

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

In the Matter of)	
)	
2018 Quadrennial Regulatory Review –)	MB Docket No. 18-349
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	

COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

Recently-released Census 2020 data indicates that the United States population is more diverse than ever before, with people of color comprising the majority of the population in many large metropolitan areas. But there is very little diversity to be found when it comes to FCC-issued licenses to broadcast over the public airwaves. And despite repeated Commission commitments to carry out its legal duty to promote diversity – and the repeated appellate court instructions directing the agency to study the impact its rules have on ownership diversity – there’s been very little progress in the last two decades. The Commission’s most recent analysis of Form 323 data is a snapshot from 2017, but it indicated that people of color own and control just 6 percent of the nation’s full-power TV stations, 7 percent of commercial FM radio stations and 12 percent of commercial AM radio stations. Those nationwide statistics are shameful. But considering the local nature of broadcasting, it is even more shameful when examining the level of diverse ownership in media markets where people of color make up the overwhelming majority of the population.

The instant notice involves the 2018 Quadrennial Review, a late-initiated proceeding that the Commission has not yet completed. The Commission is seeking public comment that will aid its process of concluding that proceeding, which was launched while courts continued to adjudicate matters related to prior Quadrennial Reviews. The *instant* notice therefore exists in an odd temporal space, like so many quadrennial review orders before it, as the highest court in the land has just upheld on agency deference grounds the Pai FCC’s decision reconsidering the 2016 Quadrennial Review, yet the Commission is also mere months away from soliciting comment in the 2022 Quadrennial Review.

These bookends of a recent Supreme Court decision and a pending new review place somewhat novel constraints on the Commission, and on commenters who understandably are looking at current law and anticipating the next proceeding. These constraints notwithstanding, the reality is that the 2018 review will not be the final review. Therefore as the Commission wraps up the 2018 after the Supreme Court's recent decision in the *Prometheus* line of cases, Free Press once again stresses the need for the Commission to address the shameful lack of ownership diversity in this country and the role of FCC policies in creating, perpetuating and exacerbating the system that prevents the people of color from having equitable access to the public's airwaves. The lack of ownership diversity and the increased consolidation of ownership and operation of FCC licensed stations are part of the broader structural inequities that exist in our media systems. Communities of color still depend disproportionately on broadcast media for critical local news and information. But FCC policies have failed to ensure that the news and information needs of people of color are being served.

The FCC's poor track record on promoting ownership diversity is well documented. Yes, the paltry numbers may ebb and flow slightly, and the Commission should ask for and conduct its own analyses on this point and others in order to complete the 2018 Quadrennial Review. But the underlying fundamental reality that greater local market consolidation further increases entry barriers for people of color has not changed.

Since initial comments in this docket were filed, consolidation has proceeded apace. Despite these trends, and despite the fact that the prior regime at the FCC wrongly repealed and relaxed so many local ownership limits, the Commission still has rules on the books – rules that are not being adequately enforced. In these comments we discuss the history of and recent

developments in broadcaster's use of so-called "operating agreements" to end-run the FCC's multiple ownership rules. This practice exploded in the past decade, as big broadcasters used the Commission's complacency to gain operational and financial control of stations they would not be permitted to own under existing rules. Though the Commission is on the verge of launching yet another new Quadrennial Review, there is no good reason for it to conclude the 2018 proceeding without closing these operating agreement loopholes that have abetted the broadcast industry's reliance on shell companies to evade even the too-few rules that remain.

In light of the procedural realities, in these comments we are calling on the FCC to, at a minimum, do three things. First, the Commission must act now and enforce its current rules and close media ownership loopholes that allow broadcasters to in fact evade ownership limits while in theory complying with those limits on paper. Second, the Commission must conduct a robust analysis of the impact of its rules on barriers to entry and to continued, real and full ownership of stations faced by women and people of color. And beyond that more narrow empirically based analysis, we are also calling for the Commission to conduct a race equity impact assessment that examines the Commission's own history of anti-Black policies, while working to identify reparative actions to address the structural and systemic failures of our current media system.

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Free Press submits these comments in response to the Commission’s Public Notice seeking to update the record in the 2018 Quadrennial Regulatory Review with “new or additional information regarding the media marketplace that commenters believe is relevant to this proceeding.”¹ During the initial comment cycle, Free Press explained that the Commission should have retained the local radio ownership rule, the local television ownership rule, and the dual network rule to protect the public from the harms of runaway media consolidation.² Free Press also provided substantial evidence that media concentration causes irreparable harm to the public and disproportionately harms disadvantaged groups, including poor communities and people of color.³

¹ *See Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, MB Docket No. 18-349, Public Notice, DA 21-6577 at 4 (rel. June 4, 2021).

