

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

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

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Filed March 5, 2012

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## Summary

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 are pleased that the Commission is seeking comment on whether to attribute shared services agreements. Television stations have been entering into these agreements with increasing frequency to evade the local television ownership limits. Attributing ownership where one station exercises substantial influence over the operation of another station in the same market would further the Commission's goals of competition, localism, and diversity. We propose a bright line, multifactor test to determine which sharing arrangements should be attributed.

We are disappointed, however, that the Commission has continued to ignore or reject our other proposals set forth in earlier comments, particularly those designed to enhance station ownership opportunities for minorities and women. We are also disturbed by the Commission's stated intent to defy the Court's order in *Prometheus II* to address important issues relating to broadcast station ownership by minorities and women in the 2010 Quadrennial Review. Except for the proposal to attribute sharing arrangements, the Commission's proposals would continue or exacerbate the obstacles faced by women and minorities seeking to enter the broadcasting business. Moreover, the lack of data does not excuse the Commission's inaction. To be sure, the Commission's data collection and analysis efforts to date have been flawed and inadequate. Nonetheless, the Commission has data that it can and should analyze during this proceeding, and we suggest several concrete steps that it should take. We urge that the Commission not take any further action to relax broadcast ownership limits until it has fully analyzed the impact of its proposals and complied with the Third Circuit's mandate.

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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,<sup>1</sup> and Media Council Hawai'i have filed comments together or separately in earlier stages of this 2010 Quadrennial Review (QR) as well as the 2006 QR and 2002 Biennial Review. In these comments we focus on two issues: attribution of sharing arrangements and increasing opportunities for minorities and women to own broadcast stations. Although the Notice of Proposed Rulemaking (NPRM) raised other issues, they are mostly the same issues that we already addressed in earlier comments, and we ask the Commission to consider those comments as well.

## **I. The Commission Should Attribute Certain Sharing Arrangements**

The NPRM asks at ¶ 204 whether Shared Services Agreements (SSAs) are substantively equivalent to agreements that are already subject to its attribution rules, such as Joint Sales Agreements (JSAs) and Local Marketing Agreements (LMAs).<sup>2</sup> We believe that in most cases they are. In recent years, stations have increasingly been entering into SSAs to evade the local

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

<sup>2</sup> SSA refers to an agreement or series of an agreement, in which one in-market station provides operational support and programming to another in-market station. 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 77 Fed. Reg. 2868, ¶ 195 (Jan. 19, 2012)[hereinafter NPRM]. A JSA is an agreement in which one station sells advertising time on another station in the market. An LMA, which is sometimes called a time brokerage agreement, is an arrangement under which the brokering station purchases discrete blocks of programming time from another station and it provides the programming and sells the advertising during that time. *Id.* at ¶ 196. A Local News Service (LNS) refers to an arrangement between broadcasters to cooperate in the gathering and production of local news content. Often, stations enter into more than one of these types of agreements. These comments will refer to all of these types of agreements collectively as “sharing arrangements.”

television rule restrictions on same market mergers.<sup>3</sup> These SSAs reduce competition, result in duplicative local news programming, and diminish opportunities for minorities and women to own broadcast stations.

**A. Sharing Arrangements Are Increasingly Being Used to Circumvent the Commission's Local TV Limits**

Because the Commission does not formally track all sharing arrangements among broadcasters, it is difficult to know how many stations are engaging in them.<sup>4</sup> But it appears that the number has increased substantially over the past few years. Stations began entering into these relationships in 2004, after the Third Circuit remanded the FCC's relaxation of the local television rule.<sup>5</sup> Commenters' counsel, the Institute for Public Representation, first learned of sharing arrangements in fall 2009, when they agreed to represent Media Council Hawai'i (MCH) in its efforts to prevent one broadcaster from operating three stations in Honolulu. By May 2010, when MCH and Communications Workers of America (CWA) filed joint comments in the Future of Media proceeding, their research had uncovered sharing arrangements in 42 different markets.<sup>6</sup> A study published in October 2011 by University of Delaware professor Danilo Yanich

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<sup>3</sup> The local television rule permits same market mergers only where eight independent voices remain and only one station is ranked in the top four.

<sup>4</sup> For this reason, we also support proposals in enhanced services in Comments of Public Interest Public Airwaves, MM Dkt. No. 11-189, filed Jan. 27, 2012, at 19–22; Comments of Public Interest Public Airwaves Coalition, MM Dkt. No. 00-168, filed Jan. 23, 2012, at 32–35; Reply Comments of Public Interest Public Airwaves Coalition, MM Dkt. No. 00-168, filed Jan. 17, 2012, at 14–19; Comments of Public Interest Public Airwaves Coalition, MM Dkt. No. 00-168, filed Dec. 22, 2011, at 19–21.

<sup>5</sup> Comments of Communications Workers of America and Media Council Hawai'i, GN Dkt. No. 10-25, at 10 (filed May 7, 2010).

<sup>6</sup> *Id.* at 3.

found that there were as many as 83 television markets with at least one sharing arrangement.<sup>7</sup> As of today, Free Press, which has been tracking these agreements, knows of 98 markets where such agreements exist, involving 81 different owners.<sup>8</sup> Most of these sharing arrangements are in smaller markets with fewer than eight independently owned television stations. Moreover, the majority involve two affiliates of the four major networks.

If the Commission does not act quickly to attribute sharing arrangements, we can expect to see many more stations enter into them. Shortly before the Commission issued this NPRM, Harry A. Jessell wrote an article for *TVNewsCheck* proclaiming that “Now’s the Time to Make Virtual Duopolies.”<sup>9</sup> Jessell warns that the Commission may crack down on virtual duopolies in the 2010 QR. He notes that sharing arrangements “essentially allow broadcasters to circumvent the ban against actual ownership of two stations in small markets.” Jessell asks, “[w]hat’s the point of having a ban against two Big Four network affiliates in a small market merging through station-sale contract if they can do it with a bunch of management contracts?”<sup>10</sup>

#### **B. Sharing Arrangements Have a Detrimental Impact on the Commission’s Policy Goals of Competition, Localism, and Diversity**

The NPRM tentatively concludes that the current local television rule, including both the top-four prohibition and the eight voices test, continues to serve the public interest.<sup>11</sup> It would be arbitrary and capricious to keep the current rule and yet allow the rule to be circumvented by

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<sup>7</sup> Danilo Yanich, *Local TV News & Service Agreements: A Critical Look*, Center for Community Research & Service, Univ. of Delaware, at 3 (Oct. 2011)[hereinafter Yanich Study].

<sup>8</sup> SaveTheNews.org, Markets (Mar. 5, 2012), <http://www.savethenews.org/changethechannels/markets>.

<sup>9</sup> Harry A. Jessell, *Now’s the Time to Make Virtual Duopolies*, *TVNewsCheck* (Dec. 9, 2011), available at <http://www.tvnewscheck.com/article/2011/12/09/55959/nows-the-time-to-make-virtual-duopolies>.

<sup>10</sup> *Id.*

<sup>11</sup> NPRM at ¶¶ 40, 46.

allowing sharing arrangements that effectively give one station control or substantial influence over another station in the same DMA.

### **1. Sharing Arrangements Reduce Competition**

In the 2006 QR Order, the Commission concluded that the local television rule was necessary to promote competition because it prevents mergers that “would be the most deleterious to competition.”<sup>12</sup> It further noted that the top-four prohibition was appropriate because “mergers of stations owned by any of the top four firms often would result in a single firm with a significantly larger market share than others.”<sup>13</sup> Moreover, “combinations among the top four would reduce incentives to improve programming that appeals to mass audiences.”<sup>14</sup> The NPRM at ¶ 40 states that the Commission continues to believe that this rationale supports retention of the top-four prohibition.

We agree. And just as the outright acquisition of a second top-four station reduces competition, so do these sharing arrangements. Many of the sharing arrangements we have identified involve affiliates of major networks. For example, there are sharing arrangements between the ABC and Fox affiliates in Charleston-Huntington, WV; ABC and NBC affiliates in Joplin, MO; ABC and CBS affiliates in Montgomery, AL; CBS and NBC affiliates in Scranton, PA; CBS and Fox affiliates in Springfield, MO; and Fox and NBC affiliates in Terre Haute, IN.

