Cease to Resist:

How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation

S. Derek Turner
Free Press

Released: October 2013

UPDATED: March 2014

www.freepress.net

EXECUTIVE SUMMARY[1]

The U.S. broadcast television industry is in the midst of a wave of consolidation, which one longtime industry insider described as "the biggest wave ... in the history of television."[2]

This wave is leaving in its wake shuttered newsrooms and jobless journalists in communities all across the country. And there is likely much more of this to come.

Local broadcast journalism is already suffering from two decades of rampant media consolidation. Absentee corporate owners, concerned only with profit maximization, long ago pushed out most station owners with ties to their communities. Prioritizing profit above public service, these corporations replaced political reporters with political ads. Cross-promotions for *American Idol* displaced important news stories. Cheap-to-produce traffic, weather and sports updates now comprise nearly half of all local news programming. And in many communities, the same company owns multiple media outlets: Changing the channel brings the same content from the same newsroom, packaged with slightly altered graphics.

The Federal Communications Commission — the agency tasked with ensuring the public airwaves serve the public interest — has long been a willing accomplice to this destruction of local journalism. Indeed, as this report demonstrates, FCC policies are a major factor driving the latest wave of consolidation. Even as the agency fought in court to maintain its ownership limits, it signaled to the market that it had no intention of even examining covert-consolidation agreements, much less calling them out as blatant violations of the agency's rules.

This FCC inaction ignited an explosion in the use of "outsourcing agreements" that allow one entity to control multiple stations in a single market— an arrangement prohibited in most markets under FCC rules. To maximize the number of independent sources of news and information, these rules bar one company from controlling two top-four stations in a local market.

But as this report details, Gannett Company, Nexstar Broadcast Group, Raycom Media, Sinclair Broadcast Group, Tribune Company and others are increasingly using outsourcing agreements with so-called "sidecar" or shell companies to evade the FCC's rules and establish near monopolies over local TV news production in markets across the country. These companies' covert media consolidation is depriving communities of the diverse news sources they need to stay informed.

There are, however, encouraging signs that the FCC under the leadership of Chairman Tom Wheeler intends to crack down on the practice of covert consolidation. The FCC is poised to adopt a rule that will require attribution of Joint Sales Agreements (JSAs), one tool in the covert-consolidation playbook. Wheeler's FCC is also closely examining a recent Sinclair deal that involves a number of outsourcing arrangements with shell corporations.

These FCC actions are small but important first steps that will return the rule of law to broadcast-ownership policy. Nevertheless, the broadcasters and the largest covert consolidators are lobbying the FCC and Capitol Hill to stop these initial steps toward reform. If the FCC maintains its independence, communities and competition will win. If it bows to industry and political pressure, we will continue to see unbridled consolidation — and the devastation of community-centered journalism.

---

[1] This report was originally released on Oct. 21, 2013. This version draws on data available through March 10, 2014. Certain text and figures contained in the original report are not included in this update. In addition, certain text has been updated to reflect subsequent FCC and Department of Justice action on these matters.

[2] Larry Patrick, an industry broker and chairman of the National Association of Broadcasters' Political Action Committee, recently stated: "This wave of consolidation has been the biggest wave in my view in the history of television. You have seen huge companies, some under pressure … but others who just said 'Look, I either have to play this game to get much, much, much bigger so that I can negotiate harder on retrans and I can negotiate more effectively for programming, or I need to sell.'" *See* Sarah Barry James, "Broadcast M&A Boom: It's Not Over Yet," SNL Kagan, Sept. 13, 2013.

Broadcasting's Boom Times

The local broadcast TV market is already concentrated in the hands of just a few firms. Thirteen companies control 85 percent of the ABC, CBS, FOX and NBC stations in the nation's 25 largest media markets. Ten companies control 55 percent of all local TV advertising revenues.

The industry's runaway consolidation, which seemed unstoppable in the late 1990s, lost momentum after the turn of the century in the face of public outrage over media concentration and a series of federal court decisions that rejected FCC proposals to gut the media ownership limits.

However, the broadcasters found a loophole in the rules, and the FCC has looked the other way as these companies went about building local media empires in direct violation of the law. As a result, 2013 was the biggest year for broadcast consolidation since 1999:

- In 2013, 286 full-power stations changed hands, the highest level in more than a decade.
- At nearly $11.4 billion in deal value, 2013 stands as the fourth-biggest year for deals on record.
- Previous waves of consolidation generally involved the national networks buying the major affiliates in the largest markets. But the latest surge involves companies that are not necessarily household names and is taking place in small and medium-sized markets.

FCC apathy isn't the only factor driving the uptick in deals. The recovering economy and improving local advertising markets — the latter buoyed by record levels of political ad spending — are also fueling this trend. The consolidation also reflects investors' interest in so-called retransmission-consent revenues — the payments broadcasters fetch from cable and satellite TV providers to carry their channels.

- In 2012, local TV stations raked in nearly $3 billion in political ad revenues, nearly doubling the total from 2008 and ranking as the biggest year ever for political ad spending. This number is expected to grow in future elections as outside groups continue to take advantage of the post-*Citizens United* environment.
- Local TV broadcasters brought in $2.4 billion in retransmission-consent revenues in 2012, up from a mere $28 million in 2005. Industry analysts expect these revenues will continue to skyrocket, reaching an estimated $6.1 billion in 2018.
- Total local TV station revenues in 2013 reached an estimated $23.5 billion in 2013 — $5.3 billion more than the industry's 2009 earnings.

Broadcasters aren't investing these newfound revenues in newsrooms. The corporations that control our airwaves are instead using record profits to snap up more stations and position themselves to cash in on future elections and extract higher payments from cable customers.