² *See, e.g., Comments of Free Press*, MB Docket No. 18-349, at 3 (filed Apr. 29, 2019) (“Free Press 2018 QR Comments”).

³ *See, e.g., id.* at 8-9.

The pandemic has demonstrated that local broadcast television can (but does not always) play a vital role in producing and delivering accurate information about public safety measures and vaccinations to local communities. Local television still outpaces network and cable television options as a frequent news source,⁴ and although data shows more people getting their news online,⁵ a closer look reveals that many are using digital tools to access traditional broadcast television and radio newscasts.⁶

But the pandemic has also further revealed the racial inequities that exist in our society. Those glaring disparities are apparent not only in the impact of the pandemic and the economic downturn it caused, but in the media's portrayal of them too. Stories about the government policies that have created these institutional and structural inequities too often go untold on local broadcast stations. Instead, communities of color continue to be stereotypically portrayed.

As the Commission wraps up the 2018 proceeding pursuant to the Supreme Court's recent decision in the *Prometheus* line of cases,⁷ Free Press once again stresses the need for the Commission to address the structural inequities that exist in our media systems due to the policies the Commission has adopted. Communities of color still depend disproportionately on broadcast media for critical local news and information. But FCC policies have failed to ensure that the news and information needs of people of color are being served.

⁴ See Pew Research Center, "Local TV News Fact Sheet" (July 13, 2021) (reporting the results of a national survey fielded during June 2020).

⁵ See Elisa Shearer, "More than eight-in-ten Americans get news from digital devices," Pew Research (Jan. 12, 2021).

⁶ See Pew Research Center, "For Local News, Americans Embrace Digital but Still Want Strong Community Connection" (Mar. 26, 2019).

⁷ See *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150 (2021).

Whatever constraints the Commission faces in this docket, as it refreshes the record but moves to close out this proceeding initiated late by the prior administration at the agency, there is much more work to be done. For better or worse, this will not be the last quadrennial review. And of course the Commission can and should do more to promote media diversity, both within and outside of the current and subsequent quadrennial reviews, in order to repair past harms and create a better future. To that end, Free Press supports a congressional letter led by Reps. Jamaal Bowman, Yvette Clark and Brenda Lawrence that called on the FCC to conduct an equity audit “to address and redress the harm the agency’s policies and programs have caused Black and brown communities and identify the affirmative steps the agency commits to taking to break down barriers to just media and telecommunication practices.”⁸

The Commission must take such critical steps to begin to address its history of adopting policies that harm the Black community and communities of color. And it also has to ensure it does not adopt policies that cause further harm. This is why we are calling on the FCC to: (1) enforce its current rules and close the “operating agreement” media ownership loopholes that allow broadcasters to in fact evade ownership limits while in theory complying with those limits on paper; (2) collect data and studies on the harms that consolidation causes to media ownership diversity, while truly analyzing the demonstrated and readily predictable impacts of concentration such ownership opportunities; and (3) conduct a race equity impact assessment that examines the Commission’s own history of anti-Black policies, while working to identify reparative actions to address the structural and systemic failures of our current media system. As

⁸ Rep. Jamaal Bowman, Rep. Yvette D. Clark & Rep. Brenda L. Lawrence, et. al, Letter to Federal Communications Commission Acting Chairwoman Jessica Rosenworcel (June 28, 2021).

the letter led by Reps. Bowman, Clarke, and Lawrence stated: “Historic federal policies are a primary reason why structural inequities exist in our nation’s media and telecommunication systems today.”⁹ It is time for the Commission to change that, both within the close parameters of this proceeding and in future and more far-reaching proceedings to come.

