of the consolidation that has occurred in recent years has put newspapers in a worse financial position as consequence of over-leveraged debt. To service this debt, these companies have cut jobs and reporting, and many of the cost savings generated by these so-called efficiencies have been used to enhance profits, not to generate more or better local news coverage. The FCC should not reward these bad business decisions by allowing these companies to consolidate even more, thereby continuing the cycle of debt service, layoffs and news cuts.

Free Press also urges the FCC to approach with caution its proposal to repeal the radio/television broadcast rule. As discussed above, evidence suggests that consolidation disproportionately affects opportunities for women and people of color to become and remain broadcast stations owners. It is especially import not to reduce entry points for these groups in the radio industry. We echo the comments of the Future of Music Coalition, which states that "[r]adio is still the medium with the greatest potential for new entrants, including women and minorities. If the FCC eliminates the radio/television cross-ownership rule it will further limit radio's potential as one of the few entry points for these vital voices."[91] Because eliminating the radio/television cross ownership rule likely would result in more radio properties being locked

[91] Comments of the Future of Music Coalition, filed MB Dkt 09-182 (Feb. 29, 2012) at 8-9.

up in the hands of fewer owners, Free Press entreats the FCC to carefully assess and weigh the potential impact of doing so on opportunities for new entrants and underrepresented groups — as indeed the Commission always should do with any ownership rule changes.

A. The Relaxed Newspaper-Broadcast Cross Ownership Rule Proposed By The Commission Is Not Supported By The Facts Or Research In This Proceeding

The NPRM tentatively concludes to lift the newspaper/broadcast cross-ownership ban currently in place, following the *Prometheus II court's* rejection relaxed NBCO rule in the 2006 Review Order. The NPRM then reintroduces a relaxed NBCO rule nearly identical to the one adopted in the 2006 Review Order. Specifically, the FCC proposes to presume that a cross-ownership of a local broadcast station by local newspaper is in the public interest if:

> (1) a daily newspaper in a top 20 DMA sought to combine with a radio station, or (2) a daily newspaper sought to combine with a full-power commercial television station in the same top 20 DMA, and: (a) the television station is not ranked among the top four television stations in the DMA and (b) at least eight independently owned and operated "major media voices" would remain in the DMA after the combination.[92]

Combinations outside the top 20 markets would be presumed to be contrary to the public interest.[93]

The FCC proposes to evaluate such combinations on a case-by-case basis[94] and seeks comment on whether it should retain am additional "Four Factor Test" adopted in the 2006 Review Order to assess the public interest benefits of allowing newspaper broadcast

[92] *2011 NPRM* at ¶102.
[93] *Id.*.
[94] *Id.* at ¶103.

combinations.[95] It also seeks comment on whether it should adopt an exception or waiver standard that would allow applicants to rebut the negative presumption against cross-owned combinations outside of the top 20 markets.[96]

Free Press has significant concerns regarding aspects of both the "Four Factor Test" and local news exception standards, which we address in these comments (*see infra* at section II(A)(3)) But as an initial matter, we question the Commission's basis for proposing to relax the NBCO rule at all. The FCC's proposal to relax the cross-ownership rules is unlikely to result in any cognizable benefits to the public. And, in the long term, it will not cure what ails the newspaper industry. Rather, it is far more likely to exacerbate the vicious cycle of over-leveraged debt, lay-offs, and news decline that has characterized the newspaper industry in recent years.

1. The Newspaper Broadcast Cross-Ownership Rule Preserves News Independence And Ensures Access To Diverse And Competing Sources Of Local News, Both Off- And On-Line.

The FCC's media ownership rules guarantee a baseline of diversity among those local media sources to which the public consistently turns for local news and information. Research strongly suggests that, if anything, relaxing the NBCO rule would lead to fewer independent sources of local news and is more likely to decrease the amount of local news at the market level.

For example, during the 2006 Review, the FCC commissioned a number of studies purporting to show that cross-owned TV stations air more local news.[97] However, the researchers mistakenly focused exclusively on what impact these rules had on news production at the station level, rather than local news production at the market level. Using the FCC's own data, Free

[95] *Id.* at ¶ 115.

[96] *Id.* at ¶116.

[97] *FCC Seeks Comments On Research Studies On Media Ownership*, Public Notice, MB Dkt Nos. 06-121 *et al*, DA 07-3470 (Jul. 31, 2007).

Press and others looked at output at the market level, and were able to show that the presence of a cross-owned TV station in a market leads to a collective curtailment in local news output by the other TV stations in the market.[98] The market level models suggest that the presence of a cross-owned station leads other stations in a market to collectively cut back on their news output by about 25 percent.[99] This result supports the "crowding-out" hypothesis. In markets without cross-ownership, local TV news stations generally take their cues from the local newspaper. Since these papers are independently owned, all the local TV news departments have reasonably equal access to the newspaper's reporters and editors. However, this mutually beneficial relationship is destroyed in markets with cross-ownership. Cross-owned TV stations are able to use their exclusive access to the local newspaper to shut out competitors from the stories that those competitors would normally report. This leads these stations to curtail their local news operations.

Research conducted by the FCC in 2010 for this proceeding confirms the finding that newspaper-television cross-ownership does not increase the amount of news at the market level. Study #4, *Local Information Programming and the Structure of Television Markets* by Jack Erb analyzes the statistical relationship between the amount of local news and local public affairs programming on local broadcast television at both the station and market level as functions of various measures of market structure, including cross-ownership of a local television station and local newspaper in the same market.[100] The study finds that at the station level "newspaper cross-

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[98] *See e.g.* Letter from S. Derek Turner, Research Director, Free Press to Marlene H. Dortch, Secretary, Federal Communications, filed MB Dkt Nos. 06-121, *et al.*, (Nov. 14, 2007) ("November 2007 Consumer Group Ex Parte Letter").

[99] *Id.*

[100] Jack Erb, *Media Ownership Study #4: Local Information Programming and the Structure of Television Markets* (2010) ("Local Information Programming ").

ownership has a positive correlation with local news."[101] However, notably, and consistent with Free Press's own findings in the 2006 Review, the author notes that even where there is a station-level increase in the amount 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."[102] The study ultimately concludes that "many of the newspaper cross-ownership variables show a negative correlation with market-level news, [though] almost none of them are statistically different from zero."[103] This negative correlation and the lack of spill over of station-level news increase into the market, coupled with previous research showing that the presence of a cross-owned station in a market leads to a collective curtailment in local news output by the other stations in the market confirms that the newspaper-broadcast cross-ownership rule continues to have an important and beneficial effect on the amount of news in local markets. As importantly, it also preserves the diversity and independence of local news sources by ensuring that the local newspapers and TV stations – typically the most dominant sources of local news – do not become consolidated under the control of a single owner.

Even though the more recent FCC-commissioned research confirms Free Press's earlier market-level result, we fully expect supporters of eliminating or weakening the cross-ownership prohibition to focus myopically on these station level results. However, it is not necessarily the case that a newspaper-TV combination will yield a genuine news increase at the station level. Again using data from the FCC's 2007 Media Ownership studies, and correcting for endogeneity problems in these FCC-commissioned studies, Free Press et al. determined that individual cross-owned stations do not in fact air more news than their *similarly situated* non-cross-owned

[101] *Id.* at 48.
[102] *Id.*
[103] *Id.*

counterparts.[104] The FCC-commissioned 2007 studies that examined the cross-ownership question all used a broad category of cross-ownership as the policy variable; stations were either classified as cross-owned or non-cross-owned. However, there are two very different types of stations that make up this category – grandfathered stations and stations with waivers – a distinction that can significantly impact the amount of news production at the station level.