Some sharing arrangements even involve three or more stations in the same DMA. For example, in Honolulu, Raycom holds the licenses outright for the NBC and CBS affiliates and

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<sup>12</sup> 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 23 FCC Rcd. 2010, at 2066, ¶ 102.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The Commission also noted that a significant “cushion” of audience share continued to separate the top four stations from the fifth ranked station.

provides local news and other services for the My Network affiliate. In Tucson, Arizona, Raycom, which owns the CBS affiliate, has a sharing arrangement with Belo's Fox and My Network affiliates. In Corpus Christi, TX, a market with only five commercial full-power television stations, Cordillera Communications controls two of them, plus two low-power stations, and the CW affiliate. As it explains on its website:

KRIS-TV is the NBC-affiliated television station for the Corpus Christi area of South Texas. Owned by Cordillera Communications (a wholly-owned subsidiary of the Evening Post Publishing Company), the station is sister to CBS affiliate KZTV (owned by Eagle Creek Broadcasting but operated by Cordillera through shared services agreement), independent KDF, Telemundo affiliate KAJA, and the area's CW affiliate, The CW South Texas. After KRIS Communications and KZTV joined forces, KRIS Communications moved into KZTV's facilities in September 2010. All five stations now share studios at 301 Artesian Street in downtown Corpus Christi.<sup>15</sup>

And in Idaho Falls, six stations (KIFI, an ABC affiliate; KIDK, a CBS affiliate; Telemundo; CW; NOW, a 24-hour news channel; and KXPI, a My Network affiliate) are all operated out of a single studio owned by News-Press and Gazette Co., the licensee of KIFI.<sup>16</sup> In addition, several markets have two sets of television stations with sharing arrangements. For example, in Dayton, Ohio, the NBC and CW affiliate have one sharing arrangement, while the Fox and ABC affiliates have another.

Instead of competing in selling advertising, purchasing programming, attracting audiences, and obtaining cable carriage, stations in sharing arrangements cooperate with each

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<sup>15</sup> KRIS 6, Cordillera Communications, <http://cordillera.tv/properties/kris-6>.

<sup>16</sup> Joan Cartan-Hansen, *KIDK-KIFI How Does This Marriage Work?*, Idaho Press Club, May 19, 2011, <http://idahopressclub.org/newsletter/spring-2011/item/126-kidk-kifi-how-does-this-marriage-work>.

other instead.<sup>17</sup> In many cases, stations with sharing arrangements jointly negotiate retransmission consent agreements with cable companies. For example, Nexstar and Mission Broadcasting, which have sharing arrangements in multiple markets, jointly negotiated retransmission consent with Cox Communications for the local markets of Abilene-Sweetwater, San Angelo, Lubbock, Amarillo, Odessa-Midland and Beaumont-Port Arthur, Texas; Shreveport, Louisiana; Fort Smith, Little Rock, and Monroe-El Dorado, Arkansas; Springfield and Joplin, Missouri; and Pittsburg, Kansas.<sup>18</sup> It is difficult to imagine how television stations could negotiate carriage fees jointly without learning a lot about their “competitor’s” financial situation.<sup>19</sup>

With joint negotiations, television stations can demand higher prices that are passed on to consumers.<sup>20</sup> For example, according to a letter from the American Cable Association, CWA and others, “available evidence strongly suggests that common control or ownership of multiple Big

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<sup>17</sup> Shared services can facilitate collusion. Antitrust agencies have long recognized the joint ventures raise collusion concerns because they can place key decisionmakers in contact and thus open opportunities for covert collusion and can have major anticompetitive effects on a local market. U.S. Fed. Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 19, at 6 (2000).

<sup>18</sup> Press Release, Cox Communications, Nexstar Broadcasting And Mission Broadcasting Reach Retransmission Consent Agreement, <http://cox.mediaroom.com/index.php?s=43&item=183>.

<sup>19</sup> Indeed, it has been reported that “Mission is a company set up by Nexstar to be its duopoly partner” in 14 markets. *Nexstar Swapping Fox for ABC in Evansville*, TVNewsCheck (Aug. 8, 2011).

<sup>20</sup> Although in theory such increase might be used to enhance local news and public affairs programming, instead much of the increase is simply passed on to the national networks. “For major networks, sharing an affiliate’s retrans revenue *is now a given*,” with the networks “planning to receive *at least half* of the [retransmission content] income flowing to affiliates.” Jon Lafayette, *Networks’ Reverse Comp Take to Hit \$1Bil in 2014*, Broadcasting & Cable (Nov. 1, 2011), [http://www.broadcastingcable.com/article/476031-Networks\\_Reverse\\_Comp\\_Take\\_to\\_Hit\\_1B\\_in\\_2014.php?rssid=20065](http://www.broadcastingcable.com/article/476031-Networks_Reverse_Comp_Take_to_Hit_1B_in_2014.php?rssid=20065) (emphases added); see Philip Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, Report Prepared for the American Television Alliance, 9, Nov. 2011 available at [http://fordham.academia.edu/PhilipNapoli/Papers/1163518/Retransmission\\_Consent\\_and\\_Broadcaster\\_Commitment\\_to\\_Localism](http://fordham.academia.edu/PhilipNapoli/Papers/1163518/Retransmission_Consent_and_Broadcaster_Commitment_to_Localism) [hereinafter Napoli Report].

4 affiliates in a single DMA results in an increase in broadcast carriage fees by at least 21.6 percent.”<sup>21</sup>

The current situation in Corpus Christi, TX, provides a particularly striking example of how reduced competition resulting from a sharing arrangement harms the public. There, the licensee of the NBC affiliate, KRIS-TV, was unable to reach an agreement with Time Warner Cable, and the cable system dropped KRIS-TV. Ordinarily, one would expect that KRIS-TV’s competitors would jump at the opportunity to increase market share. But instead, because KRIS-TV operates the CBS affiliate KZTV under a sharing arrangement, KRIS-TV was able to offer its advertisers the opportunity to “shift KRIS dollars to KZTV” or “increase ‘make-good’ weight on KRIS or KZTV.”<sup>22</sup> Because of the inability of KRIS-TV and Time Warner to reach agreement, cable subscribers have been unable to watch the NBC stations since mid-December.<sup>23</sup>

## **2. Sharing Arrangements Have a Detrimental Impact on Competition and Diversity in Local News Programming**

Sharing arrangements also reduce competition in the gathering and production of local news. The Commission’s recent report, *Information Needs of Communities* (INOC Report), has carefully documented the crisis in journalism generally, as well as problems with local television news. It found that local television stations remain the most popular source for local news.<sup>24</sup> But while the average amount of television news has increased, news staffs have been shrinking.<sup>25</sup> Sharing arrangements contribute to this problem and often result in staff layoffs. For example, as

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<sup>21</sup> Letter to Chairman Julius Genachowski, MB Dkt. 09-182, at 2 (Nov. 11, 2011).

<sup>22</sup> See Appendix A: KRIS Letter to VIP Advertisers.

<sup>23</sup> KZTV10.com, *The Latest on the KRIS Dispute with Time Warner*, Feb. 10, 2012, <http://www.kztv10.com/news/the-latest-on-the-kris-dispute-with-time-warner/>

<sup>24</sup> FCC, *The Information Needs of Communities* 76 (2011)[hereinafter *INOC*].

<sup>25</sup> *Id.* at 79.

a result of sharing arrangements, 68 employees lost their jobs in Honolulu; 30 in Peoria, Illinois; 45 in Syracuse, New York; and 24 in Salt Lake City, Utah.<sup>26</sup>

The INOC Report found that many local news programs provide scant coverage of important local issues, rarely conduct investigative reporting, and generally lack depth.<sup>27</sup> It further found an increase in “one-man-bands,” that is, “journalists who do it all: conduct interviews, shoot video, and edit their own stories.”<sup>28</sup> While this practice could free up resources for additional or more in-depth coverage, the report found that most stations have not used the savings to hire more reporters. Instead, the “reporters who once just reported the news now have many other tasks, and more newscasts to feed, so they have less time to research their stories.”<sup>29</sup>

The Report further found that

[s]ome stations have dealt with cost pressures by getting out of the news production business altogether—literally outsourcing their entire newscast to another party. Nearly one-third of TV stations say they are running news produced by another station, according to the 2010 RTDNA/Hofstra University Annual Survey. Professor Robert Papper, who conducts the study, says in his latest survey that there are 762 stations originating local news and another 224 that get news from one of those 762 stations. Some involve common ownership, some joint operating agreements.<sup>30</sup>

The Report also found that “[a]nother significant and controversial trend in local news involves competing stations sharing news reporting and production resources. More than 60 percent of stations say they are involved in some sort of cooperative newsgathering or coverage

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<sup>26</sup> Kari Lydersen, *The Case of the Disappearing Local TV Journalist*, In These Times, Oct. 24, 2011, available at [http://www.inthesetimes.com/working/entry/12173/the\\_case\\_of\\_the\\_disappearing\\_local\\_tv\\_journalist](http://www.inthesetimes.com/working/entry/12173/the_case_of_the_disappearing_local_tv_journalist).