I. The Commission Must Enforce its Current Rules and Close Ownership Loopholes.

Over the years, the Commission has rolled back its media ownership rules, leaving in the wake of these repeals several waves of massive consolidation with no offsetting benefits to the public. As our initial comments in this proceeding show, the Commission’s deregulatory leanings have not resulted in better or more local content responsive to the needs of the communities broadcasters are licensed to serve. Consolidation has contributed to an ongoing pattern of big broadcasters transitioning resources away from low-income communities, rural areas, and communities of color, and allocating them predominantly to white, wealthy, and urban areas.¹⁰

Little has changed at the FCC in the few years since initial comments in this docket were filed, and consolidation has continued as broadcasters successfully pressed former Chairman Pai and his colleagues to roll back even more rules. Yet despite these trends, the Commission still has rules that it could enforce to alleviate some of these harms by closing loopholes that broadcasters have long exploited. Till now, with few exceptions, the Commission has failed to adequately enforce the local ownership rules that still stand even after the Supreme Court’s decision deferring to Chairman Pai’s reconsideration order and his last massive repeal. There is no good reason for the Commission to conclude the 2018 proceeding without closing the

⁹ *Id.*

¹⁰ *See* Free Press 2018 QR Comments at 10.

loopholes that have abetted the broadcast industry's reliance on shell companies to evade even the too-few rules that remain.

As we've previously documented,¹¹ much of the local broadcast TV industry's growth during the past decade came from two specific types of evasions of the spirit, if not letter, of the law. Germane to this proceeding is the prevalent use of shell companies and so-called "operating agreements" with those shells to expand incumbents' *de facto* control of stations in local markets where these large firms already have a presence, but where the Commission's multiple ownership rules prevent them from holding the licenses for additional stations. Outside the scope of the quadrennial review¹² is the practice of the largest conglomerates taking over other firms and in reality reaching more than 39 percent of the national audience, above the cap that Congress set, but not accounted as reaching them because Chairman Pai's resuscitated the technologically obsolete "UHF discount."¹³ Though we continue to urge the Commission to enforce Congress' intent by closing that UHF discount loophole,¹⁴ our comments in this section are confined to the use of operating agreements to evade the multiple ownership rules that are subject to the quadrennial.

¹¹ See, e.g., S. Derek Turner, Free Press, "Cease To Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation," at 2, 4 (Updated Mar. 2014) ("*Cease to Resist*").

¹² See *Prometheus Radio Project v. FCC*, 373 F. 3d 372, 396-97 (3d Cir. 2004) ("*Prometheus I*") ("[We] note that the 2004 Consolidated Appropriations Act also added a sentence to § 202(h): 'This subsection does not apply to any rules relating to the 39% national audience limitation.'").

¹³ See Joint Petition for Stay Pending Judicial Review, MB Docket No. 13-236, at 1 (filed May 10, 2017).

¹⁴ See *Prometheus I*, 373 F. 3d at 397 ("Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h).").

A. The use of operating agreements and shell companies to evade the local ownership rules soared after the Commission's failure to close this loophole in 2011.

Broadcast TV companies have long looked for ways to get around the Commission's multiple ownership rules, and have too easily found successful workarounds. For many years both preceding and following the adoption of the Telecommunications Act of 1996, their main tool was Local Marketing Agreements, an evasion tactic invented by Sinclair. Broadcasters used LMAs to generate additional revenues, but the Commission's relatively rigorous language about LMA attribution did help to prevent total *de facto* control of stations subject to these agreements by the larger broadcasters utilizing them – at least in theory.

The Commission however was forced to tighten its LMA attribution rules after Sinclair blatantly abused the scheme it had invented to evade the duopoly rule,¹⁵ and even then had to come back two years later to sanction Sinclair and its shell company for illegal control of certain Commission licenses.¹⁶ Though the Commission's investigation made incredibly damning

¹⁵ In 1991 Sinclair, owner of Pittsburgh independent station WPTT, acquired WPGH (the market's Fox affiliate) and "sold" the WPTT license (but not its other assets) to a Sinclair employee under very favorable terms. During the first few years of this new arrangement, Sinclair programmed all but a few hours of WPTT's airtime under an LMA. In 1999 the Commission finally tightened its LMA attribution standards, but grandfathered all pre-existing LMAs. That in effect blessed Sinclair's use of a shell company nominally owned by the mother of Sinclair's CEO. However, this apparent blessing led to further abuse that resulted in the Commission issuing a Notice of Apparent Liability against Sinclair's shell company in 2001. See *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket Nos. 91-221, 87-8, Report and Order, 14 FCC Rcd 12903 (1999); see also *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559 (1999).