The majority of cross-owned properties with waivers are the product of the recent formation of a TV-newspaper combination. The newspaper owner did not create the TV station's news operation, it *bought* the station's news operation. To claim that the behavior of the acquired station reflects the effects of cross-ownership is incorrect. Rather, it is an "endogeneity" error that results from confusing correlation with causation.[105] In other words, the new cross-ownership did not generate the larger amount of local news observed at the station level. Instead it is more likely that the station's existing market incentive and capacity to engage in higher

[104] Comments of Free Press et al, filed MB Dkt 06-121 (Oct. 22, 2007) at 208-216.

[105] "Endogeneity" refers to a situation where an independent variable included in the model is potentially a choice variable, correlated with unobservables relegated to the error term. In layman's terms, this means that if we are measuring minutes of local news (dependent variable) and are investigating the impact of cross-ownership (independent variable), cross-ownership's effect can be attributed to a "choice" if you consider that waived stations were bought by a newspaper (or vice versa) as opposed to a grandfathered combo that has existed since the 1950s. *See e.g.* Stefano Della Vigna, UC Berkeley, *Peer Review of Newspaper/Television Cross-Ownership and Local News and Public Affairs Programming on Television: An Empirical Analysis by Michael Yan, available at* http://transition.fcc.gov/mb/peer_review/docs/prtpdvigna.pdf. "Cross-ownership is not randomly assigned across stations. Ownership decisions are made by profit-maximizing companies....To keep things simple, consider Area A where there is very little demand for local news, and the television stations do not provide much local news. In Area B, instead, there is more demand for local news and the televisions indeed provide such news. Now assume that we will allow cross-ownership. The newspaper owners are more likely to buy stations in area B rather than in area A, since doing so provides more of an outlet for the news already gathered by the newspaper, allowing for cost-saving. However, the station that is now cross-owned would have provided more news even *absent* the cross-ownership! Hence it is not the cross-ownership that is causing the local news programming, but rather the opposite." *Id.* at 2-3.

levels of news production is what made it an attractive acquisition for the new owner in the first place.

This logic is consistent with the facts observed in the marketplace. The waived cross-ownership situations have been created recently and primarily by the merger of highly rated TV stations in large, competitive markets with dominant newspapers. The acquired stations produced more news than other stations before they merged with the newspaper but, lacking time series data, the FCC's 2007 media ownership studies misattributed as "benefits" of cross-ownership observed effects that merely reflected a newspaper owner's decision to purchase a TV station that was already doing more news prior to purchase.

Conversely, unlike combinations with waivers, the grandfathered situations have been in place for a long period of time, making it much more reasonable to assume that the behavior of the TV stations in those combinations reflects the long-term effect of cross-ownership. Following the suggestions of the peer reviewers of several of the 2007 studies, Free Press et al. re-specified models accounting for this endogeneity problem. These adjusted models show that the grandfathered stations actually produce *less* news than the waived stations, suggesting that long term, cross-ownership does not yield increased local news benefits for communities.[106]

[106] In 2007 there were three studies commissioned for the 2006 Review (Study 3.1, Study 4, and Study 6) that examined cross-ownership and local news. Only Study 6 examined the actual content of news broadcasts, while the other two only looked at program listings. When we examined the "grandfathered-versus-waived" question using the data from Study 6, our hypothesis about grandfathered stations was supported; waived stations outperformed the grandfathered combinations. However, when we explored the same questions in Study 4 (which looked at the shallower data provided by TV listings), the result was the opposite. Further probing of this result made it apparent that WGN (a grandfathered station long cross owned with the Chicago Tribune) was an outlier driving the result in Study 4. As Free Press stated in our October 2007 Comments, "We think that the lessons from Study 4 on the impact of cross-ownership are limited by the study's lack of observations on local news programming. However, implementing some of the suggestions of the peer reviewers sheds better light on the subject. These changes to the methodology reveal that the only grandfathered stations air more news, and
(continued on next page)

Further these corrected models demonstrated that there is no evidence from the 2007 FCC-commissioned studies to suggest that cross-ownership results in more local news, and in the case of one study that measured the "localness" of actual content (as opposed to simply categorizing programs listed in programming guides), we observed that cross-ownership is associated with a statistically significant decrease in the amount of hard local news content in the days leading up to the 2006 elections.[107] These results when viewed in conjunction with the evidence that cross-ownership is associated with less market-level output of local news programming provides a strong case for maintenance of the cross-ownership restriction. The loss of a diverse local voice provides no tangible public interest benefits, but brings palpable harms to localism and diversity.

The salutary effects of the NBCO rule are not only confined to local news available in the real world. Research suggests that the NBCO rule also preserves local news source diversity in the virtual world as well.

Study after study demonstrates that traditional news outlets such as newspapers and local television stations remain the primary producers and providers of local news content. In a recent

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(footnote continued)
that this result only holds for non-Big 4 affiliated stations -- that is, WGN is driving this results, which indicates that this outlier is likely not an indicator of the effect of cross-ownership. Simply stated, there is no evidence from Study 4 that suggests cross-ownership increases the amount of news aired by a station." Comments of Free Press et al, filed MB Dkt 06-121 (Oct. 22, 2007) at 208. In the 2010 study, *Local Information Programming,* which is based on programming guides, the author, Erb, finds a similar result, one also driven in part by WGN. The bottom line is that the more precise methodology that measures actual content, and not merely programming blocks, supports Free Press's hypothesis about the inherent differences between waived and grandfathered stations. Indeed, when we examined the data from the 2006 Review's Study 6 in a Heckman model that accounted for additional relevant policy variables such as the age of the combination, the effect on local news production by both waived and grandfathered cross-owned stations completely disappeared. All this serves to suggest that the station-level results are highly dependent on model specification, and in no way amount to enough evidence to offset the clear market-level reductions seen in our earlier work and confirmed by Erb in *Local Information Programming*.

[107] *See November 2007 Consumer Group Ex Parte Letter*

survey by the Pew Center, 64 percent and 41 percent of respondents reported they rely on television and newspapers, respectively, for local news.[108] Only 17 percent reported relying on the Internet for such information.[109] What is more, even when people turn to the Internet for news, by and large, they are still reading stories sourced and produced by local newspaper and television outlets and then repackaged and re-purposed online. For example, one study by Pew reviewed the number of news outlets available in the city of Baltimore. Researchers determined that while more than fifty-three different outlets were available in that market, 95 percent of the content originated from only a handful of sources: the local newspaper, broadcast TV and radio stations.[110]

Similarly, the study *Less of the Same* confirms that "[t]here is little evidence in this data that the Internet has expanded the number of local news outlets" as the Internet "adds only a pittance of new sources of local news."[111] That study, which the FCC commissioned for this proceeding, looked at local news available online within the top 100 US television markets, identifying and analyzing over one thousand local news and information sources to determine their audience reach, traffic, and affiliation with traditional media outlets. Based on this assessment the study's author concludes that

> [a]rguments that the Internet has expanded the number of local news voices, or allowed new Web-based news outlets to fill gaps in news coverage, find little support in this data. In deciding *Prometheus v. FCC* (2004), the court's majority worried that online local news sources might just be repackaged versions of

[108] PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, SURVEY REPORT: PRESS ACCURACY RATING HITS TWO DECADE LOW (Sept. 13, 2009).