<sup>27</sup> *INOC* at 84–88.

<sup>28</sup> *Id.* at 89.

<sup>29</sup> *Id.* at 90.

<sup>30</sup> *Id.* at 96.

agreement with another station or medium.”<sup>31</sup> It explained that in “a typical LNS, two or more stations contribute camera crews to a jointly run assignment desk that decides which stories to cover and feeds video back to individual newsrooms to be produced internally.”<sup>32</sup> While some broadcasters claim that LNSs “provide creative mechanisms for local stations to redeploy journalistic resources in the most effective manner possible for service to their local communities . . . . [i]n practice, enhanced service to local communities is not always the result.”<sup>33</sup>

A major purpose of the ownership limits is to ensure that the public has ample access to diverse sources of local news and other information programming about their local communities. In fact, when the Commission first relaxed the duopoly rule in 1999, it explained that

the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal.<sup>34</sup>

As noted above, many sharing arrangements involve affiliates of two major networks. And as a result of the sharing arrangement, two independently produced local news operations are typically replaced by a single news operation that supplies both stations. In Honolulu, for example, Raycom’s Hawaii News Now produces news programs from a single facility that are

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<sup>31</sup> *Id.* at 97.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 97–98.

<sup>34</sup> Review of the Commission’s Regulations Governing Television Broadcasting, 14 FCC Rcd. 12903, 12933, (1999).

simulcast on both the NBC and CBS affiliates, and rebroadcast with only slight variation on a third station.<sup>35</sup>

It seems that Raycom has a similar arrangement in Tucson. It was recently reported that Raycom, licensee of CBS affiliate KOLD, will produce a two hour morning news show for Fox affiliate KMSB, which is licensed to Belo.<sup>36</sup> KMSB was previously planning to hire a dozen news staffers to launch the morning news program. Instead, about 20 Belo employees in Tucson will be out of a job.<sup>37</sup> A Google search using the term “KOLD TV” lists as the first result Raycom’s “Tucson News Now” website, which has a large banner at the top linking to streaming news on Belo’s Fox affiliate KMSB.<sup>38</sup>

In Denver, Fox affiliate KDVR, licensed to LocalTV, has a sharing arrangement with the Tribune-owned CW affiliate KWGN, under which the stations jointly produce news.<sup>39</sup> Although the news programs for both stations are produced by the same people, they have a somewhat different look. The President and General Manager of KDVR/KWGB has been quoted as saying that “every program on each of the stations has its own decision-makers. There are different line

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<sup>35</sup> *KHNL/KGMB License Subsidiary, LLC, Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawai’i and HITV License Subsidiary, Inc., Licensee of Station KFVE(TV), Honolulu, Hawai’i*, Application for Review, at 7 (filed Dec. 27, 2011).

<sup>36</sup> David Hatfield, *Stalled Fox 11 News Projects Will Now Happen, But Done by KOLD*, Inside Tucson Business (Nov. 18, 2011), [http://www.insidetucsonbusiness.com/media\\_technology/inside\\_media/stalled-fox-news-projects-will-now-happen-but-done-by/article\\_0016e380-114b-11e1-930e-001cc4c002e0.html](http://www.insidetucsonbusiness.com/media_technology/inside_media/stalled-fox-news-projects-will-now-happen-but-done-by/article_0016e380-114b-11e1-930e-001cc4c002e0.html). The article explains that this is part of a shared serves agreement “where basically Belo pays KOLD to operate KMSB and KTTU.” Raycom will also operate their digital side channels, This TV classic movies and Spanish Estrella TV.

<sup>37</sup> *Id.*

<sup>38</sup> See Appendix B: Front Page of Tucson News Now.

<sup>39</sup> John Tomasic, *Decrying ‘Photocopy Journalism’*, *News Watchdog Spotlights Denver TV Station Merger*, The Colorado Independent (June 28, 2011), available at <http://coloradoindependent.com/92247/freepress-decries-photocopy-journalism-spotlights-denver-kdvr-kwgn-merger>.

producers, different presenters.” But the same article quotes a staff member stating that “all of our operations have merged . . . . We have one news team. One news director.” The article also reports that both stations share the same telephone number, that the websites for the two stations are similar, and that the websites list mostly the same news personnel at each station. Although different news anchors appear on air, they use the same scripts, as well as the same reporters.<sup>40</sup>

In Idaho Falls, Fisher Communications informed its 43 employees at KIDK in May 2011 that it would be turning its operations over to KIFI, which is licensed to News-Press and Gazette Co., and laying off about 27 employees.”<sup>41</sup> As a result, KIFI now controls six stations from one building: KIFI, an ABC affiliate; KIDK, a CBS affiliate; KXPI, a My Network affiliate; affiliates of Telemundo and CW; and NOW, a 24-hour news channel.<sup>42</sup> According to KIFI’s general manager Mark Danielson, “they want to keep KIDK’s identity intact as much as possible. KIDK has its own on-air talent, its own on-air look and its own sales staff, but reporters’ work appears on both stations.”<sup>43</sup>

Danielson describes the complex technological choreography that happens in order to broadcast different newscasts from a single studio: KIFI’s talent does a newscast from 5:00-5:29 p.m. At 5:29, sets change, graphics change, and KIDK’s talent takes the desk for their newscast. When they finish at 5:59, everything flips back for KIFI’s 6:00 p.m. newscast. That’s right—they’re one-minute changeovers.<sup>44</sup>

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<sup>40</sup> To see an example of the newscasts, SaveTheNews.org, Change the Channels (Mar. 6, 2012), <http://www.savethenews.org/changethechannels>.

<sup>41</sup> Joan Cartan-Hansen, *KIDK-KIFIL How Does This Marriage Work?*, Idaho Press Club, May 19, 2011, <http://idahopressclub.org/newsletter/spring-2011/item/126-kidk-kifi-how-does-this-marriage-work>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

The same article quotes a retired reporter from KIDK lamenting the reduction in competition: “I worry about the loss of competition . . . . Very often, the lead story is the same. They have essentially blended into one.”<sup>45</sup> The article further notes that

[c]ompetition is an issue in the Idaho Falls market. KPVI, the Pocatello-based station in the market, currently has no reporters in its Idaho Falls bureau, leaving KIFI as the dominant TV station. One public relations officer joked that now when he calls a press conference, he is lucky if one photographer shows up. The change may also impact competition in the Boise market. Because of the combined newsroom, KIFI can share its stories with KBOI and KIVI, its sister affiliates, but not with KTVB, as it once did.<sup>46</sup>

University of Delaware Professor Danilo Yanich has conducted a systematic review of the content of local newscasts by stations in eight markets where some stations are involved in sharing.<sup>47</sup> He concludes that:

the implementation of shared services (SSA) and local management/marketing (LMA) agreements had a profound effect on the local news broadcasts in the markets in which they operated. Specifically, the effect was evident in the distribution of stories across the stations and in the use of shared resources, such as the anchor, the reporter, the script and video/graphics for the story. That said, the effect on both of these characteristics was varied across the markets.<sup>48</sup>

For example, in Dayton, OH, the ABC and Fox affiliates had one LMA and the NBC and CW affiliates had another. The ABC and Fox affiliates showed the same stories 98% of the time and used wholesale sharing of resources such as anchors, reporters, scripts, videos, and

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> The Yanich Study, *supra* note 7, has been filed in this docket. The markets examined are Denver, CO, Jacksonville, FL, Dayton, OH, Des Moines, IA, Burlington, VT, Peoria, IL, Columbus, GA, and Wichita Falls, TX.

<sup>48</sup> Yanich Study at 105.

graphics.<sup>49</sup> The NBC and CW affiliates, however, showed the same news stories only about one-third of the time.<sup>50</sup> In Denver, CO, the Fox and CW affiliates broadcast the same stories—using the same scripts, video, and graphics almost two-thirds of the time.<sup>51</sup> The stations used the same reporter for the story 39% of the time.<sup>52</sup>

Finally, a reduction in the diversity of local TV news also reduces sources of online news. Local TV stations are important sources for online news and rank among the most popular news websites.<sup>53</sup> Stations that have sharing arrangements usually share online content as well as on-air content. In Youngstown, Ohio, for example, the websites for the ABC, Fox, and CBS affiliates—the stations involved in the SSA between New Vision and PBC Broadcasting—have identical content except for the call sign displayed.<sup>54</sup> The same is true for the CBS, NBC, and MyNetworkTV affiliates—the stations involved in the SSA between Raycom Media and MCG Capital Corporation—in Honolulu.<sup>55</sup>

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<sup>49</sup> *Id.* at 51.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 28.