¹⁶ See *In the Matter of Edwin L. Edwards Sr. (Transferor) and Carolyn C. Smith (Transferee) for Consent to the Transfer of Control of Glencairn, Ltd., parent entity of Baltimore (WNUV-TV) Licensee, Inc. Licensee of Television Station WNUV-TV, Baltimore, Md., et al.*, File No. BTCCT-19991116BEC, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236 (2001) ("Glencairn NAL").

findings that should have unraveled all of Sinclair’s LMAs, the Commission decided to only deal with the narrow set of facts in front of it at the time.¹⁷

This feeble Commission action only emboldened Sinclair and other broadcast conglomerates that followed suit.¹⁸ Despite relaxed ownership rules (that led to the company acquiring more than half of its existing LMA stations), Sinclair set about inventing the “outsourcing agreement” evasion tool to continue and expand this shell game. All of these types

¹⁷ The Commission couldn’t help but notice that right after it relaxed its multiple ownership rules, the Glencairn shell agreed to sell stations to Sinclair at below-market rates, walk away from prior purchase agreements and allow Sinclair to take its place. As the FCC stated: “We do not believe that, absent immediate and pressing financial distress, a reasonable businessman would allow his company to walk away, uncompensated, from the bargain such a deal represented and allow another company to take its place. Glencairn has made no such claim of financial distress.” *See* Glencairn NAL, ¶ 26.

¹⁸ In an indefensible move, the Commission declined to expand its review of Sinclair shells, ruling that the initial petitioners failed to demonstrate “that it is likely that such violations may continue in the future, particularly in light of Edwards’ departure and the assumption of control of Glencairn by Carolyn Smith.” According to the FCC, even though Sinclair illegally controlled Glencairn when it was nominally run by an employee unrelated to the family, the replacement of that employee (Eddie Edwards) with the Sinclair CEO’s elderly mother (Smith) would put the arrangement on the up and up. So the Glencairn shell was renamed Cunningham, and Sinclair plowed ahead, even trying to outright acquire Cunningham in 2002 (which was denied by the FCC, who couldn’t just totally ignore its existing rules, even as then-Chairman Powell tried to dismantle them). *See* Letter from Media Bureau to Sinclair in FCC Application No. BALCT—20020718ABH (Sept. 13, 2002).

of agreements between broadcasters and their shell companies are now known under the umbrella term “operating agreements,” which includes shared services agreements (or “SSAs”).¹⁹

In sum, Sinclair has a long history of “innovating” new ways to evade the Commission’s rules, and though these continued tactics now copied across the industry are material to the current quadrennial too, we will not recount even more of that history here.²⁰ What we will note is that Sinclair started pushing these evasion tactics heavily following the Commission’s wrong 2011 decision in the *Raycom Hawaii* case,²¹ when Raycom used SSAs and LMAs to control three stations including two top-4 ranked stations. The Commission shamelessly used a procedural excuse to bless the arrangement and punt the issue to the 2010 Quadrennial Review, even though

¹⁹ Just three weeks after the FCC published its findings that Sinclair illegally controlled Glencairn, Sinclair CEO David Smith sent a note to investors that took credit for inventing LMAs as a means of circumventing ownership rules. And he previewed his invention of new outsourcing agreements to take the place of LMAs once the Commission started to monitor LMAs more closely. *See* Sinclair Broadcast Group, 2001 Annual Report to Shareholders (Dec. 31, 2011) (“As you know, 10 years ago we created the first local marketing agreement (LMA), an alternative structure that allowed us to program another owner’s television station while reaping the benefits of duopoly; a structure today that is part of the FCC’s rules and regulations. This past year, we once again introduced the industry to another innovative structure, which we termed as an ‘outsourcing agreement.’ Under this arrangement, one station provides the sales and operating services, but not the programming, to another station in that market. Similar to the joint sales agreements common in the radio industry, this structure enables us to more effectively compete in those markets where duopolies or LMAs are currently not permitted. As our industry matures, these types of structures that promote cooperation among broadcasters within their markets are even more important to enhancing broadcasters’ economic and competitive positions. We have already entered into such arrangements in two of our markets and continue to look for added opportunities.”).

²⁰ For an even more complete review, see *Cease to Resist* at 18-27.

²¹ *See In the Matter of KHNL/KGMB License Subsidiary, LLC, and HITV License Subsidiary, Inc, Fac. ID Nos. 34867 and 34445*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087 (2011).

the Commission agreed with petitioners that Raycom's arrangement was "clearly at odds with the purpose and intent of the duopoly rule."²²

In the two years following this 2011 decision, the twenty largest broadcast TV companies entered into 61 new outsourcing agreements, increasing by more than 50 percent the number of all such agreements in place before then for these companies. During that two-year period Sinclair alone went from a mere two SSA stations to 35 (and today it operates 46 stations pursuant to SSAs, JSAs and LMAs).