Sinclair Broadcast Group: Leading the Wave of Consolidation

National network owners like CBS, NBC and News Corporation that dominated earlier periods of local TV market consolidation have given way to smaller companies that have spent the past several years building the foundations of their own media empires.

Leading the way is the Sinclair Broadcast Group:

- In just the last two years, Sinclair has closed or announced deals that would increase its holdings from 58 to 162 stations nationwide.

- In the past two years, Sinclair has made deals that would more than double the number of markets it serves, from 35 in the middle of 2011 to 78 as of March 2014.

- If the FCC approves all of its pending deals, Sinclair stations will reach 38.8 percent of the national audience, up from just 22 percent two years ago.

Sinclair has been able to take over this many stations this quickly through the use of "outsourcing agreements" designed to evade FCC rules. Under a typical agreement, Sinclair takes over the operations of one or more competing stations in the same market, while another nominal owner (a sidecar, or shell company) holds the stations' license(s) on the paperwork at the FCC. Sinclair pioneered the use of these covert-consolidation arrangements with its invention of the Local Marketing Agreement (LMA) in the early 1990s. The company later refined the technique via its creation of the Shared Services Agreement (SSA), a hybrid arrangement that includes programming, advertising sales and operational agreements.

Sinclair today operates 47 stations using one or more of these arrangements, and it produces the news broadcasts for an additional seven stations. Sinclair relies primarily on three shell companies — Cunningham Broadcasting, Deerfield Media and Howard Stirk Holdings — to skirt the FCC's ownership rules. These three sidecars hold the licenses to 31 of the 47 stations that Sinclair operates under outsourcing agreements. Only six of the 47 Sinclair-operated stations are owned by a party that also owns stations Sinclair doesn't control.

Covert Consolidation: A Convenient Lie

Longstanding FCC rules prohibit one company from owning more than one TV station in a market with fewer than eight independent owners. The rules also preclude any single party from owning the license to two or more top-four-ranked stations in the same market. But Sinclair controls multiple stations, including multiple top-four stations, in dozens of markets where the FCC rules bar such arrangements.

Sinclair claims that even though it exercises complete control over these stations, the company is not violating FCC rules because Sinclair does not technically own the stations' licenses. But as we document in this report, there is ample evidence that these covert-consolidation agreements give *de facto* control to Sinclair over station operations in every meaningful way:

- In nearly every single instance, the only asset a shell company owns is the station license itself. Sinclair almost always owns 100 percent of these stations' physical assets.

- Under the structure of these outsourcing agreements, Sinclair receives nearly all of the stations' profits. The license owners receive fees for putting their names on the licenses.

- The parent company is often the shell company's sole financier. For example, Sinclair is on the hook for 100 percent of Deerfield Media's bank loans.

- Sinclair's outsourcing agreements contain contractual language that requires the nominal owners to sell their stations' licenses to Sinclair — and only Sinclair — for bargain-basement prices, should the FCC relax its rules.

- These shell companies often have no physical presence. For example, Sinclair's longtime shell, Cunningham Broadcasting, is headquartered in Sinclair's flagship station's studios in Baltimore.

- Cunningham has also struck deals to purchase stations, only to let Sinclair take its place as the buyer once it became apparent the deals wouldn't violate FCC rules. No legitimately independent business would walk away from a deal and let a supposed competitor take its place.

- The shell companies are usually owned by individuals who don't actually run any of their stations, as they have other full-time jobs or are retired. Cunningham's CEO, for example, is a full-time broadcast attorney at a New York law firm.

- In most cases, Sinclair produces 100 percent of any original programming, including news, that airs on these sidecar stations. In terms of viewpoint diversity, there is no difference between Sinclair and the nominal owner.

- When Sinclair communicates with investors, it doesn't hide the fact that it is the true owner of these shell companies and their stations, repeatedly referring to them as "our sidecar companies" and "our stations."

- Indeed, under Securities Exchange Commission rules, Cunningham, Deerfield and Howard Stirk are considered the same company as Sinclair, which "has the power to direct the activities" of these companies that "most significantly impact [the sidecar company's] economic performance."

Thus, we have one set of rules for the FCC and another set of rules for the SEC. By forcing Sinclair to tell the truth about what it owns, the SEC is protecting investors' interests, ensuring they understand precisely what Sinclair does and doesn't own. In contrast, by letting Sinclair perpetuate its covert-consolidation fiction, the FCC is failing to protect the public interest. In the FCC's eyes, these shell companies — which have business relationships only with Sinclair — are completely independent firms … and good stewards of the public airwaves to boot.

Riding the Wave: Gannett, Media General, Nexstar and Tribune

Sinclair may have invented outsourcing agreements and started the current wave of consolidation, but several other companies are coming along for the ride. Firms like Gannett, Media General, Nexstar and Tribune have gobbled up billions in TV assets over the past year, using outsourcing agreements to evade the FCC's rules in dozens of communities around the country.

- In December 2013, Gannett completed its acquisition of Belo TV's 20 full-power stations, in a deal valued at $2.2 billion. This deal nearly doubled Gannett's broadcast portfolio, taking it from 23 stations in 19 markets to 43 stations in 33 markets, and allowing the company to reach more than 30 percent of the country. Gannett attempted to use SSAs with its newly created shell company Sander Media to sidestep the FCC's newspaper-broadcast cross-ownership rule and its prohibition on owning two top-four stations in a single market. However, the Department of Justice moved to block this arrangement for the St. Louis CBS affiliate, and Gannett subsequently divested that and two other Belo stations.

- In June 2013, Media General announced its buyout of Young Broadcasting. The nearly $700 million deal involves 12 owned-and-operated stations and another three stations that Young operates pursuant to outsourcing agreements. The deal nearly doubles the number of Media General stations — from 18 to 35 — and increases its national reach to 14 percent.