<sup>52</sup> *Id.*

<sup>53</sup> *INOC* at 76. For example, WWL in New Orleans served its community during Hurricane Katrina by keeping information consistently available online and streaming coverage. It allowed displaced storm victims to learn about their community and homes. *Id.* at 80.

<sup>54</sup> See WYTV – News, Weather, Sports (Mar. 6, 2012), <http://www.wytv.com/default.aspx>; WKBN Youngstown, Ohio – News, Weather, Sports (Mar. 6, 2012), <http://www.wkbn.com/default.aspx>; Fox Youngstown Home Page (Mar. 6, 2012), <http://www.foxyoungstown.com/default.aspx>.

<sup>55</sup> See Hawaii News Now – KGMB and KHNL (Mar. 6, 2012), <http://www.hawaiinewsnow.com/>; KFVE The Home Team (Mar. 6, 2012), <http://www.k5thometeam.com/>.

### 3. Sharing Arrangements Reduce Ownership Opportunities for Minorities and Women

Sharing arrangements also reduce ownership opportunities for minorities and women both directly and indirectly. An example of how a sharing arrangement effectively eliminated a minority owner from the market was presented at an earlier FCC workshop: Professor Reed-Huff of Syracuse University College of Law stated that “Syracuse lost an African-American television station due to a[n SSA] that transferred management of the station to a nonminority-owned corporation that also owns and operates another major network affiliate in the market. The two television stations now simulcast the same news programming, depriving the market of an essential voice and independent source of information.”<sup>56</sup>

SSAs also may reduce opportunities for minority and women entrants by allowing struggling stations to avoid the requirements for a failed station waiver. Under 47 C.F.R. § 73.3555, a failing station can get a waiver of the local television rule to sell to an in-market broadcaster only if it can show that the in-market buyer is the only entity willing and able to operate the station. This requirement was created to increase opportunities for new entrants, including minorities and women, to purchase broadcast stations by ensuring that new entrants get a fair chance to learn that an affordable station is for sale.<sup>57</sup> In *Prometheus I*, the Third Circuit ruled the Commission’s repeal of the rule arbitrary and capricious and remanded the decision for failure to consider the impact on minority and woman ownership.<sup>58</sup> But a struggling station that enters an SSA avoids offering opportunities to new market entrants. Instead of providing a new

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<sup>56</sup> Statement of Lavonda N. Reed-Huff, Associate Professor of Law, Syracuse University College of Law, FCC Media Ownership Workshop, Washington, DC, Jan. 27, 2010.

<sup>57</sup> *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd. 12903, at 12909–10, 12937 (1999).

<sup>58</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420–21 (3d Cir. 2004) [hereinafter *Prometheus I*].

opportunity for minority or woman ownership, therefore, the market simply loses an independent voice.

**C. The Commission Should Adopt a Bright Line, Multifactor Test that Will Attribute Ownership Where One Station Exercises Substantial Influence Over Another Station in the Same Market**

Because it is clear that many sharing arrangements confer “influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions,”<sup>59</sup> we urge the adoption of a bright line, multi-factor test for attribution.

Under this test, the broadcaster that provides services (Servicing Broadcaster) under the sharing arrangement is attributed with ownership of another license-holding station that receives services (Licensee) under the sharing arrangement if any one of the following circumstances exists:

1. the Servicing Broadcaster provides all or substantially all local news programming for the Licensee’s station;
2. the Servicing Broadcaster sells 15% or more of the Licensee’s weekly advertising time;
3. the stations share management personnel;
4. the Licensee station maintains no separate facilities;
5. the Servicing Broadcaster reports to the Securities and Exchange Commission that the Servicing Broadcaster owns 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 Licensee outsources its retransmission consent negotiations to the Servicing Broadcaster.

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<sup>59</sup> NPRM at ¶ 194.

Any one of these factors should automatically trigger attribution because each one alone gives the Servicing Broadcaster significant influence over the Licensee's station. In addition, some factors that might not confer influence standing alone, could do so in combination. For this reason, we identify eight additional factors, of which any sharing arrangement meeting three or more should be attributed.

**1. Ownership Should Be Attributed Under Any One of these Conditions**

*a. The Servicing Broadcaster Provides All or Substantially All Local News Programming for the Licensee's Station.* The Commission already attributes time brokerage agreements (TBAs), which are also known as local marketing agreements (LMAs) where there are two television stations in the same market and a party with a cognizable interest in one station brokers more than 15% of the broadcast time per week of the other station.<sup>60</sup> Although, as described above, many stations provide local news programming to another station in the same market, these relationships are currently not attributable because the amount of local news constitutes less than 15% of the total programming per week.<sup>61</sup> At the same time, local news is often the only locally originated programming on these stations, and revenue from local news programs is substantial.<sup>62</sup> Thus, whenever a station in a market provides all or substantially all local news programming to another station in the same market, it should be attributed a cognizable interest in that station.

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<sup>60</sup> 47 C.F.R. § 73.3555, Note 2(j) (2012).

<sup>61</sup> In 2011, broadcast stations produced, on average, roughly 11.5 hours of local news programming per week, or approximately 7 percent of total broadcast hours, and just under 1.5 hours of local public affairs programming per week, or approximately 0.89 percent of total available broadcast hours. Napoli Report at 18–19.

<sup>62</sup> *INOC* at 74.

*b. The Servicing Broadcaster Sells 15% or More of the Licensee's Advertising Time Per Week.* The Commission already attributes joint sales agreements (JSAs) where an entity with a cognizable interest in a radio station sells more than 15% of the advertising time per week for another station in the same market.<sup>63</sup> In 2004, the Commission tentatively concluded that JSAs have the same effect in local television markets as in radio markets and should thus be treated similarly.<sup>64</sup> TV JSAs should also be attributed because they contain the same terms, serve the same functions, and raise the same competition concerns as radio JSAs. In fact, the need for attribution in television may actually be greater because there are many fewer television stations than radio stations, and thus, such JSAs have an even more negative effect on competition. Therefore, JSAs between television stations in the same market involving 15% or more advertising time should be automatically attributed.

*c. The Parties to the Sharing Arrangement Share Management Personnel.* The Commission should automatically attribute ownership of the Licensee's station if the Servicing Broadcaster and the Licensee share management personnel. Having the same people make personnel, content, operational, and financial decisions for both stations surely eliminates competition and stifles localism and diversity.

*d. The Licensee Maintains No Separate Facilities.* The Commission should automatically attribute ownership of the Licensee's station to the Servicing Broadcaster if the Licensee maintains no separate facilities. With no facilities of its own, the Licensee is unable to operate independently. Its reliance on the Servicing Broadcaster's facilities provides the Servicing

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<sup>63</sup> 47 C.F.R. § 73.3555, Note 2(k) (2012).

<sup>64</sup> *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Dkt. No. 04-256, 19 FCC Rcd. 15238, 15242 at ¶ 12 (2004). The Commission never took any further action in this proceeding.

Broadcaster significant leverage over the programming and other operations of the Licensee. Moreover, because the Licensee cannot operate separately from the Servicing Broadcaster, it lacks the incentive and ability to compete with the Servicing Broadcaster.

*e. The Servicing Broadcaster Reports to the Securities and Exchange Commission that It Owns or Operates the Licensee's Station.* The Commission should automatically attribute ownership of the Licensee's station if the Servicing Broadcaster reports to the SEC that it owns or operates the Licensee's station. Under the Securities Act of 1933, a broadcaster may be liable if its prospectus is materially misleading, and it is a crime for the broadcaster to knowingly and willfully make any materially false, fictitious, or fraudulent statements or representations before the SEC as a matter within the jurisdiction of the executive branch of the United States.<sup>65</sup> The Servicing Broadcaster should not be able to claim it does not exercise significant influence over a station that it has told the SEC it owns or operates.<sup>66</sup> Thus, in such cases, ownership should be attributed.

*f. Fifty Percent or More of the Licensee's Total Revenues Go to the Servicing Broadcaster.* The Commission should attribute ownership of a Licensee's station to another station in the market if the sharing arrangement provides for a Servicing Broadcaster to receive 50% or more of the Licensee's revenues. In that situation, the stations lose the incentive to

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<sup>65</sup> 15 U.S.C.A. § 77; 18 U.S.C.A. § 1001.