Thus, thanks to the Commission's inaction and even implied acceptance of such evasions, the practice of using shell companies to evade the Commission's rules is commonplace. Nearly one out of every ten full power commercial TV stations are now operated pursuant to an outsourcing agreement, with the SSA/JSA combination accounting for three-fourths of the more than 120 such extant arrangements. The two biggest broadcasters (Nexstar and Sinclair) and their "sidecar" companies account for more than two-thirds of these rule-evading operations. The Commission has seen plenty of evidence, both before the initial comment cycle here and since, of such tactics; and it should use the opportunity of this record refresh to recognize these agreements for the evasions and fictions that they are.

B. The Securities and Exchange Commission protects investors' interests by recognizing a broadcaster's shell companies as a fiction.

We still believe and have in fact demonstrated that in many cases, broadcasters are using their "license-only" sidecar companies and operating agreements to exercise *de facto* control

²² *Id.*, ¶ 23.

over stations for which they are not permitted to hold the licenses even today, after the Supreme Court's recent decision deferring to the Pai FCC's wrongheaded repeals.

The reason that broadcast incumbents use these agreements is just as obvious today as it was when Sinclair's CEO first bragged to investors about their benefits: the big broadcasters reap the majority of the financial benefits from these supposedly independently-owned stations. We believe that a full investigation of the operational and accounting practices of these arrangements would demonstrate that most are not in compliance with the spirit of the Commission's multiple ownership rules, even if broadcasters can argue that they comply with the letter of the rules by ascribing *de jure* control of licenses to separate entities.

Other authorities agree that the shell-game is a legal fiction. Companies ultimately must not run afoul of the agencies that have the power to sanction them if they step out of line, and this Commission is not the only agency to which publicly traded media conglomerates report. Though the FCC has abided by the broadcaster's sidecar fiction, the same is not true for the Securities and Exchange Commission. Under Generally Accepted Accounting Principles ("GAAP") and SEC rules, there is no difference between Sinclair, Cunningham, Deerfield, Howard Stirk or most of the other companies that are named as the license holders of Sinclair-operated stations: the law considers them to be one company (and the same is of course true for Nexstar and its sidecar company Mission Broadcasting).

The SEC considers these sidecar companies to be Variable Interest Entities ("VIEs"), since the parent company has the power to direct the shell companies' activities that most significantly impact their economic performance, and the parent companies are obligated to

absorb the losses and receive the profits that are significant to these sidecar companies.²³ Indeed, when Sinclair²⁴ or Nexstar²⁵ talk to their investors and the analyst community, they don't even try to hide the reality of who is actually in control of these supposedly independent stations.

²³ *See, e.g.*, Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year concluded on Dec. 31, 2020, Commission file number: 000-26076 (Mar. 1, 2021) (“As discussed in Note 14. Variable Interest Entities within the Consolidated Financial Statements, we have determined that certain third-party licensees of stations for which we perform services pursuant to arrangements, including LMAs, JSAs, and SSAs, are VIEs and we are the primary beneficiary of those variable interests because, subject to the ultimate control of the licensees, we have the power to direct the activities which significantly impact the economic performance of the VIE through the services we provide and because we absorb losses and returns that would be considered significant to the VIEs.”).

²⁴ In its second quarter 2021 investor call, Sinclair provided commentary on why its expenses were up, noting the impact of its VIEs and directly highlighting how the SEC requires Sinclair to report its financials by incorporating the shell companies’ financials too, which the SEC does because of course these VIEs are completely tied to the parent: “Media expenses were 15% higher in this year's second quarter versus last year. That's on higher network programming fees, higher variable interest entity expenses, which we're required to consolidate in our financials.”