[109] *Id.*

[110] 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).

[111] *Less of the Same* at 11.

> television and newspaper content. The comScore data show that this is indeed the case.[112]

But here, too, the newspaper-broadcast cross ownership rule plays an integral role in ensuring access to diverse sources of local news both on and offline. *Less of the Same* finds evidence that "media concentration offline carries over into online media markets. Most local news markets on the Web are dominated by just a few firms," and "[r]estrictions on media cross-ownership do not just matter in print and on the airwaves: they likely impact news diversity on the Web as well."[113]

Thus, even though the FCC rules were developed to foster diverse media pre-Internet, the rules have had the added benefit of guaranteeing some level of diversity among the most popular news sources available online. Because the vast majority of Americans still receive the lion's share of their local news from traditional media outlets – specifically, local newspapers and broadcast television – the FCC's rules remain a critical component of ensuring that these primary news sources do not become consolidated in the hands of a few companies

2. Relaxing The NBCO Will Not Cure What Ails The Newspaper Industry – Indeed, Allowing More Concentration Will Weaken It In The Long Run

When the rule modification that is the subject of the instant proceeding was first proposed in 2007, then-Chairman Martin argued that removing the cross-ownership ban was needed to "improve the health of the newspaper industry."[114] Chairman Martin claimed that newspapers would "wither and die" without drastic action,[115] even though there was little credible evidence at the time showing that the newspaper industry was in such dire straits. Nearly five years later

[112] *Id.* at 30.

[113] *Id.* at 30-31.

[114] Martin, "The Daily Show.".

[115] *Id.* .

evidence of the newspaper industry's imminent demise has yet to emerge. Indeed, newspaper executives interviewed for a study just released by the Pew Research Center's Project for Excellence in Journalism "insisted that newspapers, by and large, are not dying."[116]

Though print circulation of daily newspapers has declined, the notion that newspapers are an "endangered species" is greatly exaggerated. Despite the severe, economy-wide recession and its impact on the advertising markets, many newspapers still enjoy operating profit margins near 20 percent, often higher than the S&P 500 average operating margin of 17.7 percent. McClatchy's operating margin improved from 14 percent in 2008 to 18.2 percent in 2011.[117] Gannett's margin rose from 16 percent in 2009 to 18 percent in 2011.[118] A.H. Belo Corp., the now independent newspaper company that was formerly a cross-owned company, has slowly improved its operating margins in the three years since it was spun off from its broadcasting parent.[119] While it is true that the era of monopoly newspaper profits has passed, the newspapers and their brands still represent a very profitable business. William Dean Singleton, CEO of MediaNews Group has characterized the newspaper industry as "very, very, very profitable" and predicted it will continue to be so "for a very long time."[120]

More importantly, there's little or no evidence to suggest that cross-ownership will improve the finances of newspaper companies. To the contrary, consolidation appears to be part of the problem – not part of the solution. Newspaper companies have touted cross-ownership as a

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[116] Corey Dade, "4 Survival Strategies For Struggling Newspapers," NPR (Mar. 5, 2012) (discussing PEW RESEARCH CENTER PROJECT FOR EXCELLENCE IN JOURNALISM THE SEARCH FOR A NEW BUSINESS MODEL: HOW NEWSPAPER ARE FARING TRYING TO BUILD DIGITAL REVENUE, (Mar. 5, 2012)).

[117] Company 10-K SEC filings.

[118] Company 10-K SEC filings.

[119] Company 10-K SEC filings.

[120] Phil Rosenthal, "Singleton Sold on Newspapers," CHICAGO TRIBUNE (June 21, 2006).

way to maintain the high profit margins they have garnered historically. But consolidation seems to exacerbate the problem of declining news output by loading companies with additional debt. The short-term benefit of mergers is an increase in revenue and market share. The long-term consequence is a substantial debt load. For example, Tribune Co., the owner of the *Los Angeles Times*, *Chicago Tribune*, *The Baltimore Sun*, and twenty-three TV stations, is one of the most financially troubled newspaper companies. Yet it is by far the largest owner of cross-owned newspaper-TV combinations operating under temporary waivers. The company filed for bankruptcy protection in December 2008 because of the $13 billion debt load resulting from a 2007 leveraged buy-out by real estate mogul Sam Zell.[121] If cross-ownership has not helped save Tribune, why should the FCC – or more importantly the public – expect it to yield financial benefits to other newspaper companies?

To be sure, many TV-owning newspaper companies have undone or are considering undoing their cross-owned combinations. The New York Times Co. recently sold all of its TV stations,[122] and Belo Corp. spun off its TV stations and its newspaper business separately.[123] One of the largest proponents of eliminating the cross-ownership protection, Media General, is now actively pursuing the option of selling its entire newspaper division.[124] In contrast to the dire projections offered elsewhere about the health of the newspaper industry, Media General stated that "the valuations of local media properties in recent merger and acquisition transactions,

[121] Michael Liedtke, "Tribune Co.'s bankruptcy reorganization plan still faces opposition from unhappy lenders," ASSOCIATED PRESS (April 12, 2010).
[122] Louise Story, "Times Co. Agrees to Sell TV Stations to Equity Firm, N.Y. TIMES (Jan. 5, 2007).
[123] "Belo Board of Directors Approves Spin-off Details That Will Create Separate Television and Newspaper Businesses," Belo Press Release (Jan. 11, 2008).
[124] Sarah Barry James, "Media General Exploring Sale of Newspapers," *SNL Kagan* (Feb. 22, 2012).

including local newspapers, have reflected the strong market positions of the entities being sold."[125]

These trends suggest that newspaper companies will be fine if they focus on their core mission of providing quality journalism and work to attract online readers. As demonstrated by the evidence in this and previous media ownership reviews, the Internet is less a new independent source of local news than it is a new platform for incumbent media. In a similar vein, the Internet presents an opportunity rather than a genuine threat to the newspaper industry. Local newspapers are by far the dominant source for local news on the Internet. As the FCC itself observes in the NPRM, newspaper websites rank among the most popular news websites and "from a traffic perspective, newspapers have come to dominate the Internet on the local level."[126]

There will always be a strong demand for local news reporting, regardless of how it is delivered. The more financially troubled newspaper chains (such as Tribune) have not navigated the online transition as well as other media companies that currently are thriving online and off. As these companies navigate the changing terrain and modify their business models, they will continue to succeed financially. Indeed, the mobile market, particularly the app market is a promising new venue for high-brand awareness outlets like newspapers. Right now only 1

[125] Sarah Barry James, "Media General Exploring Sale of Newspapers," *SNL Kagan* (Feb. 22, 2012).