<sup>66</sup> For example, Sinclair Broadcast Group stated in its Prospectus, at 1, filed March 2011, available at <http://www.investorscopes.com/SINCLAIR-MEDIA-I-INC/424B3/10834221.aspx>, that "We currently own, provide programming and operating services pursuant to [LMAs] . . . or provide . . . sales services pursuant to [sharing arrangements] to 58 television stations in 35 markets. For the purpose of this prospectus, these 58 stations are referred to as 'our' stations." Similarly, Barrington Broadcasting has told the SEC that it "currently owns and operates twenty network affiliated television stations and operates a twenty first station under a [LMA]," Barrington Broadcasting Group LLC, Barrington Broadcasting Capital Corporation, filed August 13, 2007, available at [http://www.barringtontv.com/wp-content/uploads/2009/05/current\\_report\\_2007\\_q2.pdf](http://www.barringtontv.com/wp-content/uploads/2009/05/current_report_2007_q2.pdf).

compete. In essence, the Licensee becomes a second outlet for the Servicing Broadcaster, thereby eliminating an independent voice and reducing viewpoint diversity. Revenue sharing also greatly reduces competition. The two stations will likely maximize overall profits rather than compete.

*g. The Licensee Outsources Its Retransmission Consent Negotiations to the Servicing Broadcaster.* The Commission should attribute ownership when the parties to a sharing arrangement jointly negotiate retransmission consent. As discussed above, such agreements significantly reduce competition and harm consumers.<sup>67</sup>

## **2. A Combination of Three or More of the Following Factors Should Result in Attribution**

When stations engage in the above activities at a lower level that does not automatically result in attribution, that activity may still evidence substantial influence when combined with other factors. Thus, we suggest that the following factors be taken into account along with other factors to determine whether attribution is appropriate. These other factors may include 1) the Servicing Broadcaster provides between 8% and 15% of the licensee's programming; 2) the number of employees at the Servicing Station significantly outnumbers those at the Licensee station; 3) the stations share some physical facilities; 4) the stations engage in joint promotional activities;<sup>68</sup> or 5) the stations share financial risk and reward.

However, other important factors should also be taken into account. First, the Commission should take into account the involvement of one or more stations in a local news service agreement (LNS). An LNS involves multiple stations contributing staff and equipment to

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<sup>67</sup> See discussion *supra* at pp. 6–7.

<sup>68</sup> Examples might be promoting each other on station websites, co-branding, utilizing the same reporters, etc.

a joint news gathering effort under a single manager.<sup>69</sup> The broadcasters work together rather than compete to create news programming. Journalists have noted that LNS coverage typically includes only the obvious “who, what, and where” and not “the more valuable ‘why and how.’”<sup>70</sup>

Another relevant factor is whether a station has a sharing arrangement with more than one other station in the market. Sharing arrangements involving more than two in-market stations increase threats to competition, localism, and diversity.

Another factor should be whether the Servicing Broadcaster has an option to purchase the Licensee’s station. If the Licensee anticipates that it may be purchased, the Licensee loses incentive to remain independently viable and is likely to cede greater control to the servicing station.

We recognize that adoption of this test may put some stations in violation of the local television rules. In such case, the Commission should permit short temporary waivers to allow the stations to come into compliance. In addition, we urge the Commission to issue a public notice advising broadcasters that any newly created sharing arrangement will not be grandfathered.

Finally, we agree with that the NPRM at ¶ 45 that applying the top-four prohibition only at the time of an application to the Commission creates a potential for evading the intent of the rule. Therefore, we urge that the Commission adopt a rule prohibiting a top-four station from acquiring a second top-four station by acquiring the network affiliation agreement of another station.

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<sup>69</sup> See Comments of Communications Workers of America, et al., at 11, MB Dkt. No. 09-182 (May 7, 2010).

<sup>70</sup> Jill Geisler, *Six Hazards of TV News Pooling and How to Avoid Diluting Your Coverage*, Poynter Online, Jun. 2, 2009, available at <http://www.poynter.org/column.asp?id=34&aid=164309>. She is talking about LNS.

#### **D. A Bright Line Test Benefits the Public, Commission, and Broadcasters**

Adopting a bright line test for attribution would have many advantages over the current situation. First, it will allow the Commission and the public to find out about these proposed agreements *before* they are entered into. Currently, the Commission has no way to track these agreements and generally will learn of them only if a third party both finds out about the agreement and files a petition to deny (if the shared services agreement is part of a transfer) or complaint.

Second, having a bright line test will reduce the burdens on the Commission. Investigating allegations of *de facto* transfers of control on a case-by-case basis is fact-intensive and time-consuming. For example, when Media Council Hawai'i filed its complaint and request for emergency relief concerning the sharing arrangement in Honolulu, it took more than two years for the Media Bureau to issue a decision.<sup>71</sup> The Bureau had to request that the parties submit copies of the agreements. Because the parties sought confidential treatment, it took months before the contracts were actually made available to MCH. The five separate but related agreements were lengthy and complex. Moreover, the parties amended them several times, each change triggering a new round of filings.

Third, a bright line test will benefit broadcasters by making clear what types of sharing activities are permitted before ownership is attributed. Currently, broadcasters have to glean what has been permitted in the past from a handful of Bureau decisions and assess whether their agreement fits within those parameters. For example, if the Bureau has approved an agreement

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<sup>71</sup> *KHNL/KGMB License Subsidiary, LLC, Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii and HITV License Subsidiary, Inc., Licensee of Station KFVE(TV), Honolulu, Hawaii*, The Media Bureau experienced the current approach's difficulties in Honolulu, Hawaii. Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 11-1938, Adopted Nov. 22, 2011 ("*Hawaii Order*"), *application for review pending*.

where the Servicing Broadcaster gets 20% of the other station's revenues, what about an agreement for 30% or 50% of revenues? The Bureau's short decisions provide little detail or guidance.

Fourth, having a clear rule will prevent stations from using sharing arrangements to evade the broadcast ownership limits and obtain an unfair competitive advantage. At the same time, it will allow economically efficient sharing that does not pose undue risk to competition, diversity, or localism. Because everyone will know what the rules allow, broadcasters will compete on a level playing field.

Finally, at present, nothing stops parties to sharing arrangements from changing the terms of the agreement. For example, in *SagamoreHill of Corpus Christi Licenses, LCC*,<sup>72</sup> the Media Bureau denied a petition to deny the assignment of license of a Corpus Christi television station that planned to enter into a sharing arrangement with another television station in the market. The Bureau denied the petition alleging that the deal constituted a *de facto* transfer of control because it found that:

with respect to personnel, station KZTV(TV) retains its own management. The SSA states specifically that [KZTV(TV)'s licensee] will maintain separate personnel for the selection and procurement of programming to be aired on KZTV(TV), and that there will be no sharing of services, personnel, or information regarding programming with the exception of the newsfeeds to be provided by [the licensee of KRIS-TV].<sup>73</sup>

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<sup>72</sup> *SagamoreHill of Corpus Christi Licenses, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2809 (MB 2010).

<sup>73</sup> *Id.* at 2814.

However, it appears that the two stations are sharing management personnel, including the General Manager.<sup>74</sup>

A bright line rule would prevent stations from expanding sharing arrangements in ways detrimental to competition, diversity, and localism.

## **II. The Commission Must Address Ownership by Minorities and Women in the 2010 Quadrennial Review**

We agree with The Leadership Conference on Civil and Human Rights letter expressing grave concerns that the Commission is repeating the mistakes of the Bush Administration by permitting further media consolidation without taking long-overdue action to promote ownership opportunities for people of color and women. Rather than reiterating those concerns, however, this section will address how most of the proposals set forth in the NPRM, if adopted, will exacerbate the problem of already extremely low levels of ownership by women and minorities. This section also urges the Commission to assess the effectiveness of race- and gender-neutral policies and to improve its data collection and analysis.

### **A. Most of the Commission's Proposals Will Limit Ownership Opportunities for Minorities and Women**

The NPRM makes several tentative conclusions regarding whether to retain, repeal or modify the existing media ownership restrictions, while at the same time, seeking comment on alternatives. At the end of each section discussing a rule, the NPRM includes one or two paragraphs requesting comment on how its proposals will affect minority and female

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<sup>74</sup> Opposition and Answer of Time Warner Cable, File No. CSR-8578-C, MB Docket No. 12-15, at 21 (Feb. 1, 2012). Time Warner attaches the webpages from each station showing the same individual in the same positions (President/General Manager, News Director, Chief Engineer, Director of Sales, Internet Sales Director, and Director of Brands and Marketing). When we checked the website on March 5, 2012, all of the personnel in these positions were the same at both stations except that KZTV did not list anyone as President/General Manager.

ownership.<sup>75</sup> However, the NPRM provides no analysis of how adoption of its tentative conclusions would affect ownership opportunities for women or minorities. Nor do any of the studies the Commission conducted or commissioned directly address these issues.