- Nexstar, a company focused primarily on small and mid-sized markets, operates 35 stations under covert-consolidation agreements. In 26 of the 53 markets Nexstar serves, it controls two or more of the market's top-four network affiliates, giving the company a stranglehold over news production in these communities. Nexstar primarily uses a shell company called Mission Broadcasting to evade the FCC ownership rules.

- Shortly after emerging from bankruptcy, Tribune Company announced its plans to purchase 20 full-power TV stations from private equity group Oak Hill Capital Partners in a deal valued at $2.7 billion. This deal, which was completed at the end of 2013, nearly doubled the number of stations (from 24 to 44) and markets (from 19 to 35) in Tribune's portfolio. Tribune Company now reaches 44 percent of the nation's households, exceeding the 39 percent cap on national media ownership Congress established in 2004. Tribune is using SSAs with a shell company called Dreamcatcher to avoid violating the FCC newspaper-broadcast cross-ownership rule in three markets.

The use of operating agreements to evade the FCC's media ownership rules is now a standard business practice. Before the FCC turned a blind eye to these evasions, small broadcasters and new entrants actually had a chance to participate in this industry, particularly in the medium- and smaller-sized markets. But now that companies like

Sinclair and Nexstar are using these sneaky tactics to gobble up stations in these markets, the opportunities for other competitors are virtually non-existent.

The extent to which companies use these arrangements to evade the FCC's ownership rules is stunning:

- Operating agreements are used to skirt the FCC's rules in nearly half of all U.S. media markets.
- More than 85 percent of these markets are outside the top-50 largest Designated Market Areas, and half are outside the top-100 DMAs.
- Operating agreements are used to form otherwise illegal duopolies between two top four-ranked stations in 78 markets.

A Wake-Up Call to the FCC

Unless the FCC starts enforcing its rules, there will be much more consolidation to come. Job losses will continue. Newsrooms will close. People won't have competing sources of news about issues that matter to their communities.

In the seminal 1945 case *Associated Press v. United States*, Supreme Court Justice Hugo Black concluded that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[3] The FCC'sownership rules limiting the number of stations any one owner can controlare intended to promote a diverse range of viewpoints. An unfettered broadcast market — one without any limits on how much of the airwaves one owner can control — will not produce the full range of views that can inform and enlighten the public.

FCC Chairman Tom Wheeler has the power to stop this wave of consolidation. As an honest regulator, he must end the dishonest practice of covert consolidation.

Mr. Wheeler should first close the loopholes:

- If it's good enough for Wall Street, it should be good enough for Main Street. If the SEC considers a broadcast corporation and its shell company a single entity, so should the FCC. This should be the case no matter what kinds of evasion tactics companies use. The FCC is poised to close the Joint Sales Agreement loophole, but must act to close other loopholes companies exploit via shared services, operating and management agreements.
- The FCC must reform its ownership-attribution rules to better reflect the realities of the broadcast TV market and the stated purpose of these rules. If one station programs the entire news schedule of another, the FCC should consider the two companies one voice for the purposes of the ownership rules.
- Free Press, the Rainbow PUSH Coalition and other organizations and individuals have challenged recent acquisitions by Sinclair, Tribune and Gannett that use covert-consolidation arrangements to evade the FCC ownership rules. The FCC should block these deals since they are structured to evade rules designed to protect the public interest.
- The FCC must end the UHF discount. For example, if the Tribune Company completes its acquisition of Local TV LLC, it will control stations that collectively reach 44 percent of the U.S. population — far in excess of the 39 percent cap Congress established in 2004. However, under the FCC's current rules —and thanks to the FCC's antiquated way of calculating ownership —Tribune's reach is counted as just 27 percent. The FCC recently initiated a proceeding to close this loophole. But under the proposal, the FCC

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

will grandfather all owners that exceed the 39 percent cap. This includes any firm that has pending deals that will exceed the cap — a generous exception that applies solely to the Tribune Company.

By closing these loopholes, the FCC will give truly independent owners a chance to secure licenses and serve their communities.

In the longer run, the FCC should reinstitute ownership policies that promote viewpoint diversity, ownership diversity, competition and localism as well as more efficient use of the public airwaves. We need rules that recognize that digital multicasting allows broadcasters to use one over-the-air "channel" to broadcast multiple high-quality signals. This means there is no longer any legitimate reason to allow any owner to control multiple licenses in a single local market. If companies like Sinclair want to air multiple stations, they can use multicasting technology with a single over-the-air license. To do otherwise wastes our scarce public airwaves.

A one-owner/one-license-per-market policy will not reduce the availability of over-air-content that millions of Americans rely on. It will, however, free spectrum that can be used to serve the public interest. For example, reclaimed spectrum could be used for wireless broadband deployments in the "white spaces" to improve Internet access for millions of Americans.

Whatever path the FCC chooses, it must take action immediately. If it does not enforce its rules and end the fiction of broadcast shell companies, the long-term effects of this new wave of consolidation will be irreversible.

TABLE OF CONTENTS

LIST OF FIGURES

Introduction: The New Wave of Media Consolidation

The local television industry impacts the lives of all Americans. Even in the social media era, we get most of our news and information from local broadcast TV. Indeed, though overall interest in the news continues to decline, Americans follow local news stories more closely than national or international news stories, and they get this information primarily from local TV stations.[4]

Local TV also remains—for better or worse — the primary conduit for electoral information, mainly in the form of political advertising. Even for those who never tune in, local broadcast television has a profound impact on everyone living in the United States.