²⁵ Nexstar controls 38 stations using operating agreements, most through its shell subsidiary Mission Broadcasting. Like Sinclair, Nexstar is far more transparent with the SEC and its investors than it is with its FCC filings as to the true nature of these arrangements. For example, in Nexstar’s most recent quarterly report it noted in the context of its own retrans revenue trajectory the significant contribution to that from a single Mission-licensed station: “Second quarter 2021 distribution fee revenue rose 15 percent year-over-year to approximately \$617 million, reflecting our renewal of distribution agreements in 2020 representing approximately 18 percent of our subscriber base, synergies related to Mission Broadcasting’s acquisition of WPIX-TV and stable subscriber trends across our platform that remain consistent with our expectations.” Nexstar also discussed Mission’s loan structures in the context of how they impact Nexstar’s own leverage, a curious thing for a company to opine on if it really were talking about another (supposedly) “independent” company. Indeed, as a VIE, Mission’s debt is included in Nexstar’s discussion of its own debt and leverage. As stated in the SEC filing, “[t]he consolidated debt of Nexstar and Mission Broadcasting, Inc., an independently owned variable interest entity (collectively with Nexstar, the “Company”) at June 30, 2021, was \$7,619.8 million including senior secured debt of \$4,837.8 million.” On Nexstar’s most recent investor call, it mentioned Mission nine times. One of the references came in response to the question about Nexstar handling retransmission negotiations for Mission, to which Nexstar’s CEO responded in part, “[W]e are in New York, negotiating on behalf of WPIX because Nexstar does not own a station in that marketplace. And that's permissible under the FCC rules.”

The SEC's primary mission is to protect the interest of shareholders, so it doesn't abide the shell company fiction. It treats the shell companies and the parent broadcaster as one for the purposes of accounting statements because the parent company is "the primary beneficiary" of these arrangements (and "absorb[s] losses and returns that would be considered significant" to the shell companies), and the parent has "the power to direct the activities which significantly impact the economic performance of the" shell companies.

So, the now three-decade old yet frustratingly still open and current question for the Commission is, if the SEC sees fit to call out the shell company fiction in order to carry out its duty to protect shareholder interests, why doesn't the FCC do the same in order to fulfill its duty to protect the public interest?

C. In recent years the Commission has been forced to sanction specific cases where broadcasters used operating agreements to evade the multiple ownership rules. This *ad hoc* approach is wholly inadequate to protect the public interest.

While the operating agreement shell game is thus a fiction that only the FCC abides, this Commission has been forced to take action in at least a few egregious instances more recently. This string of recent cases demonstrates that even the Commission is increasingly finding it can't completely ignore reality.

In a surprising move,²⁶ in 2018 the Commission effectively blocked Sinclair's attempted takeover of the former Tribune stations,²⁷ because of Sinclair's lack of candor in discussing its

²⁶ We characterize this as surprising, in part because referrals of broadcast license transfers to the Administrative Law Judge are rare, but also because the most-recent former FCC Chairman was a strong advocate for broadcast consolidation.

²⁷ See *Applications of Tribune Media Company and Sinclair Broadcast Group*, MB Docket No. 17-179, Hearing Designation Order, 33 FCC Rcd 6830 (2018).

proposed divestiture of WGN to a license-only company nominally owned by a close business associate.²⁸ Sinclair’s loss became Nexstar’s gain, as Nexstar swooped in and received quick Commission approval to takeover those Tribune stations, in the process replacing Sinclair in the rankings as the nation’s largest broadcaster.

But that swift approval of the Nexstar acquisition came with a nearly identical set of questionable “license-only” divestitures to shell operations. And now the Commission finds itself once again in the position of adjudicating an allegation that Nexstar is using operating agreements to evade the multiple ownership rules.²⁹ Comcast’s petition calling out Nexstar’s shell games at WPIX is but one of three examples in recent months of the tensions operating agreements are creating for the Commission and its longstanding, lax interpretation of its rules. Each reflects an escalating farce that can only be adequately dealt with if the Commission finally closes the shell company loopholes.

The second of those three examples came just on July 7th, as the Commission issued a forfeiture order to Gray Television for “willfully and repeatedly violat[ing] the Commission’s prohibition against owning two top-four television stations in the same Designated Market Area (DMA), by acquiring the CBS network affiliation for KTVA(TV), Anchorage Alaska, which resulted in the ownership and operation of two of the top-four stations in the Anchorage, Alaska

²⁸ See, e.g., Robert Channick, “Sinclair deal to sell WGN to chairman’s business partner gives broadcaster control,” *Chicago Tribune* (Mar. 1, 2018).

²⁹ See Comcast Cable Communications, LLC, Petition for Declaratory Ruling that Nexstar Media Group Inc.’s Relationship with WPIX-TV Violates 47 C.F.R. § 73.3555(e) and the *Nexstar/Tribune Order* (filed July 1, 2021).