### **1. Retaining the Existing Local Television Rule Will Negatively Affect Ownership Opportunities for Minorities and Women**

The NPRM at ¶ 26 tentatively concludes that the local television ownership rule, with certain modifications, remains necessary in the public interest to promote competition. Thus, the Commission rejects without explanation our proposal that the Commission return to a one-to-a-market rule.<sup>76</sup> Adopting our proposal would have the effect of opening up markets to new entrants, including minorities and women, and would not be subject to strict scrutiny because it would be race- and gender-neutral.

Moreover, the transition to digital has rendered moot the contentions of broadcasters that they need to acquire more stations to compete with multichannel operators. The NPRM recognizes that since the transition to digital television in 2009, full-power television stations have had the ability to multicast.<sup>77</sup> To allow a television licensee to own a second station in the same market when it is not fully utilizing the multicasting capability of the digital spectrum is a remarkably inefficient use of spectrum at a time when there are many competing demands for that spectrum. In fact, it seems to flatly contradict the Commission's own recent proposal to

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<sup>75</sup> NPRM at ¶ 59 (local television rule); ¶¶ 82-83 (local radio rule); ¶ 117 (newspaper-broadcast cross-ownership); and ¶ 134 (radio-television cross-ownership).

<sup>76</sup> *See, e.g.*, Comments of UCC, et al., MB Dkt. No. 06-121, filed Oct. 23, 2006, at 45 [hereinafter 2006 UCC Comments].

<sup>77</sup> NPRM at ¶ 56.

reduce the amount of spectrum allocated to broadcasters by “repurposing [120 megahertz] of the UHF and VHF frequency bands that are currently used by the broadcast television service.”<sup>78</sup>

Because the transition to digital has made the Grade B overlap test irrelevant, the FCC proposes to replace it with a DMA-based approach, and to grandfather existing combinations that would violate the revised rule.<sup>79</sup> While we do not oppose a DMA-based approach, we strongly oppose the tentative conclusion to grandfather existing combinations. By instead requiring such owners to come into compliance within a reasonable time period, the Commission would open up markets to new entrants, including minorities and women. Conversely, by grandfathering existing combinations, it is more difficult for women and minorities to enter the market. And even if they do, they will find it difficult to compete against an entrenched duopoly.

Allowing existing duopolies to be, as the NPRM puts it, “freely transferable in perpetuity” would be even worse. This is contrary to the purpose of grandfathering, which is to avoid unnecessary disruption caused by forced divestiture. If such combinations are grandfathered, the Commission should follow its usual practice of requiring that when they are sold, they be sold to separate owners. Perpetual grandfathering not only has the disadvantages of ordinary grandfathering, but would make it even more difficult for minorities and women to enter the market. The Commission has long recognized that minorities and women face discrimination in capital markets. They would find it even more difficult to obtain sufficient financing to enter a market by purchasing a duopoly.

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<sup>78</sup> *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, 25 FCC Rcd. 16498, at ¶ 1 (2010).

<sup>79</sup> NPRM at ¶ 39.

## 2. The Commission’s Proposal to Relax the Newspaper/Broadcast Cross-Ownership Rule Will Harm Ownership Opportunities for Minorities and Women

The Commission proposes to relax the prohibition on newspaper/broadcast cross ownership by adopting a rule similar to that adopted in the 2006 QR, which would presumptively allow combinations in top 20 markets between a newspaper and “(1) a radio station or (2) a television station, [when] (a) the television station [is] not ranked among the top four stations in the DMA and (b) at least eight independently owned and operated ‘major media voices’ would remain in the DMA after the combination.”<sup>80</sup>

We oppose this proposal because it will facilitate further industry consolidation and reduce ownership opportunities for minorities and women. The proposed rule effectively prohibits the combination of a daily newspaper and a station affiliated with one of the top-four networks in the same market, but permits combinations between a newspaper and an independent television station or radio station in the same market. Minority ownership, however, is more prevalent among non-affiliated broadcast stations. A 2007 study by Free Press found that “minorities own just 5 of the 845 big-four-affiliated stations, or 0.6 percent.”<sup>81</sup> The same study found that fully 65% of minority owned stations are entirely unaffiliated, meaning that they have no connection to either the big four or other networks such as The CW, Telemundo, and Univision.<sup>82</sup> On the other hand, 63.6% of non-minority-owned stations are big four affiliates.<sup>83</sup>

Because minority station owners typically own only one station, minority-owned stations are particularly vulnerable to media concentration. A 2009 study by Professor Catherine

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<sup>80</sup> NPRM at ¶¶ 85–91.

<sup>81</sup> See S. Derek Turner, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States*, at 29 (Oct. 2007), available at <http://www.freepress.net/files/otp2007.pdf>.

<sup>82</sup> See *id.* at 29–30 fig. 13.

<sup>83</sup> See *id.* at 30 fig. 13

Sandoval found that, during the wave of consolidation following the 1996 Act, “only a handful of minority owners were positioned for expansion.”<sup>84</sup> As a result, “61% or 198 minority commercial radio owners in mid-2009 control[led] only one station.”<sup>85</sup> If the newspaper/broadcast cross-ownership rule is relaxed as proposed, these minority-owned single stations will be likely targets for acquisition.

These statistics suggest that relaxing the newspaper broadcast ownership rule could have a devastating effect on already low levels of minority ownership of broadcast stations. Indeed, the most recent data analyzed by Commission staff found that minorities own 65 out of 1394 full-power commercial television stations—only 4.6%.<sup>86</sup>

### **3. The Commission’s Proposal to Retain with Modification the Existing Local Radio Rule Will Negatively Affect Ownership Opportunities for Minorities and Women**

The NPRM proposes to maintain the current system of numerical limits for radio station ownership.<sup>87</sup> The NPRM acknowledges CWA’s concern that the number of radio station owners has dramatically decreased since the Commission relaxed the radio rules in 1996.<sup>88</sup> However, the

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<sup>84</sup> Catherine Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* 5 (2009), <http://www.radiodailynews.com/mmtcreport.pdf>. “In mid-2009 only 14 minority broadcasters control 10 or more commercial radio stations, while only 3 minority-owned companies control 25 or more stations.” *Id.*

<sup>85</sup> *Id.* at 4.

<sup>86</sup> NPRM at ¶¶ 155–56. Unfortunately the Commission did not provide any figures regarding radio stations owned by women or minorities.

<sup>87</sup> NPRM at ¶ 60–61.

<sup>88</sup> *Id.* at ¶ 65.

NPRM fails to discuss the proposals of UCC and others that the Commission should advance opportunities for minorities and women by tightening up the local radio limits.<sup>89</sup>

Radio provides a particularly important method for new entrants, because a radio station can be acquired and operated with much less capital than a television station. Yet, radio station ownership by minorities and women remains low. A 2007 study by Free Press concludes that minorities own a mere 7.7% of full-power commercial radio stations, and that women own only 6%.<sup>90</sup>

Tightening the radio limits would promote ownership diversity by making it more likely that existing minority and women owners will not be forced out of the market due to increased consolidation. Studies by Free Press and others have demonstrated that, over the last decade, ownership concentration has occurred at the expense of minority and women owners.<sup>91</sup>

Tightening the local radio rule and requiring combinations to comply with the new rule within a reasonable period of time would also create new opportunities for minorities and women to own radio stations. When the Commission modified the radio limits in the 2002 Biennial Review, it grandfathered some combinations that exceeded the new rule. In the 2006 QR, UCC and others argued that requiring the divestiture of grandfathered media combinations would create ownership opportunities for minorities and women.<sup>92</sup> Specifically, UCC found that eliminating grandfathering would require the sale of 96 radio stations.<sup>93</sup> This policy should be

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<sup>89</sup> See, e.g., Comments of UCC, et al., MB Dkt. No. 09-182 (filed July 12, 2010), at 9 [hereinafter 2010 UCC Comments].

<sup>90</sup> S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States*, at 4 (June 2007), available at [http://www.freepress.net/files/off\\_the\\_dial.pdf](http://www.freepress.net/files/off_the_dial.pdf).

<sup>91</sup> *Id.* at 7; S. Derek Turner, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States*, at 3 (Oct. 2007), available at <http://www.freepress.net/files/otp2007.pdf>.

<sup>92</sup> 2006 UCC Comments at 27.