Over the last few decades, the local TV industry has transformed from one largely controlled by local and small regional owners serving their communities to one dominated by a handful of corporations focused on serving shareholders. This transformation has led to a decline in the production of actual local news reporting, which is more costly to produce than the frequent traffic, weather and sports updates that now fill nearly half of the nightly newscast.[5]

Policymakers in Congress and at the Federal Communications Commission enabled and encouraged this shift toward prioritizing profit over public service. In the mid-1990s, Congress and the FCC removed many of the rules governing how broadcast licenses are awarded, allowing one company to own multiple stations in a single local market[6] and relaxing limits on how much of the country a single company could reach.[7]

These rule changes helped spur a long and steady trend of consolidation in the broadcast TV industry, one that the Great Recession of 2008–2010 slowed only temporarily. Indeed, 2013 was the biggest year for broadcast consolidation since 1999.

---

[4] *See, e.g.,* "In Changing News Landscape, Even Television is Vulnerable," the Pew Research Center for the People and the Press, Sept. 27, 2012. This survey shows a decline in engagement with every news medium except digital/mobile. However, 48 percent of all respondents indicated they regularly watch local TV news, which outpaces those reporting regular consumption of cable news (34 percent), daily newspapers (38 percent) or online news (46 percent). And though online news consumption is growing, the sources for *local* news and information available online are generally local television and print outlets. Excluding aggregator sites like Google News and Yahoo! News, local news websites were the second-most-used sources for *all* news, behind only CNN.com. *See also, e.g.,* "How People Get Local News and Information in Different Communities," Pew Research Center, Sept. 26, 2012 (this report shows that local TV news broadcasts are Americans' primary source of local news and information, far exceeding newspapers, newspaper websites and even word of mouth).

[5] *See* "The State of the News Media 2013 — An Annual Report on American Journalism," the Pew Research Center's Project for Excellence in Journalism (2013). "In local television, newscasts in recent years have placed an even greater emphasis on traffic, weather and sports, reduced the number of edited package stories on the air and shortened the lengths of stories — trends that may reflect the economic strains affecting the industry. One notable change in the construction of the local newscast is a roughly 20 percent decrease in airtime allotted to packaged stories. According to 2005 data, those packages accounted for 41 percent of the local television news hole. In 2012, that was down to 33 percent. The study suggests that local news has built up a third leg to the two core elements of weather and traffic on local television news. In addition to the more modest increase in the already substantial amount of airtime filled by weather and traffic — from 25 percent in 2005 to 29 percent in 2012 — the time devoted to sports nearly doubled, from 7 percent of the news hole in 2005 to 12 percent in 2012. Thus when sports, traffic and weather are combined, the airtime devoted to these subjects rose from 32 percent to 40 percent of local TV newscasts — a 25 percent increase. Indeed, Pew Research's examination of 48 evening and morning newscasts in late 2012 and early 2013 found that 20 of them led with a weather report or story."

[6] In 1999, the FCC relaxed its multiple ownership rule, allowing a single owner to control two (and in some cases more than two) stations in a single market (so long as there were a minimum number of eight unique owners remaining after the formation of the duopoly). It also blessed the practice of Local Marketing Agreements (LMAs), which allow for the formation of "virtual" duopolies in markets where the FCC's revised rules would not otherwise permit multiple ownership.

[7] This limitation pertains not to the number of licenses a single owner can control nationwide, but to the percent of the U.S. population an owner can reach. See the discussion of the UHF discount below for further analysis of this so-called "national cap" policy.

The current consolidation wave differs from those in prior years in a major way. In the past we saw a few blockbuster deals involving national network owners in the country's most prominent markets. Today most consolidation is taking place in medium-sized markets and involves companies that are not household names.

The recovering economy and improving local advertising markets — the latter buoyed by record levels of political ad spending — are also fueling this wave. Another factor is investors' interest in booming retransmission-consent revenues — the payments broadcasters fetch from cable and satellite TV providers to carry broadcast channels.

However, the primary factor driving this current wave of consolidation is FCC policy. The FCC ushered this trend in by signaling to the market in a 2011 decision that it has no intention of enforcing its own broadcast ownership rules. The FCC's actions (or more precisely, inaction) ignited an explosion in the use of so-called outsourcing agreements, which allow one entity to control multiple stations in a single market. This "covert consolidation" has resulted in one owner controlling most — or in some cases, all — of the broadcast television news production in markets across the country.

A Brief History of Local TV Consolidation

At nearly $11.4 billion in deal value, 2013 stands as the fourth-biggest year for local TV deals over the past three decades.[8] And this year stands out in other ways. Blockbuster deals involving major network-owned stations defined each of the three previous highest-total-value years. But 2013's deals involve existing owners expanding their holdings in new and existing markets.

In 1985, Capital Cities Communications merged with ABC in a deal valued at $3.5 billion,[9] with $1.6 billion of the value attributed to ABC's five owned-and-operated (O&O) local broadcast TV stations.[10] That same year, Rupert Murdoch's News Corp entered the U.S. broadcasting market through its acquisition of seven local TV stations from Metromedia, in a deal valued at $2 billion.[11] And the year closed out with General Electric's acquisition of RCA, a deal that included five NBC O&O stations valued at $1.8 billion.[12]All of these deals involved major network-affiliated stations in some of the nation's largest markets. And News Corp acquired stations in major markets to form the core of its new FOX network.