[126] *2011 NPRM* at ¶97 (citing Steven Waldman, et al., *The Information Needs of Communities: The changing media landscape in a broadband age*, Federal Communications Commission Staff Report (rel. June 9, 2011), at 76 and 55-56 ("INC Report")).

percent of all advertising dollars flow to mobile platforms, when users spend 23 percent of their media time on mobile, second only to television and more than web, print, or radio.[127]

The push to lift the cross-ownership ban seems designed to benefit certain companies like Tribune, Media General and Gannett, which have bet heavily on TV-newspaper cross-ownership as a business model – a bet that has not panned out. But it is not the FCC's duty to bail out a few conglomerates that mismanaged their businesses. It certainly should not bail out companies who themselves no longer believe in the cross-owned model themselves. In other words, the relaxed cross-ownership policy the Commission is pursuing is really just *a solution in search of a business model.*

Consolidating local newspapers and television station is not the answer to solving the mismanagement of their business by some newspaper companies. There is very little evidence that this strategy will succeed financially in the long run, and it is not worth the democratic costs in terms of the loss of diverse and antagonistic news sources. These enterprises need to adapt and take advantage of the opportunities in cyberspace. To allow them to consolidate now will only stifle viewpoint diversity and competition in the future.

3. If The FCC Ultimately Decides To Relax the NBCO, It Should Not Adopt The "Four Factor Test" Or The Local News Exception

Maintaining the current, across-the-board prohibition against newspaper broadcast cross-ownership, with waivers available using the traditional waiver test , would best serve the public interest. While Free Press believes that there is little policy or record support for relaxing the NBCO rule in the first place, we nevertheless have several concerns about particular elements of

[127] *See* Peter Farago, "Upper Middle Class, Females Key to Bridging Mobile Ad Spending Gap," *Flurry Blog* (Feb. 20, 2012).

the proposed rule that the Commission is considering. Specifically, should the Commission decide to relax the NBCO, it should not adopt either the "Four Factor Test" or the local news exception to the prohibition against cross-ownership in markets ranked below the top 20. These standards are vague, unenforceable and would have the effect of creating exceptions that would swallow the rule entirely.

a. The Four Factor Test Is Vague And Cannot Be Monitored, Much Less Enforced

Under the rule proposed in the NPRM, the Commission would presume that a newspaper-broadcast combination was in the public interest if initial four criteria were met: (1) the market at issue is one of the 20 largest Nielsen Designated Market Areas ("DMAs"); (2)the transaction involves the combination of a major daily newspaper and one television or radio station; (3) if the transaction involves a television station, at least 8 independently owned and operating major media voices (defined to include major newspapers and full-power commercial TV stations) would remain in the DMA following the transaction; and (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA.[128] All other proposed newspaper-broadcast combinations would continue to be presumed not in the public interest.[129]

Notwithstanding the presumption, the Commission asks whether it should consider an additional four factors (adopted as part of the 2006 Review Order's revision to the NBCO) to determine if a particular transaction may be in the public interest. The factors would require applicants to demonstrate: (1) the amount of local news that would be produced post-transaction; (2) the extent to which the affected media outlets would exercise independent news judgment;

[128] *2011 NPRM* at ¶102.
[129] *Id.*

(3) the level of concentration in the DMA; and (4) the financial condition of the applicant, and if financially distressed, the applicant's commitment to invest in newsroom operations.[130]

Free Press opined on the flaws of this test when it was previously proposed and then adopted in 2007.[131] However, given the Commission's apparent reluctance to abandon consideration of the test entirely, we reiterate here the reasons why it should do so. The test overall is flawed because it is open-ended and ambiguous, and the Commission has never explained how such factors would work in tandem to allow the Commission to evaluate whether a proposed cross-owned combination would be in the public interest or not. For example, is one factor more important than another? How many factors must be satisfied to meet or defeat a presumption one way or the other?

Notwithstanding the problem of how the factors would work together, many of the criteria are defective in and of themselves. For example, the first criterion asks the applicants whether the cross-ownership will increase the amount of local news disseminated through the combination. That is entirely the wrong question. As Free Press has repeated *ad nauseum* throughout these proceedings, the relevant question is whether a proposed combination is likely to increase the amount of local news at the market level. As discussed above (see *infra* at section II(A)(1)), both the FCC's and Free Press's research shows that cross-ownership leads to lower levels of local news overall, even if the merged entity were to increase its own amount of local news production. Such an increase by the entity itself is of questionable benefit to the public if it leads to an overall curtailment of the both the amount and independence of local news available to them. Nor does the FCC suggest how it will define "local news" for this purpose, or what level

[130] *Id*. at ¶ 115.

[131] *See Devil in the Details.*

of local news increase would suffice to find a cross-ownership transaction to be in the public interest.

Similarly, the second criterion asks whether the combined properties will exercise independent news judgment, but the Commission does not define what is meant by “independent news judgment,” or how that could be demonstrated. Nor does it explain how the Commission would or could enforce this factor in properties that are commonly owned and which presumably share multiple personnel and facilities. The third factor – which considers the level of concentration in the market – also fails to define what level of market concentration is relevant for the purpose of applying the test. The fourth factor does not fare any better. That criterion considers the financial condition of the applicant, and if financially distressed, the applicant’s commitment to invest in newsroom operations. These factors are subjective, and indefinable. For example, if an applicant is operating “in the red” but promises it will “try its best” to operate a newsroom, is that sufficient to overcome a negative presumption against a combination?

Additionally, all four factors suffer from the fatal flaw that they cannot be enforced. The NPRM fails to suggest any means for the FCC to determine that the recipient of the waiver in fact lives up to its commitments. And in the event that the FCC were to discover that an applicant did not keep its promises, the NPRM provides no enforcement mechanism or relief for local communities who were forced to accept greater consolidation of local newspapers and broadcast stations in exchange for an empty promise.

In sum, the “Four Factor test” in its current incarnation would impose a “standardless standard” that would be almost impossible for the FCC to assess or enforce. Once again, Free Press urges the Commission not to adopt it, and more importantly to abandon its consideration of this flawed test once and for all.

b. The Local News Exception Is Ill-Defined And Hard To Enforce

The Commission seeks comments on whether it should adopt an exception or waiver standard that would allow applicants to rebut the negative presumption against cross-owned combinations outside of the top 20 markets.[132] The exception as adopted in the 2006 Review Order states that the Commission would reverse the negative presumption "(1) when the proposed combination involved a failed/failing station or newspaper, or (2) when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination."[133]

The second part of the test – the local news exception – suffers from many of the same deficiencies as the Four Factor test in that the term "local news" is not defined and the Commission has not suggested any means of monitoring or enforcing the seven additional hours per week.[134] Licensees currently are not required to report the amount of news programming they air either to the FCC or the public. Even though the Commission is contemplating requiring television broadcasters to report on the amount of local news they offer during two sample weeks per quarter, that proceeding is still in the Notice of Inquiry stage, thus there is presently no requirement to report on such programming and no mechanism for monitoring compliance with the local news exception proposed by the Commission. Nor does the Commission suggest a means for relief for local communities if an applicant ultimately reneges on this commitment.

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[132] *2011 NPRM* at ¶ 116.

[133] *Id.*

[134] The Commission currently maintains a standard for determining whether a stations is failed or failing. *See* 47 C.F.R. § 73.3555 Note 7. It has no existing standard for determining whether a newspaper is "failing" or "failed.