<sup>93</sup> *Id.* at 27.

reassessed, particularly now that the Commission has eliminated its policy of allowing transfers of unlawful combinations to “eligible entities” as a means of promoting ownership opportunities for minorities and women.<sup>94</sup>

**B. The Commission Can and Should Evaluate the Effectiveness of Its Existing Policies Designed to Increase Opportunities for Minority and Woman Ownership**

In *Prometheus II*, the Court concluded that “[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue.”<sup>95</sup> The Court stated that because “ownership diversity is an important aspect of the overall media ownership regulatory framework, *see Prometheus I*, 373 F.3d at 420–21, 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.”<sup>96</sup>

Despite the Court’s clear directive, the Commission is now proposing to postpone all meaningful diversity-related action until 2014. The NPRM explains 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. Although we would prefer to be able to propose specific actions in response to the Third Circuit’s remand of the measures relying on the eligible entity definition in this NPRM, we

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<sup>94</sup> *Prometheus I*, 373 F.3d at 427–28 (3d Cir. 2004); *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, DA 11-1232 (rel. July 25, 2011).

<sup>95</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) [hereinafter *Prometheus II*].

<sup>96</sup> *Id.* at 472.

believe that making legally sound proposals would not be possible based on the record before us at this time.

As discussed in section C below, we agree that there are problems with the Commission's data collection and analysis that need to be fixed. However, we do not believe that these problems should preclude the FCC from evaluating whether its current race- and gender-neutral policies designed to promote opportunities for minorities and women are in fact working as intended. To defend against a constitutional challenge to any future policy that uses race as a factor, the Commission will have to show that it tried race-neutral solutions and found them insufficient.

Thus, it is critical that the Commission analyze its existing or former race-neutral policies intended to promote opportunities for minority ownership. This would include the failed station solicitation rule (FSSR), and the auction preferences for new entrants. The Commission should also evaluate all of the recently discontinued programs that were based on "eligible entities."

### **1. The Commission Should Analyze the Impact of the Failed Station Solicitation Rule**

In *Prometheus I*, the Third Circuit remanded the Commission's decision to repeal the FSSR and directed the Commission to analyze the impact of the rule on minority and female ownership.<sup>97</sup> The FSSR requires failing stations to advertise to potential buyers outside the market.<sup>98</sup> The rule was adopted in 1999 as a race- and gender-neutral means to promote ownership opportunities for minorities and women.<sup>99</sup> The Commission, however, has not performed any analysis on the FSSR's impact on opportunities for minorities and women.

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<sup>97</sup> *Prometheus II*, 652 F.3d at 466.

<sup>98</sup> 47 C.F.R. § 73.3555 n. 7 (2012).

<sup>99</sup> *Prometheus II*, 652 F.3d at 465.

The Commission surely has the data to analyze the effectiveness of this rule. Since the Commission has to approve every transfer of a broadcast license, it knows which stations have changed hands since the rule took effect, and how many involved failing station waivers. Now that it has better data on minority owned television stations, it should be able to assess whether any of the stations transferred during this period were transferred to minority buyers.

## **2. The Commission Should Assess the Effectiveness of New Entrant Bidding Credits**

In 1998, the Commission adopted a policy of awarding new entrant bidding credits to qualified bidders for new broadcast licenses. An applicant can qualify for a 35% credit if it owns no other media outlets or a 25% credit if it owns three or fewer outlets.<sup>100</sup> At the time, the Commission expressed the hope that these bidding credits would make it easier for minorities to compete for licenses, stating, “[p]roviding bidding credits to entities holding no or few mass media licenses will promote opportunities by minorities and women consistent with congressional intent.”<sup>101</sup> However, to our knowledge, the Commission has never evaluated whether the bidding credits have had their intended effect.

UCC *et al.* filed comments in the 2006 QR informing the Commission that “[n]ot only is there no indication that the intended recipients of the new entrant credit have benefitted from the program, there is actually evidence that non-women and non-minorities, who cannot reasonably

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<sup>100</sup> See 47 C.F.R. § 73.5007(a) (2012). Mass media outlets are defined by 47 C.F.R. § 73.5008(b) (2012) to include “daily newspaper[s]; . . . cable television system[s]; or . . . license[s] or construction permit[s] for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder.”

<sup>101</sup> *Implementation of Section 309(J) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, Report and Order, MM Dkt. No. 97-234, 13 FCC Rcd. 15920 at 15995, ¶ 189 (1998).

be considered ‘new entrants’ have taken advantage of the credit.”<sup>102</sup> In 2011, UCC *et al.* again urged the Commission to “collect and analyze data on current spectrum auction participants and beneficiaries of the existing [auction] credits,”<sup>103</sup> expressing concern about the misuse of “new entrant” credits.

Because the Commission administered these auctions, it has to know which applicants received broadcast licenses and whether they took advantage of the bidding credits. Now that the Commission has better data on the race and gender of broadcast station owners, it should be able to assess whether the new entrant bidding credits assisted any minority- or women-controlled applicants in obtaining licenses.

### **3. Instead of Abandoning or Repurposing the “Small Business” Definition of Eligible Entities, the Commission Should Assess Whether It Has Had Any Effect on Ownership of Broadcast Stations by Minorities or Women**

In the 2002 Biennial Review, the FCC decided to permit the transfer of grandfathered combinations in violation of the local ownership limits to certain “eligible entities” as a means to provide opportunities for minorities and women to enter radio markets. The Commission defined “eligible entities” using the SBA’s small business definition instead of adopting a test for “socially disadvantaged businesses” or SDBs, as many commenters urged.

In *Prometheus I*, the Court found the Commission’s definition to be reasonable at the time. But as the Court explained in *Prometheus II*:

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<sup>102</sup> Comments of UCC, et al., MB Dkt. No. 06-121, at 8 (filed Oct. 1, 2007).

<sup>103</sup> Comments of UCC, et al., GN Dkt. No. 10-244, at 4–6 (filed Feb. 7, 2011) In one example, long-time broadcaster Bigglesworth Broadcasting, LLC received a new entrant credit worth nearly \$10 million. Bigglesworth was able to receive these credits because its owners had “sold all 39 of their broadcast stations for \$256 million shortly before the auction.” *Id.* at 5. In another example, Randy Michaels, former CEO of Clear Channel Radio, left the company to found Radioactive, Inc. In 2004, Radioactive used new entrant credits to get a 35% credit on each of twenty-one licenses, for a total discount of nearly \$5 million. *Id.* at 5-6.

In upholding the transfer rule, we rejected as premature “Citizen Petitioners’ contention that the Commission should have chosen ‘socially and economically disadvantaged businesses’ (SDBs) as the waiver-eligible class instead of Small Business Administration-defined small businesses.” We reached that conclusion because the FCC had “noted that, because of pending legislation, the definition of SDBs is currently too uncertain to be the basis of its regulation.” However, we noted that we expected a long-awaited SDB definition to be forthcoming.<sup>104</sup>

The Court concluded that the Commission failed to explain how its decision to continue using the small business definition of “eligible entity” would increase broadcast ownership by minorities and women.<sup>105</sup> Thus, the Court concluded that the Commission “did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand[ed] for it to do so before it completes the 2010 Quadrennial Review.”<sup>106</sup>

The NPRM invites the public to provide additional documentation of the nexus between small businesses and minority- or women-controlled businesses.<sup>107</sup> We think it would be more productive for the Commission to analyze whether any transfers of co-located radio stations that would otherwise exceed the limits to eligible entities in fact resulted in minority or woman ownership.

### **C. The Commission Must Remedy Shortcomings in Its Collection and Analysis of Data on Broadcast Station Ownership**

*Prometheus II* unequivocally directs the Commission to improve its data collection and analysis of minority and woman ownership “within the course of the Commission’s 2010 Quadrennial Review.”<sup>108</sup> The Court acknowledged that in 2009, the Commission set “in motion a

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<sup>104</sup> *Prometheus II*, 652 F.3d at 466 (citations omitted).

<sup>105</sup> *Prometheus II*, 652 F.3d at 470.

<sup>106</sup> *Id.* at 471.

<sup>107</sup> NPRM at ¶ 160.

<sup>108</sup> *Prometheus II*, 652 F.3d at 472.

process for collecting better data as a basis for informed policy making.”<sup>109</sup> But it found that “[w]hile this is certainly a welcome and long overdue step, it does not remedy the existing data gap in the Diversity Order. We anticipate that it will, however, lay necessary groundwork for the Commission’s actions on remand.”<sup>110</sup>

The NPRM describes the Commission’s efforts to improve its data collection. Specifically, it describes how the Media Bureau has compiled a dataset of ownership reports showing a “‘snapshot’ of ownership data in a series of planned biennial reviews that collectively should provide a reliable basis for analyzing ownership trend in the industry, including ownership by minorities and women.”<sup>111</sup> But instead of committing to complete its analysis of the dataset as part of the 2010 QR, the Commission proposes only to take some vague steps “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.”<sup>112</sup>

This is not enough. Nor do we think that the Court will or should accept the lack of data as an excuse. The FCC has been on notice of problems with its ownership data for many years. For example, UCC, NOW and others filed comments in the 2006 QR showing how the FCC’s efforts had fallen short.<sup>113</sup> These problems were confirmed by studies commissioned by the FCC in the 2006 QR and by the General Accounting Office.