Similarly, 1995's then-record-breaking year included some transactions in anticipation of Congress' pending deregulation of the broadcast industry. However, nearly 70 percent of the $12.8 billion in deal value that year came from Disney's purchase of ABC (10 stations valued at $6.4 billion) and Westinghouse's takeover of CBS (7 stations valued at $2.4 billion).[13] Likewise, more than 60 percent of the $14.4 billion in deals in 1999 was due to Viacom's acquisition of CBS (17 stations valued at $8.8 billion).[14]

Since the passage of the Telecommunications Act of 1996 and the FCC's relaxation of its local ownership rules in 1999, there have been a number of notable deals from companies pushing the limits of what the law allows. News Corp made several hefty acquisitions that brought it up to and beyond the FCC's continually shifting national ownership cap[15] (which now stands at 39 percent of households).[16] Sinclair grew substantially in the late 1990s from

---

[8] *See Cease to Resist*, October 2013, Figure 1.

[9] N.R. Kleinfield, "ABC Is Being Sold for $3.5 Billion; 1st Network Sale," *New York Times*, March 19, 1985.

[10] *See* "TV Station Deals Databook: 2013 Edition," SNL Kagan, July 3, 2013 ("SNL Kagan 2013 Databook").

[11] *Id.*

[12] *Id.*

[13] *See* Geraldine Fabrikant, "The Media Business: The Merger; Walt Disney to Acquire ABC in $19 Billion Deal to Build a Giant for Entertainment," *New York Times*, Aug. 1, 1995. *See* also Geraldine Fabrikant, "CBS Accepts Bid by Westinghouse; $5.4 Billion Deal," *New York Times*, Aug. 2, 1995. *See also SNL Kagan 2013 Databook*.

[14] *See* Lawrie Mifflin, "Making a Media Giant: The Overview; Viacom to Buy CBS, Forming Second-Largest Media Company," *New York Times*, Sept. 8, 1999. *See also SNL Kagan 2013 Databook*.

[15] Notable News Corp deals include its 1996 acquisition of New World Radio's 10 TV stations (valued at $2.9 billion) and its 2000 acquisition of Chris Craft Industries' 10 TV stations (valued at $3.7 billion). The latter deal put News Corp above the

two major deals: its 1996 acquisition of 10 stations from River City Broadcasting, and its 1998 deal for 14 stations from Sullivan Broadcasting. (Each deal was valued at approximately $1 billion; many of these stations were initially held by Sinclair's shell company, Cunningham Broadcasting, until the FCC relaxed its multiple ownership rules in 1999.)

2013 was a historic year for consolidation in terms of deal value — and it was also one of the largest in terms of the number of stations sold. A total of 286 full-power stations changed hands in 2013, the highest level this decade. While there were a number of significant deals in 2006–2007, many of these involved privatization of publicly traded companies (e.g., ION Media Networks, the Tribune Company) or private equity deals where investment firms acquired stations formerly held by big industry players (such as Oak Hill Partners' 2006 purchase of the New York Times Company's nine stations, or Providence Equity Partners' 2007 acquisition of Clear Channel's 35 stations). In contrast, the current consolidation wave consists entirely of straight sales or mergers, where existing behemoths are growing even larger.

As we discuss here, there is ample evidence that the current wave of consolidation — unique from those in past years in both size and scope — was prompted by the FCC's signal that it would not curb covert consolidation, and would permanently grandfather any deals that ran afoul of ownership limits. But while the FCC provided the initial push, the local TV industry's greatly improved fiscal prospects are also fueling the consolidation.

Political ad spending is one of the bright spots for local TV broadcasters, driven in part by the explosion in third-party ads enabled by the Supreme Court's decision in the *Citizens United* case. In 2008, local TV stations brought in $1.5 billion in political ad revenues. This rose 40 percent, to $2.1 billion in 2010 — a midterm election year. And in 2012, local TV stations brought in nearly $3 billion in political ad revenues, nearly doubling the total from 2008 and ranking as the biggest year ever for political ad spending.[17]

The Sinclair Broadcast Group, with its broad geographic coverage in many swing states, is by far the biggest beneficiary of this increase among local TV station owners. Sinclair's 2012 political ad revenues were $97 million, up *136 percent* from its 2008 haul of $41 million.[18]

The expected continued growth in political ad spending will be a crucial source of future growth for local TV broadcasters. Analysts expect traditional advertising revenues to see little growth in the coming years, and foresee only modest growth from digital/online platforms.[19]

---

national ownership cap (which then stood at 35 percent), requiring the company to divest a number of stations. However, the FCC gave News Corp a temporary reprieve while the courts sorted out challenges to the FCC's 2002 order that increased the cap to 44 percent. In late 2003, Congress stepped in and set the national cap at 39 percent, just above News Corp's UHF-adjusted national reach at the time. In 2007, the company sold nine of its stations to private equity firm Oak Hill Partners (all but one of which are now being sold to the Tribune Company). News Corp acquired two mid-sized-market stations earlier this year (WMYT and WJZY), bringing its current national reach to 37.3 percent (24.8 percent with the UHF discount).

[16] Consolidated Appropriations Act, 2004, Public Law 108-199, section 629, 118 Stat. 3 (2004).

[17] *SNL Kagan 2013 Databook*, p. 3 (citing Television Bureau of Advertising data).