In conclusion, Free Press strongly urges the Commission to retain its newspaper broadcast cross ownership rule, a policy that continues to serve the important governmental and public interest of ensuring that local communities have access to diverse and independent local news and information from the most dominant providers of such content – local newspapers and broadcasters.

B. The FCC Should Retain The Local Television Ownership Rule And Address The Problem Of "Covert Consolidation" By Local Television Stations

In the NPRM the FCC proposes to retain the local television ownership rule,[135] including the eight-voices test and the existing numerical limits and the prohibition against mergers among the top-four-rated stations.[136] The NPRM concludes that the rule remains necessary in light of competition considerations, and seeks comment on whether the rule "also is necessary to promote our localism and viewpoint diversity goals."[137]

Free Press strongly supports the Commission's decision not to relax the local television rules. Moreover, as the programming benefits that were predicted when the FCC relaxed the local TV ownership rule in 1999 have not materialized, we encourage the FCC to return to the single license rule previously in place. A "one to a market" rule would promote competition in larger markets where duopoly ownership is currently permitted, as well as free-up stations for purchase by new entrants. Additionally, given the multicasting benefits yielded by the digital transition, stations can now program multiple streams using the same amount of spectrum. Multicasting eliminates the need to acquire an additional TV station and returning to a single

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[135] The FCC proposes to eliminate the Grade B contour approach to implementing the local television ownership and relying solely on Nielsen DMAs. Free Press has no objection to this proposed change. *2011 NPRM* at ¶37.

[136] *Id.* at ¶26, 27.

[137] *Id.* at ¶26.

license restriction would encourage more efficient use of broadcast spectrum. At the very least, it is imperative that the FCC not relax the local television ownership rule further.

1. The FCC Local TV Ownership Limits Remain Necessary To Preserve The Public's Access To Competing and Independent Sources Of Local News

The public overwhelmingly depends on local television stations to report on local issues.[138] Local television is an important journalistic player, accounting for about a third of all original news content, even in large cities.[139] On "a typical day," 78 percent of Americans say they get news from their local TV station -- more than from newspapers, the Internet, or the radio. Fifty percent of all Americans watch local TV news "regularly." In addition, local TV news sites rank among the most popular news websites.[140]

Because local television stations continue to dominate local news markets it remains critical that the FCC's media ownership rules continue to preserve competition and independence among local stations.

In the NPRM, the FCC notes the broadcast industry's persistent claim that common ownership of local television stations may improve programming because consolidation will lead to "efficiencies" and that that "the efficiencies gained from combined ownership will allow them to compete better in today's changing marketplace."[141] The NPRM also notes that

> [t]elevision broadcasters generally support relaxing the local television ownership rule, asserting that they face decreased revenues, as a result of both increased competition from nonbroadcast video programming providers and the recent

[138] PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS: PRESS ACCURACY RATING HITS TWO DECADE LOW (Sept. 13, 2009)..

[139] PROJECT FOR EXCELLENCE IN JOURNALISM: HOW NEWS HAPPENS (Jan. 11, 2010)

[140] *INC Report* at 76.

[141] *2011 NPRM* at ¶29 (citing Nexstar Comments at 12; Belo Comments at 2.)

> economic downturn. Broadcasters assert that the efficiencies gained from combined ownership will allow them to compete better in today's changing marketplace.[142]

These industry arguments, while often-repeated, are unpersuasive. First, the local news generating "efficiencies" of consolidation have not materialized. Evidence suggests that consolidation does not increase the provision of local news programming. Research by Free Press, Consumers Union, and Consumer Federation of America shows that television duopolies do not exhibit statistically significant increases in either market share or hours of news.[143] Furthermore, a 2009 study by Dr. Danilo Yanich found that independently owned television stations broadcast more local content during their newscasts than those stations that are part of a local duopoly.[144]

Even less persuasive is the argument that consolidation is necessary to sustain local television stations in light of their of declining revenues. While it may be convenient to plead poverty in Commission rulemakings, such claims are not borne out in the real world. Most local TV stations remain highly profitable. The FCC's INC Report determined that, based on data gathered by the National Association of Broadcasters, "a local TV station in 2009 with average net revenues and cash flow would have a cash flow margin of nearly 23 percent of revenues."[145]

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[142] *Id.* (citing NAB Comments at 29-30 (citing Matthew Spitzer, Television Mergers and Diversity in Small Markets, 6 J. COMPETITION L. & ECON. 705 (2010) ("Spitzer Study")); Nexstar Comments at 11; Coalition of Smaller Market Television Stations ("Small Market Coalition") Comments Ex. 2, Spitzer Study.)

[143] Reply Comments of Consumers Union, Consumer Federation of American and Free Press, filed, MB Docket No. 06-121 (Jan. 16, 2007) at 95.

[144] Danilo Yanich, Paper presented at the annual meeting of the International Communication Association: *Ownership Matters: Localism, Local Television News, and the FCC* (May 20, 2009).

[145] *INC Report* at 74.

2010 was strong year for broadcasters. While many other sectors of the economy struggled with the nation-wide economic down turn, broadcast television profits headed north. One analysis showed that "[a]d spending on local TV in the first three quarters of 2010 was up 27 percent from the same period in 2009...The local television industry experienced 23.2 percent growth in 2010 and achieved over-the-air revenues of $19.4 billion."[146] That same report also found that "local television stations earned $450 million from digital and mobile advertising in 2010 and estimates that number will climb to $890 million by 2015."[147]

The economic forecast continues to look rosy for local television stations going forward. This year the presidential election, coupled with an influx of third party ads stemming form the Supreme Court's 2010 decision in *Citizens United,* is unleashing a surge of political ad spending, with the vast majority projected to flow to local television stations.[148] Estimates suggest that candidates, political parties and independent groups will spend up to $3.3 billion to buy TV ads during the 2012 election season.[149] One former broadcast executive wrote "[i]f you happen to operate a television station in a presidential battleground state that also has a key U.S. Senate race, it will be like winning the lottery."[150] Another former TV news executive stated that "[i]n late 2011 and early 2012, the Iowa caucus cycle produced 24/7 campaign ads, and some reports indicate that local television broadcasters in the state earned $18 million in campaign

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[146] "Local TV Revenues Rose 23.2% Last Year," TVNEWSCHECK (April 28, 2011) (citing a report by BIA/Kelsey).

[147] *Id.*

[148] Paul Thomasch and Lisa Richwine, "TV Broadcasters Enjoy Spoils of Political Wars," REUTERS (Jan. 7, 2012).

[149] *See* Julia Boorstin, "Record Political Ad Spending Powered by Special Interests," CNBC (Nov. 8, 2011).

[150] Bill Wheatley, "What Should TV Stations Do with All That Negative Ad Money?" Nieman Watchdog (Dec. 18, 2011).

advertising."[151] The greatest beneficiaries of this political advertising surge are companies that own stations in states where elections will be hotly contested; this includes companies such as Belo Corp., CBS Corp., E.W. Scripps, Gannett Co., Inc., Media General, News Corp. and Sinclair Broadcast Group.[152]

TV broadcasters are clearly not wanting for cash of late, but even so, as with broadcasters' so-called "efficiency" claims there is no guarantee that stations' increasing bottom lines will result in more news. Notably, the FCC's INC Report found that instead of using "the additional money that poured into local TV stations from the historic levels of political advertising in the 2010 election season to increase the pool of reporters who could cover their communities and more effectively monitor institutions and government agencies, many stations have opted to let those dollars simply flow to the bottom line."[153] Given this evidence, broadcasters' arguments that consolidation is necessary to provide communities with news and information programming are unpersuasive. In any event, it is not the Commission's job to protect industry profit margins. Rather, it must promulgate and enforce rules designed to promote competition, diversity, and localism so that the public interest, convenience and necessity are served.