DMA.”³⁰ Gray made this possible by acquiring all the non-license assets of KTVA (the central feature of the shell operation farce), then airing all of that station's programming on KYES as KTVA went dark. The Commission thankfully put a stop to this end-run around the top-four rule, but only apparently because of the order of operations and the dormancy of the “licensed” station. This is welcome, but the underlying practice of broadcasters’ evading the multiple ownership rules with acquisitions that acquire everything but the license then resorting to operating agreements, remains unchecked by a proper, consistent, and reality-based interpretation of the rules subject to the quadrennial.

Just three weeks after issuing the *Gray Forfeiture Order* the Commission also issued a forfeiture order to many of Sinclair’s shell company partners. In this action the Commission ruled in favor of AT&T in its retransmission dispute with Sinclair and a number of those shell companies, who neglected to carry out their duty as “independent” licensees to negotiate their own retransmission agreements and not leave it all to Sinclair.³¹ This case is particularly frustrating, because in 2016 the Commission obtained a nearly 8-figure settlement payment from Sinclair for the broadcaster’s improperly negotiating retransmission consent agreements on behalf of its shell companies.³² Somehow that lesson didn’t stick, so here the Commission is back to issuing more fines, which at this point may be a small price for Sinclair to pay for a much larger profit than is legally permissible under the multiple ownership rules.

³⁰ See *Gray Television, Inc., parent of Gray Television Licensee, LLC, Licensee of Stations KYES-TV, Anchorage, AK and KTUU-TV, Anchorage, AK*, Facility ID Nos. 21488, 10173, Notice of Apparent Liability for Forfeiture, FCC 21-81 (rel. July 7, 2021) (“*Gray Forfeiture Order*”).

³¹ See *DIRECTV, LLC and AT&T Services, Inc. vs. Deerfield Media, Inc., et al.*, MB Docket No. 19-168, Forfeiture Order, FCC 21-89 (rel. July 28, 2021).

³² See *Sinclair Broadcast Group, Inc.*, Order, 31 FCC Rcd 8576, ¶ 4 (2016).

We suggest that if the Commission were to have full access to the financial records of these sidecar companies, it would no longer be able to abide the fiction of independent ownership. We believe that for most of these operating agreements, particularly those of the largest broadcasters and their exclusive VIEs, the financial benefits paid to the shell company license holders amount to little more than a relatively small (in percentage terms) fee, with the overwhelming bulk of the revenues and profits accruing to the parent broadcaster.

Free Press has a long history of advocating for ownership rules that promote localism and protect the diversity of voices. Part of that advocacy has focused on opposing rule changes that would increase national and local consolidation, further increasing already high entry barriers and rewarding Big Broadcast's long-running move away from quality local journalism. But our advocacy isn't confined to opposing rule changes: we have long urged the Commission to enforce its existing rules. The need to do so is more important than ever, given the recent substantive changes to the multiple ownership rules. Now that the prior firewall against rampant consolidation has been severely weakened, we expect another "wave of consolidation" unless the Commission takes long overdue action to fully enforce its rules by closing the "operating agreement" loopholes.

II. Collecting Media Ownership Data and Conducting an Analysis of the Impact of FCC Policy on Entry Barriers are Critical to Fostering Ownership Opportunities for Women and People of Color.

Despite repeated mandates from the Third Circuit directing the Commission to examine how the agency's weakening of and changes to broadcast ownership limits impact ownership

opportunities for women and people of color, the agency has refused to act.³³ As it prepares for the next Quadrennial Review in 2022, the Commission should conduct a thorough analysis assessing the policies and market structures that are more likely to foster ownership by women and people of color, and before undertaking any rule changes should first analyze how such decisions will impact broadcast ownership diversity. The Commission’s mandatory review of its media ownership rules is not a “one-way ratchet”³⁴ that must turn towards deregulation. Based on existing analyses that show that broadcast consolidation heightens barriers to entry for women and people of color,³⁵ the Commission should consider tightening broadcast ownership limits in the 2022 Quadrennial Review.

III. The Commission Must Conduct a Racial Equity Impact Assessment and Address the Need for Media Reparations.

The racial inequities that exist in the broadcast industry have been the result of policy decisions the FCC adopted. The FCC was founded when segregation ensured a racial caste system in our country.