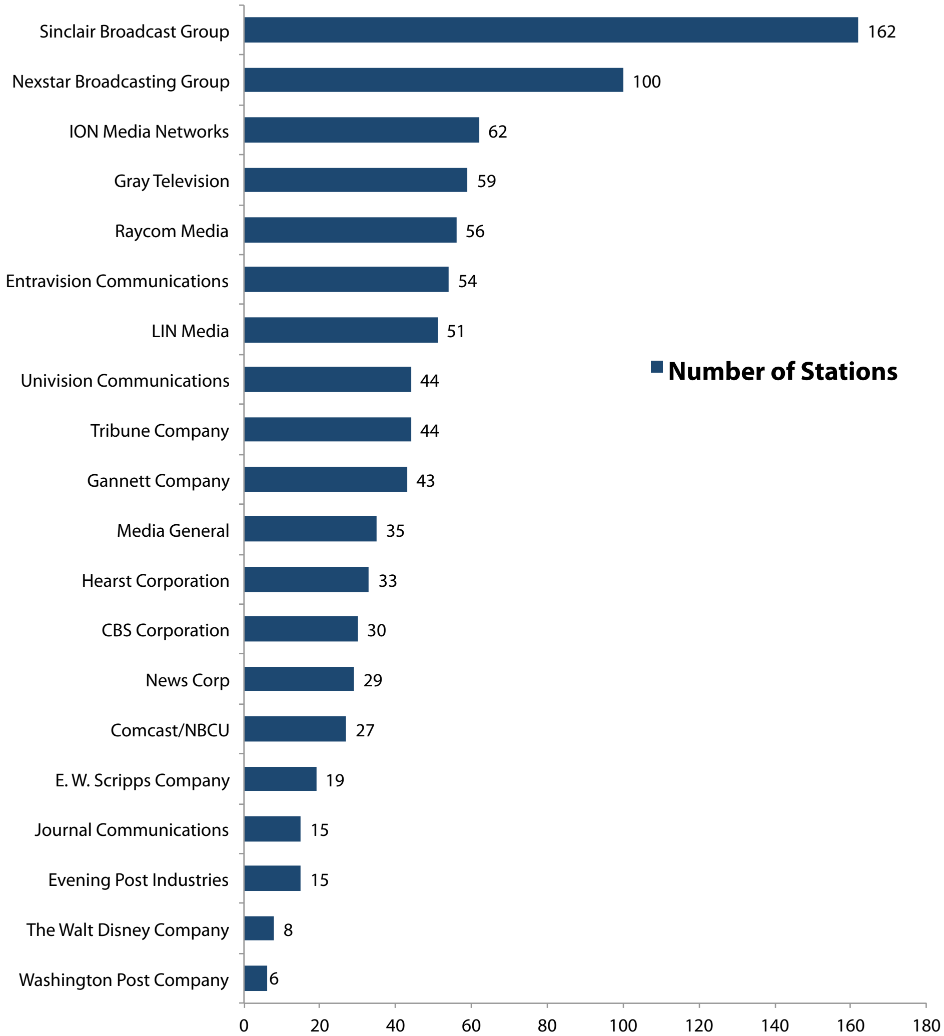
[18] "Sinclair Reports $0.73 Diluted Earnings Per Share in Fourth Quarter 2012; Declares $0.15 Quarterly Dividend per Share," Sinclair Broadcast Group release, Feb. 26, 2013.

[19] *See* "Media Trends: Actionable Metrics, Benchmarks and Projections for Major Media Sectors — 2012 Edition," SNL Kagan, Dec. 21, 2012, p. 5. ("In general, our projections continue to show that the expected trend of rising political spend and at least flat-core ad spend will produce sharp peaks and valleys in TV stations' even/odd-year growth patterns over time.")

Meet the Big 20: The Companies That Dominate Local TV

To better illustrate the consolidation engulfing local TV, we must first look at the industry's largest players. We examined the holdings, revenues and population reach of all local commercial TV broadcast station owners (assuming FCC approval of all pending transactions, and attributing stations operated under outsourcing agreements to the operating firm). Using this information, we have identified a group of firms we call the "Big 20." The Big 20 includes well-known companies like CBS and Comcast-NBCUniversal as well as mid-market giants like Nexstar and Sinclair.

Figure 1: The Big 20: Number of Stations



Source: Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Values include all full-power stations, including full-power satellite stations, but exclude all low-power translator stations. Ownership data reflect stations owned or operated as of Mar. 10, 2014, as well as all stations in pending deals.

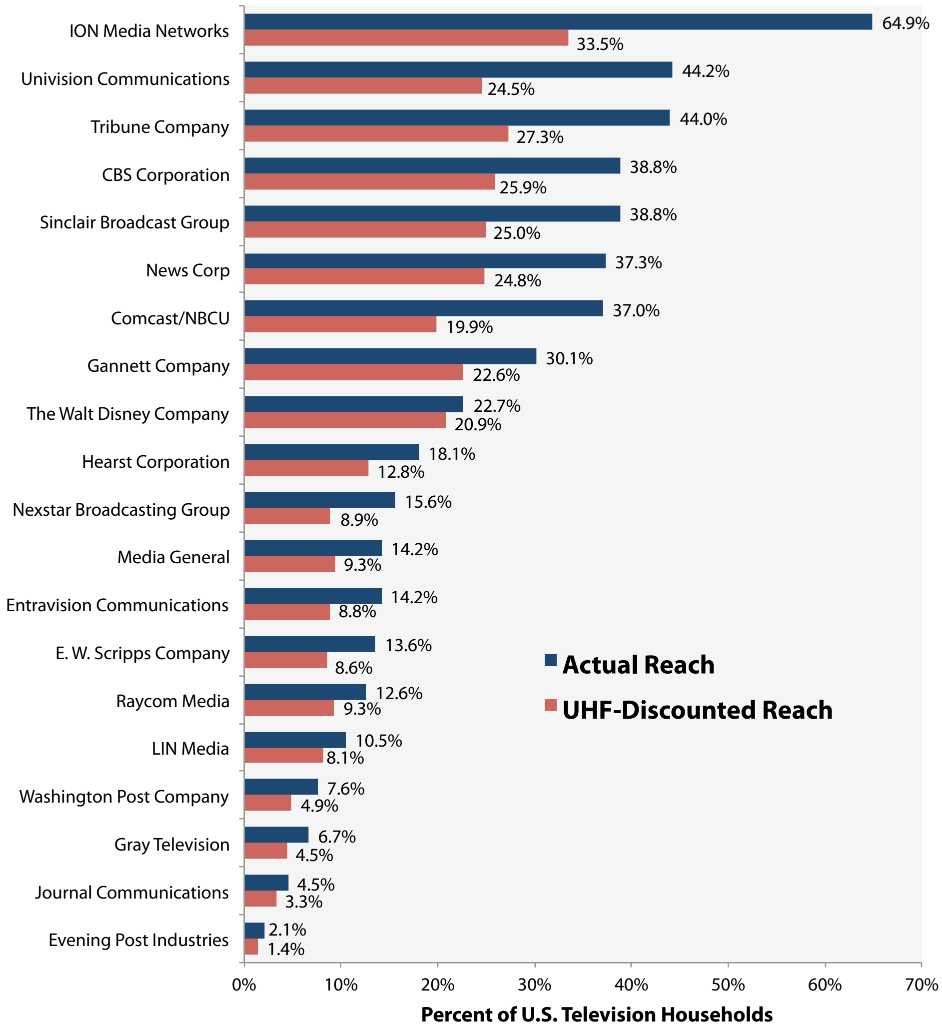
Figure 1 presents the number of stations each firm in the Big 20 owns. The range — from the Washington Post Company's six stations[20] to Sinclair's 162 stations — points to the different strategies each company has used. Companies like Disney and News Corporation 21st Century Fox (now called "21st Century Fox") focus on the