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[151] Susan King, "Stations Need Transparency In Political Ads," TVNEWSCHECK (Feb. 23, 2012).

[152] *See* Boorstin, "Record Political Ad Spending." Things are not just improving for individual TV stations. The broadcast networks with which they are affiliated are also seeing an advertising boom. In August 2011, Reuters reported that "after plunging with the economy in 2008, ad money is now flowing to broadcast and cable television networks" and that media companies "are set to report quarterly revenue gains on the back of a booming advertising market that shows little sign of retreating." Lisa Richwine, "Big media rings up sales as advertisers keep coming," REUTERS (Aug. 1, 2011).

[153] *INC Report*. at 114.

2. The FCC Should Not Allow The Public Interest Benefits Of The Local Television Ownership Rule To Be Evaded And Undermined By Broadcaster Resource Sharing Arrangements

Free Press agrees with the Commission that local television ownership rules remain "necessary in the public interest as a result of competition."[154] This is all the more reason for FCC to ensure that TV broadcasters' increasing reliance on resource sharing arrangements does not undermine the competition-promoting benefits of the local television ownership limits. While outright media consolidation in local TV markets adversely impacts competition and diversity, increasingly we are witnessing a more covert and insidious form of consolidation at the local level through news and resource sharing agreements. In many communities the end result is a TV dial where most of the news is essentially a duplicate of what is aired on another local broadcast channel. The corrosive effects that these practices are having on editorial independence and journalistic integrity should alarm the public, regulators, and industry professionals.

In the NPRM the Commission seeks comment on the impact of shared services agreements (SSAs) and other sharing arrangements and asks whether and how the agency should address attribution of such arrangements in its ownership rules.[155] As reliance on these joint ventures increases, local news competition is being reduced and the quality and quantity of independently reported and produced local news is declining.[156] What is more, the FCC's existing rules do not account for and do not adequately protect the public from the anti-competitive effects of these ventures. A lack of governing standards over such arrangements increases the potential that these agreements will continue to be abused to the detriment of the

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[154] *2011 NPRM* at ¶26.
[155] *Id.* at ¶195.
[156] Hilary Atkin, "As Local Sharing Progresses, New Concerns Emerge," TVWEEK (Aug. 5, 2009).

public's access to local news and information that should be provided by diverse, independent and competing sources.

3. TV Station Sharing Arrangements Diminish The Amount And Availability Of Competing, Independent And Diverse Local News Sources

The FCC's media ownership rules are designed to preserve competition and diversity by preventing local media markets from being "cornered" by a few owners and interests. But many broadcasters appear to be using these agreements to get around these rules. When they are unable to formally consolidate station ownership, these deals allow stations to consolidate their core local news operations – producing effects that are expressly contrary to the Commission's localism, competition and diversity goals.

In the absence of much needed FCC oversight, reliance on these arrangements is increasing. According to the INC Report, "[n]early one-third of TV stations say they are running news produced by another station."[157] Additionally, Free Press and other public interest groups have been documenting how the use of these types of agreements adversely impacts the amount and quality of independently produced broadcast news programming available to local residents. Free Press has identified almost 80 television markets where these types of deals are in place, involving more than 200 stations in total.[158] We have compiled video clips showing how these agreements result in the airing of carbon-copy local newscasts on multiple, supposedly "competing" local TV stations.[159]

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[157] *INC Report* at 96.

[158] *See* "Change the Channels" at http://www.savethenews.org/changethechannels. *Change the Channels* is a project launched by Free Press in 2011 to map the use of resource sharing arrangements by television broadcasters across the country.

[159] *See* "Change the Channels - Stop Newsroom Consolidation Now," http://www.youtube.com/watch?v=E9bIgcrWd1o&feature=relmfu.

In the NPRM the FCC determines that "local broadcast television stations compete directly with each other, particularly during the parts of the day in which these stations do not transmit the programming of affiliated broadcast networks."[160] The FCC acknowledges a critical factor about competition in local television markets: while stations may air programming from a variety of sources (including network and affiliated programming), they primarily compete on the production and airing of programming about their local communities -- *i.e.* local news. But stations involved in covert consolidation arrangements do not compete for local programming because the local news comes from a single source. Their own newscasts make this abundantly clear.

In Honolulu, Raycom Media laid off more than 60 people upon entering into a shared services agreement with MCG Capital in 2009.[161] As a consequence of the arrangement, all operations for three TV stations in Honolulu – channels 5, 7, and 9 – are now based out of the same building and the three stations air identical news coverage on all three stations.[162] A Honolulu resident captured video of this triplicate news phenomenon during Hawaii's 2010 gubernatorial election. When she tuned-in to Channels 5, 7, and 9 for coverage of the contested race, she found the same reporter conducting same interview simultaneously on all three channels.[163]

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[160] *2011 NPRM* at ¶33.

[161] Erika Engle, "TV Stations' pact draws fire," STAR BULLETIN (Aug. 19, 2009); *see also* Gordon Y.K. Pang, "Shocked Journalist Worried About Jobs," HONOLULU ADVERTISER (Aug. 19, 2009).

[162] Dan Nakaso, "Consolidation biggest on-air change since '95," HONOLULU ADVERTISER (Aug. 19, 2009).

[163] *See* "Different Channels, Same Election Coverage" http://www.youtube.com/watch?v=7M_0jo-XR_A.

The arrangement is clearly at odds with the purpose of the local television rules: Honolulu viewers are not getting more news – they are getting more of the exact same news from stations that are no longer competing against one another for viewers. It also has led to an overall decrease in the amount of independently produced local news, which defeats the Commission's diversity and localism goals. Finally, because all of the local news and information programming produced by these stations is identical, the arrangement results in an inefficient and duplicative use of valuable public spectrum.

The Commission has acknowledged that such arrangements may contravene the goals of the media ownership rules. In 2009, a local citizens' group, Media Council Hawai'i, filed an FCC complaint regarding the Honolulu SSA.[164] In November 2011, the Media Bureau released an order determining that under existing FCC policy the stations did not technically engage in a violation of the local television ownership rule -- but it found that the "net effect" of some types of sharing agreements is "clearly at odds with the purpose and intent of duopoly rule."[165] The Commission stated that it would take up "the duopoly rule issues that [the Media Council Hawai'i Complaint] and similar cases raise" in the 2010 Media Ownership Review.[166]

In addition to the virtual triopoly that it runs in Honolulu, Raycom Media has taken control of three local television stations (KMSB, KOLD and KTTU) in Tucson, AZ. Raycom's station, KOLD, produces all of the news for the three stations, which are now co-branded as "Tucson News Now" and operate out of the same studio – minus the 40 employees that were laid

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[164] *See Media Council Hawai'i Complaint and Request for Emergency Relief Regarding Shared Services Agreement between Raycom Media and MCG Capital for Joint Operation of Television Stations KHNL, KFVE, and KGMB, Honolulu, Hawai`i* (Oct. 7, 2009).