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<sup>109</sup> *Prometheus II*, 652 F.3d at 471.

<sup>110</sup> *Prometheus II*, 652 F.3d at 471.

<sup>111</sup> NPRM at ¶ 155.

<sup>112</sup> *Id.* at ¶ 158.

<sup>113</sup> *See, e.g.*, 2006 UCC Comments at 39–40. These comments explained that although the Commission had collected information on the station owners’ race and gender since 1998, researchers uncovered many problems with the gathering mechanisms and analysis of the information that undermined its usefulness. For example, sole proprietors and partnerships of

(continued on next page)

In May 2009, the Commission acknowledged these problems and directed the Media Bureau to revise the existing biennial ownership report Form 323 and create an electronic interface so that the ownership data “is incorporated into the database, is searchable, and can be aggregated and cross-referenced electronically.”<sup>114</sup> At the same time, it established November 1, 2009, as the uniform filing date for all broadcast stations. However, the Commission subsequently extended the filing date several times, so that this data was not filed until July 8, 2010.

Even then, the FCC did not make the data available to the public. In February 2011, commenters and other organizations and individuals concerned about the lack of racial and gender diversity in media ownership called on Chairman Genachowski to promptly make the data on broadcast station ownership by minorities and women available to the public in a meaningful way.<sup>115</sup> Soon afterwards, the Commission posted on its website a dataset compiling all ownership reports filed for 2009. On December 1, 2011, broadcasters filed biennial ownership reports for 2011.<sup>116</sup> This dataset has not been publicly released. More significantly, the Commission still has not created a database that the public can search, aggregate and cross-reference for either year.

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(footnote continued)

natural persons are exempt from filing. Moreover, because group owners need only file once for all of their stations, it is difficult for the staff to determine whether every station had filed. Most importantly, the FCC staff conducted no analysis of the data relevant to the reason for its collection, that is, to assess the effectiveness of the FCC’s current rules and whether those rules need to be changed. At most, the staff occasionally totaled the numbers without checking for completeness or accuracy, and posted the total on its website. It took two years for the FCC to even post the 2001 data.

<sup>114</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd. 5896 at 5908 (2009) [hereinafter *2009 Diversity Order*].

<sup>115</sup> Letter from UCC, et al., MB Dkt. 07-294 and MB Dkt. No. 09-182, filed Feb. 2, 2011, at 2.

<sup>116</sup> See *Promoting Diversification of Ownership in the Broadcasting Services*, Order, 26 FCC Rcd. 11464, at ¶ 3 (2011).

Nor has the Commission made public any comprehensive analysis of the data in its possession. The only analysis that the Commission has made public to date is that presented in ¶ 156 of the NPRM. That analysis does not even mention the number of stations controlled by women. Although it reports minority ownership of full-power commercial broadcast television stations, it does not report the figures for low-power television stations or radio stations. Moreover, the staff's analysis consists entirely of *tallies*, counting the total number of full-power commercial television stations owned by minorities. It fails to examine the interaction between minority ownership and other variables, such as market size or concentration. Perhaps most significantly, the Commission fails to conduct any longitudinal analysis of ownership.<sup>117</sup> This type of analysis should be possible now that the Commission has data for both 2009 and 2011.

The NPRM acknowledges some gaps in the data. For example, the Media Bureau has no information for 64 stations, or 4.5% of the total, and has not been able to categorize the race or ethnicity of owners of 244 stations, or 17.5% of the total. This is in addition to the fact that the ownership data is incomplete because of the Commission's decision to exempt certain broadcast owners from the data filing requirement.<sup>118</sup> This information is needed to assess whether the

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<sup>117</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd. 5922, 5942 (2008) (noting the importance of longitudinal analysis) [hereinafter *2008 Diversity Order*].

<sup>118</sup> On reconsideration of the May 2009 Order, the Commission exempted "holders of certain nonattributable interests" from the ownership filing requirement because it concluded that it had not given sufficient notice under the Administrative Procedure Act. *2009 Diversity Order*, 24 FCC Rcd. at 5905 (2009). Although the Commission indicated at that time that it would seek comment on whether to include the non-attributed owners, it has never taken the necessary step of Federal Register publication to initiate that process.

FCC's changes in the attribution rules designed to help minority- and women-owned broadcasters to attain financing are working as intended.<sup>119</sup>

Finally, although the FCC reportedly spent large amounts of money on studies for the 2010 QR, it did not commission any studies regarding broadcast station ownership by minorities and/or women. UCC, NOW, CWA and others proposed topics for research in response to the Media Bureau's Public Notice seeking suggestions for additional studies.<sup>120</sup> Yet, the Commission has not conducted any of the suggested studies.

We do not believe that the Court will allow the Commission to once again use its own failure to collect and analyze data as an excuse for deferring consideration of ways to increase minority and woman ownership of broadcast stations.

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*.<sup>121</sup>

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<sup>119</sup> In the *2008 Diversity Order*, the Commission found that one of its attribution rules, known as "Equity Debt Plus," was having the "unintended consequence" of exacerbating the "financing problems faced by small businesses, including those owned by women and minorities." 23 FCC Rcd. at 5935 (2008). It thus decided to relax the rule to allow the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold without triggering attribution where such investment would enable an eligible entity to acquire a broadcast station. *Id.*

<sup>120</sup> 2010 UCC Comments at 2.

<sup>121</sup> *Prometheus II*, 652 F.3d at 471 n.42 (emphasis added).

Thus, we urge the Commission to act now to improve its data collection and to provide the analysis required by the Court. Unless and until the FCC completes its analysis, it must not relax any of the existing ownership rules.

### Conclusion

For the reasons stated above, we urge the Commission to promptly adopt a rule that attributes sharing arrangements conferring on one station substantial influence over another station in the same market. By so doing, the Commission will prevent stations from circumventing the local television rules and will promote competition, more diverse local news, and opportunities for new entrants. However, the FCC should not take any action to *relax* the ownership rules until it has completed its analysis of the proposed changes on opportunities for minorities and women to own broadcast stations and has complied fully with the mandate of the Third Circuit.

Respectfully submitted,

/s/

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Filed: March 5, 2012

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\* Admitted to the Maryland bar only; DC bar membership pending. Practice supervised by members of the DC bar.

Appendix A:  
KRIS Letter to VIP Advertisers



## KRIS COMMUNICATIONS

301 Artesian, Corpus Christi, TX 78401 – 361-886-6101

Monday, January 09, 2012

Dear Corpus Christi Marketer:

As you may be aware KRIS-TV6(NBC), KDF (Independent); CW; KAJA (Telemundo) have not been carried by Time Warner Cable in the Corpus Christi Market since midnight, Monday, December 12th. Negotiations are continuing but unresolved as of this date. Please know that this retransmission negotiation does not impact KZTV-TV10 (CBS) who currently has an agreement in place with Time Warner.

We feel it is important to formally advise you at this point while negotiations continue. We need to insure that you are receiving the value you purchased. We would like to offer you the following for any under delivery of your media schedule since Tuesday, December 13<sup>th</sup>:

- Increase “make-good” weight on KRIS and/or KZTV
- Shift KRIS dollars to KZTV (KZTV remains on Time Warner)
- Suspend schedule until issue is resolved

We have agreements with DirectTV, DISH, Grande Cable and all other distributors in the market.

Time Warner covers approximately 75,220 households in Corpus Christi. That represents 36.9% of the 203,550 households in the market as reported by Nielsen in November 2011.

We would be glad to discuss this issue with you in detail. Your KRIS Communications sales representative will be in touch to hear how you would like to proceed.

We value your business and appreciate your understanding and cooperation until a new agreement has been reached.

Sincerely

Tim Noble  
President & General Manager

Jim Birschbach  
Director of Sales

Appendix B:  
Front Page of Tucson News Now



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73°

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84°



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Obama: 'Loose talk' plays into Iran hands

Rush Limbaugh loses eight advertisers

Sunspot erupts powerful flare

Girl found in field after Friday's killer tornadoes dies

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RAW: Funnel cloud in Indiana

RAW: Tennessee storm damage

RAW: Violence precedes eviction at Occupy camp

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