[20] We include the Washington Post Company in the Big 20 since its ad revenues make it the largest publicly traded local TV station owner not among the top 25 firms in national reach and/or number of stations. All firms other than the Washington Post Company were among the top 25 owners in two or more of the three metrics studied (holdings, revenues and reach).

biggest media markets, while companies like Nexstar and Sinclair build their businesses with far more stations but in smaller media markets.

Figure 2 presents the national reach of each of these firms, illustrating that a company can still have a substantial national reach even if it owns a relatively small number of stations — so long as those stations are in the most populated media markets. Indeed, both Sinclair and CBS reach just under 39 percent of the nation, yet Sinclair controls five times as many stations as CBS (162 vs. 30) in four times as many markets (78 vs. 18).

Figure 2: The Big 20: Percent of U.S. TV Homes Reached



Sources: Free Press research, Nielsen Media Research and SNL Kagan. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of Mar. 10, 2014, as well as all stations in pending deals. Population reach values are based on Nielsen's 2012–2013 TV household estimates.

Figure 2 highlights the differences in each firm's actual national reach versus its reach for the purposes of complying with the FCC's 39 percent national ownership cap. As we discuss in detail below, the outdated and now completely meaningless UHF discount means that companies like CBS, News Corp, Sinclair and Tribune technically could gobble up many more stations even though their actual reach is at or exceeds the 39 percent national cap Congress set in 2004.[21]

[21] There may be minor differences between the national reach some of these firms reported and what we present here. This is because our figures capture all stations, including those operated under outsourcing agreements (this, however, has a very

Most local commercial television stations are affiliated with a national network. Half a century ago, this meant affiliation with one of the "Big Three" networks: ABC, CBS or NBC. In the 1980s, Rupert Murdoch's entry into the U.S. market in a partnership with 20th Century Fox gave rise to the FOX network and the term "Big Four."

In 1995, Tribune and Time Warner started the WB Network and CBS launched UPN. Both networks quickly gained affiliates and had some successful programming (the WB had *Buffy the Vampire Slayer* and *Gilmore Girls* while UPN aired *Star Trek: Voyager* and *America's Next Top Model*). However, in 2006 Time Warner and CBS announced what amounted to a merger of the two networks. Both networks were shuttered and replaced with Time Warner and CBS' new, co-owned network: the CW.

That same year, News Corp formed MyNetworkTV, a network that provided a content partner for the former UPN affiliates left without a national network after the CW's launch. The term "Big Six" is often used to describe the Big Four networks along with UPN/WB (pre-2006) or CW/MyNetworkTV (post-2006).

While the mass media has traditionally ignored the Spanish-language market, the 1980s saw the rise of Telemundo and Univision, former independent broadcast chains that later transformed into national networks. NBCUniversal acquired Telemundo and its stations in 2002, and Univision remains an independent company.

Though there are other national networks (such as Ion, Me-TV and UniMás), the Big Eight networks discussed above are by far the largest in terms of number of affiliates. In addition, the Big Eight affiliates are the most likely to air some local content, with most ABC, CBS, FOX, NBC and Univision affiliates airing local news content.

To understand the impact of consolidation on viewpoint diversity, it's necessary to understand the relationship between affiliation and local news content. Just 13 companies control 85 percent of the ABC, CBS, FOX and NBC stations in the top 25 markets, which serve half of all Americans. In the biggest 100 markets (which reach 86 percent of the population), 18 companies control 77 percent of these Big Four network affiliates, the stations that produce most of the English-language local TV news content. Just three companies (Comcast/NBCU, Entravision and Univision) produce most of the Spanish-language local TV news aired in the U.S.

As we discuss in detail below, much of the recent growth the Big 20 companies experienced involves expansion in markets where the FCC rules prohibit these companies from acquiring new stations. Gannett Company, Nexstar Broadcast Group, Raycom Media, Sinclair Broadcast Group, Tribune Company and others are using outsourcing agreements to skirt the FCC's rules and establish near monopolies over local TV news production in markets across the country. As Figure 3 shows, covert consolidation is a significant tool for several of the Big 20 companies discussed in this report.[22]

small impact on the reach figures, since most outsourcing arrangements occur in markets where the operator already owns stations). We also count Class-A and low-power stations in markets where the stations are carried on local cable systems (this again has a very small impact, since very few of the Big 20 owners control low-power stations in markets where they do not also control one or more full-power stations).