[165] *In the Matter of KHNL/KMGB License Subsidiary, LLC and HITV Subsidiary Inc*., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087, 16095 (Nov. 25, 2011) ("KNHL/KMGB Order").

[166] *Id.*

off when the deal was announced.[167] The Maynard Institute, which promotes diversity in journalism, noted in an article about the deal that one-third of the news staff at KMSB-TV (the station impacted by layoffs) was black or Latino.[168]

Similarly, in the summer and fall of 2011, Media Reform South Carolina (MRSC), a group comprising local media activists, began studying the consolidation of newscasts by two local television stations in Charleston, SC. They found that the local FOX affiliate airs its newscast at 10 p.m. Then one hour later, the CBS affiliate broadcasts the same news. MRSC recorded excerpts of these newscasts, which Free Press then compiled into a video showing that these stations are not only sharing anchors and newsroom staff, their newscasts feature virtually identical news content and scripts.[169]

A recent study by Dr. Danilo Yanich confirms what on a daily basis many local communities observe first hand. That study, which conducted content analyses of eight markets where these types of agreements are in operation, confirms that these arrangements are widespread and that they have a "profound effect on the local news broadcasts in the markets in which they operate"[170] and that their "obvious and unambiguous result was a reduction in the number of separate news voices in the market."[171]

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[167] Michael Malone, "Belo's KMSB Tucson Outsourcing News; Raycom's KOLD to take over news for Belo's Fox in shared services pact," BROADCASTING & CABLE (Nov. 15, 2011).

[168] "Anchor's Report: We're All Losing Our Jobs, In Tucson, Station Turns Over News Shows to Competitor," THE MAYNARD INSTITUTE (Nov. 16, 2011).

[169] Libby Reinish, "The Great Local News Heist," *SavetheNews.Org* (Oct. 20, 2011) http://www.savethenews.org/blog/11/10/20/great-local-news-heist (video embedded and also available at http://www.youtube.com/watch?v=0ZXqAl-acic&feature=relmfu.)

[170] Yanich, Danilo, *Local TV News & Service Agreements: A Critical Look*, University of Delaware (2011) at 98.

[171] *Id.* at 100.

Stations that participate in sharing arrangements are quick to tout what they see as the efficiency benefits of these arrangements. For example, in comments to the FCC in this proceeding, Nexstar Broadcasting argues that if it "were not for the combined news operations [through shared services agreements] in several of its markets, local news programming on at least one of the stations in these markets also would be discontinued due to the high costs required to provide local news programming."[172]

However, more often than not, these "efficiencies" are really just code for plain, old-fashioned lay-offs. Time and again, the announcement of a shared services arrangement is followed by the complete liquidation of one station's news staff, eliminating that station's ability to produce original content. In Nexstar's case, its own shared services agreement with Mission Broadcasting in Scranton, Pennsylvania, led to a rapid deterioration in local news. In the agreement, Nexstar's WBRE began to produce newscasts of Mission's WYOU in the same studio. While Nexstar initially aired both newscasts, it later took WYOU's newscast off of the air. It fired all but two of it staff at WYOU. When it canceled WYOU's newscast, a Mission executive told Broadcasting & Cable that in spite of ending all WYOU local news production in Scranton, Mission remained committed to providing local news.[173] Mission's WYOU started broadcasting "Judge Joe Brown" and "Access Hollywood" in the place of the original local news broadcast.[174]

A reduction in independent journalism and journalism jobs is par for the course with these practices. In March 2009, Granite Broadcasting and Barrington Broadcasting entered into a

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[172] Comments of Nexstar Broadcasting, filed MB Dkt 09-182 (July 7, 2010) at 18.

[173] Michael Malone, "WYOU's Disbanded News Operation May Be The First of Many," BROADCASTING & CABLE (April 13, 2009).

[174] Andrew M. Seder**, "**WYOU ceasing news broadcasts**,"** THE TIMES LEADER (April 3, 2009).

joint venture in Syracuse, whereby Barrington Broadcasting's station, WSTM, took over production of local news at Granite Broadcasting's station, WTVH. Under this shared services and joint sales agreement, WTVH laid off at least 40 employees and started broadcasting out of WSTM's studio.[175] "They came in and said basically, 'We're closed. You're all out of work,'" according to Bill Murray a local member of the Communications Workers of America.[176] "They emptied the building, and the newscasts are identical at this point. It's the same people. It's the same crew. It's the same reporters. It has to be, because Granite has literally no news employees."[177]

In Peoria, the two companies swapped roles, and Granite began producing all the news for the local Barrington station with similar results. Steve Tarter, a local newspaper journalist in Peoria, said the agreement has had a detrimental impact on the local television industry in Peoria.[178] When Granite's WEEK took over the operations of Barrington's WHOI, the local newspaper estimated that upwards of 30 people were laid off.[179] "In fact, the [news production] has really been reduced," Tarter said. "The weekend news is virtually the same. [WHOI] does not have a recognizable presence anymore."[180]

Even more recently, investigative reporting by the *Toledo Blade* revealed that the local FOX affiliate, WUPW-TV, intends to lay off 63 of the station's employees on the heels of

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[175] Michelle Breindenbach, "Syracuse's Channel 5 shuts down its newsroom," THE POST STANDARD (Mar. 2, 2009).
[176] Free Press, *Outsourcing the News: How covert consolidation is destroying newsrooms and circumventing media ownership rules* (2011) at 10.
[177] *Id.*
[178]. *Id.*
[179] Steve Tarter, "WEEK-TV taking over WHOI operations," PJSTAR.COM (Mar. 2, 2009).
[180] *Outsourcing the News* at 10.

entering into a shared services agreement with the WTOL-TV, the local CBS affiliate.[181] The agreement will allow the two stations "to share news staff and broadcasts. In addition to news, WUPW and WTOL would share access to studios, master control, technical facilities, maintenance, and promotional efforts."[182]

In *Prometheus II*, the court upheld the FCC's decision to retain its existing local television ownership limits as necessary to protect competition in local markets because competition for viewers "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers."[183] The evidence above strongly indicates that SSAs and similar agreements do not increase competition between local TV stations nor do they lead to more or better independent local programming. These practices are not those of a station acting independently and competitively in the marketplace. As Free Press stated in a recent joint letter, "[a]truly independently owned and operated station does not outsource its rights and obligations to its competitors."[184]

4. Resource Sharing Arrangements Are An Inefficient And Duplicative Use Of Valuable Public Spectrum And Are Not Necessary To Preserve The Financial Viability Of Local TV Stations

Not only are these arrangements bad for jobs and local journalism, they are not necessary to preserve stations experiencing genuine financial distress. Notwithstanding, the fact that the local TV industry as a whole is doing quite well (see i*nfra* at section II(B)(1)), stations frequently

[181] Kris Turner, "Channel 36's owner plans to lay off 63," THE TOLEDO BLADE (Mar. 1, 2012).

[182] *Id*.