³³ The Commission has disregarded the Third Circuit’s explicit mandate in 2004, 2011, and 2016. *See Prometheus I*, 373 F. 3d at 420-421, n. 59 ; *Prometheus Radio Project v. Federal Communications Commission*, 652 F.3d 431, 471 (3d Cir. 2011); *Prometheus Radio Project v. Federal Communications Commission*, 824 F. 3d 33, 54 n. 13 (3d Cir. 2016).

³⁴ In the first *Prometheus* case the Third Circuit rejected the notion that under § 202(h) review of its ownership rules “the ‘repeal or modify in the public interest’ instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations.” *See Prometheus I*, 373 F. 3d at 394.

³⁵ *See, e.g.*, S. Derek Turner and Mark Cooper, “Out of the Picture 2007: Minority & Female TV Station Ownership in the United States,” Appendix B (October 2007) (summarizing the results of an econometric study that found “that the probability that a given station is minority-owned is significantly lower in more concentrated markets, even if market and station characteristics are held constant. This result is also seen when examining the probability that a market will have a minority-owned station.”).

As the Media 2070 project noted in its October 2020 essay: “The passage of the 1934 Communications Act and the creation of the Federal Communications Commission led to agency policies that ensured white corporate control of the commercial broadcast industry – an approach that exists to this day.”³⁶

The FCC played a critical role in ensuring its policies reflected this caste system by excluding Black, Indigenous, Latinx and Asian American communities from ownership opportunities. Meanwhile, the FCC awarded licenses to people and companies who sought to uphold these racial hierarchies, including in the broadcast industry.

As the Media 2070 essay explained: “Like so many powerful white-owned and -controlled newspapers, the broadcast industry spread the myth of Black inferiority to protect a white-racial hierarchy. And it did so with the aid of government policies.”³⁷ In fact, in a 1969 report, the DOJ’s Community Relations Service stated: “Few American institutions have so completely excluded minority group members from influence and control as have the news media. This failure is reflected by general insensitivity and indifference and is verified by ownership, management, and employment statistics.”³⁸

The FCC has granted licenses to broadcast stations that have used the airwaves to support segregation and racial terrorism in this country. Meanwhile, over the last 40 years, the Commission has also adopted policies that allowed for greater consolidation and thus erected and maintained barriers to ownership opportunities for communities of color.

³⁶ Joseph Torres, *et al.*, “Media 2070: An Invitation to Dream Up Media Reparations,” at 31 (Oct. 6, 2020).

³⁷ *Id.* at 43.

³⁸ *Id.* at 53.

We are calling on the FCC to conduct Racial Equity Impact Assessment, separate from and beyond the instant proceeding and future quadrennial reviews, to ensure that the commission has to consider the impact of these past and present policies on communities of color.

It is critically important for the FCC to conduct a historical overview of how its policy decisions resulted in excluding Black, Latinx, Asian American and Indigenous communities from ownership of our nation's media and telecom infrastructure. This has created a media system that continues to portray the Black community and communities of color in terms of criminality and as a threat to the health and well-being of our society. This kind of media portrayal has helped to perpetuate historical narratives that center disinformation about communities of color and continue to this day. These efforts have served the political purpose of those attempting to ensure that a multiracial democracy will never fully be realized.

As noted at the outset of these comments, we welcome and support fully the congressional letter led by Reps. Bowman, Clarke, and Lawrence that calls on the FCC to “to address and redress the harm the agency’s policies and programs have caused Black and brown communities and identify the affirmative steps the agency commits to take to break down barriers to just media and telecommunication practices.”³⁹

It is critical for the FCC to conduct such an equity audit to assess and then address how the agency’s policies have excluded Black, Latinx, Asian American and Indigenous communities from ownership opportunities, and have resulted in news and information that harms communities of color and local communities rather than serving them.

³⁹ See supra note 8.

Conclusion

FCC-blessed broadcast consolidation has routinely undermined the public interest in competition, localism, and ownership and viewpoint diversity. Ample evidence suggests that broadcast deregulation severely harms the public in general and disproportionately harms disadvantaged groups, including people of color. The Commission must at the very least in this docket begin to enforce its remaining ownership rules by closing the loopholes outlined above, then in the next quadrennial finally commit to conducting the Court-mandated analysis that would allow it to accurately evaluate and promote media ownership diversity, while further committing to a fuller Racial Equity Impact Assessment to inform future reviews and all Commission decisions on media and telecommunications policy going forward.

Respectfully Submitted,

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