[183] *Prometheus II*, 652 F.3d at 459 (citing the *2006 Review* Order and Order on Reconsideration, 23 FCC Rcd. 2010).

[184] Joint Letter from the American Cable Association, DISH Network, Free Press, National Association of Broadcast Employees and Technicians-Communications Workers of America, The Newspaper Guild-Communications Workers of America, and Time Warner Cable, filed MB Dkt 09-182 (Nov. 14, 2011).

suggest that such agreements are required to maintain news production, as well as the continued financial viability of the stations themselves.

Ironically, despite broadcast executives' supposed concern for preserving affected stations, these agreements often result in the virtual shuttering of the stations, which is the very outcome broadcasters argue that these deals are designed to avoid. With little or no newsroom or operating staff, many of the stations that remain on the air as a result of such an agreement are simply operating on autopilot. In other words, the lights are on, but no one is there – because they were all laid-off. The resulting news product is merely a re-run of content produced by another station and does not increase product diversity in terms of viewpoints, substance or coverage of different issues.

It is clear that SSAs and similar practices are not preserving local jobs and they are not preserving local journalism. Nor is carbon copy local programming consistent with the Commission's "long-standing policy goal in favor of efficient and non-duplicative use of the spectrum."[185] If a broadcaster cannot support itself or serve its community with independently produced local news, or if a market cannot support the current number of TV stations, it might be preferable as a matter of public policy for that broadcaster to go out of business and sell its spectrum to a new entrant in the market, or to relinquish its spectrum so that it may be put to a better use in the community.

In the event that an out of market buyer cannot be found, stations do not need to covertly consolidate to survive: if they are *genuinely* failed or failing they can apply for a failing station waiver which would allow common ownership of two stations that would otherwise violate the

[185] *Echostar Communications*, 17 FCC Rcd 20559, 20573 (2002); *see also Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503, 17552-53 (2004).

rules. A waiver of the television duopoly rule can be obtained for a station that has been struggling for an extended period of time both in terms of its audience share and financial performance. The Commission rules use the following criteria to assess a station's financial health which, if satisfied, presume that a waiver of the rules will be in the public interest.

> 1. One of the merging stations has a low all-day audience share, (i.e. 4 percent or lower);
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> 2. The financial condition of one of the merging stations is poor. For example, that the station has had a negative cash flow for the previous three years;
>
> 3. The merger will produce public interest benefits; and
>
> 4. The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; and selling the station to an out-of-market buyer would result in an artificially depressed price.[186]

Even though this mechanism is available, many of the broadcasters that have justified their use of SSAs based on financial distress claims have not taken advantage of the waiver – probably because they are not in genuine financial distress. Instead of applying under the waiver standard, broadcasters have opted for the "covert consolidation" provided by SSAs, which result in many of the same adverse effects as outright consolidation, but are at this point subjected to far less transparency and oversight by the public and the Commission.

5. The FCC Must Make Broadcaster News And Resource Sharing Practices Attributable Under The Media Ownership Rules

In the absence of more proactive attention by the Commission to the problems raised by SSAs and similar practices, stations are entering into these deals with increasing and alarming alacrity. The FCC can no longer tacitly approve such practices through its own inaction. The

[186] *See 1999 TV Order*, 14 FCC Rcd at 12907-8; *See also* 47 C.F.R. § 73.3555 Note 7.

FCC must change its attribution policies to better address the anti-competitive effects of resource sharing agreements and it must do so promptly. In other words, if it walks like a duopoly and talks like a duopoly, then the Commission should attribute it like a duopoly under the local television ownership rule. Furthermore, the FCC should not grandfather existing SSAs and other arrangements that are not in compliance with the new policy we propose, but should require broadcasters to come into compliance with rule changes within a reasonable period of time.

The FCC should adopt a set of criteria that identifies aspects of sharing agreements, which if met, would render the agreement attributable for the purpose of the FCC's media ownership limits. The Commission should identify the qualities of such arrangements which, on their own or in conjunction with other factors, demonstrate that a station is exerting substantial influence or control over the programming and operations of another in-market station.

To this end, Free Press supports the proposal advanced by the Georgetown Institute for Public Representation in its comments filed on behalf of The Office of Communication of the United Church of Christ, Inc., Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, and Media Council Hawai'i (collectively "UCC et al."). Those comments propose a bright line, multifactor test for assessing the level of control that one station exercises over another via a sharing agreement, such that attribution of that agreement would be deemed necessary to account for its effect on the localism, diversity, and competition goals of the FCC media ownership limits. Specifically, UCC et al. propose that an agreement would be automatically attributed if <u>one</u> of the following factors is met:

> 1) The servicing broadcaster provides all or significantly all local news programming for the licensee's station;

> 2) The servicing broadcaster sells 15 percent or more of the licensee's weekly advertising time;
>
> 3) The stations share management personnel;
>
> 4) The licensee maintains no separate facilities;
>
> 5) The servicing broadcaster reports to the securities and exchange commission that it owns, controls or operates the licensee's station;
>
> 6) Fifty percent or more of the licensee's total revenues go to the servicing broadcaster; or
>
> 7) The parties to a Sharing Agreement jointly negotiate retransmission consent.[187]

Acknowledging that in some circumstances it is the confluence of multiple factors, rather than a single aspect of an agreement, that raise attribution concerns, UCC et al. propose an additional and alternative test. Under this test an agreement would trigger attribution if at least <u>three</u> of the following factors are satisfied: (1) the servicing broadcaster provides between 8% and 15% of the licensee's programming; (2) the number of employees at the servicing broadcaster significantly outnumber those at the licensee station; (3) the stations share some physical facilities; (4) the stations engage in joint promotional activities; (5) the stations share financial risk and reward; (6) there is a Local News Service agreement in the local market; and (7) the servicing broadcaster maintains an option to purchase the licensee's station.[188]

Free Press believes that the two tests proposed by UCC et al. identify many of the qualities of a resource sharing agreement which, either on their own or compounded by other factors, would contravene the FCC's localism, competition, and diversity goals. These bright-line tests provide objective and measurable criteria that will allow the FCC to make sure such arrangements are consistent with the public interest without unduly constraining the activities of

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[187] Comments of UCC et al., filed MB Dkt 09-182 (Mar. 5, 2012) at section I(C)(1).
[188] *Id.* at section I(C)(2).

the stations involved. We urge the FCC to consider this or similar proposals as a means of addressing the increasing problem of covert consolidation.

Conclusion

The FCC's media ownership rules, when effectively enforced, ensure that the public is served by diverse and competing media sources. Free Press urges the Commission to promptly address the diversity issues remanded by the Third Circuit and in no event to conclude the 2010 Ownership Review until it has done so. The FCC should abandon its proposal to relax the cross ownership rules, a proposal that is not supported by any credible evidence in this record. The Commission should at least maintain all of its existing media ownership rules which remain necessary to promote competition and diversity in local media markets. Finally, Free Press urges the Commission to adopt attribution policies that will ensure that "covert consolidation" of local television stations through broadcasters' use of resources sharing agreements do not continue to subvert the local television ownership rules and the public interest goals of localism, competition and diversity.

Respectfully Submitted,

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Corie Wright
S. Derek Turner
Free Press
1025 Connecticut Ave, NW
Suite 1110
Washington, DC 20036
202-265-1490