[22] In this report, we track and discuss only outsourcing arrangements where one company controls the operation of another station such that the control confers *de facto* ownership on the operator. There are a number of so-called news-sharing arrangements where one station programs a portion of another station's news schedule, or where there is a pooling of news resources (such as journalists or studio equipment). These news-sharing arrangements do raise serious issues for the purposes of the FCC's ownership rules, but they are less blatant violations of these limitations.

Figure 3: The Big 20: Covert Consolidations

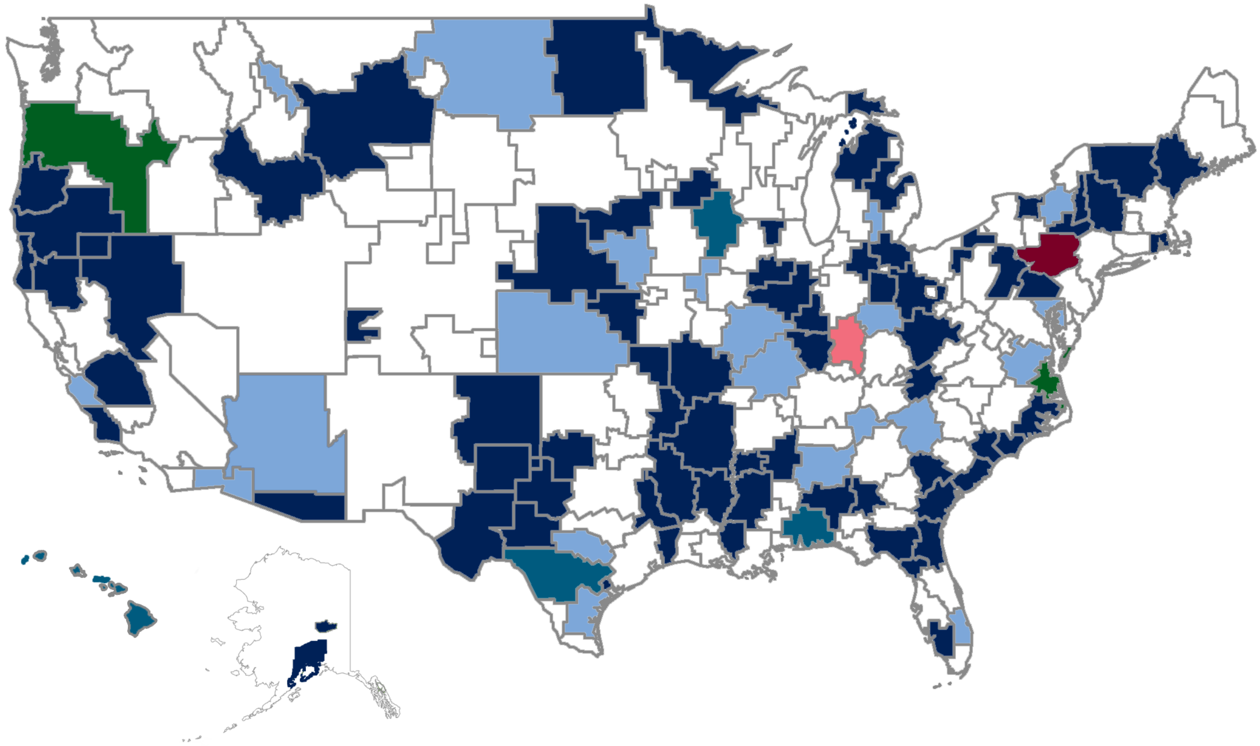
Company	Direct Owned and Operated Stations	Stations Operated via Marketing, Services, Sales and/or Operating Agreements	Notes
Sinclair Broadcast Group	115	47	41 of the 47 outsourced stations are licensed to companies that do not operate any of their stations (and all of these companies exclusively outsource to Sinclair)
Nexstar Broadcasting Group	65	35	33 of the 35 outsourced stations are licensed to two companies that do not operate any of their stations (and both of these companies exclusively outsource to Nexstar)
Raycom Media	43	13	11 of the 13 outsourced stations are licensed to two companies that do not operate any of their stations (and both of these companies exclusively outsource to Raycom)
LIN Media	42	9	All 9 of the outsourced stations are licensed to three companies that do not operate any of their stations (and all three companies exclusively outsource to LIN TV)
Entravision Communications	46	8	Six of the eight LMA/SSA stations are owned by Univision Communications
Gannett Company	41	2	Outsourced stations are in markets where Gannett owns a newspaper (Portland, Ore., and Louisville, Ky.)
Media General	32	4	ABC-FOX virtual duopoly in Albany, N.Y.; CBS-ABC-MyNetworkTV virtual triopoly in Lansing, Mich.; ABC-NBC virtual duopoly in Augusta, Ga.
Tribune Company	41	3	Outsourced stations are in markets where Tribune already owns daily newspapers (*Daily Press* in Newport News, Va.; *The Morning Call* in Allentown, Penn.)
Gray Television	52	7	Outsourced stationa are licensed to a former Gray Television executive; this arrangment allows Gray to control two top 4 stations in five markets

Sources: Company 10-K SEC filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014, as well as all stations in pending deals.

The use of operating agreements to skirt the FCC's media ownership rules is now a standard business practice. Before the FCC turned a blind eye to these evasions, small broadcasters and new entrants actually had a chance to participate in this industry, particularly in the medium- and smaller-sized markets. But now that companies like Sinclair and Nexstar are using these sneaky tactics to gobble up stations in these markets, the opportunities for other competitors are virtually non-existent.

Indeed, as Figure 4 shows, operating agreements are used to evade the FCC's ownership rules in nearly half of all U.S. media markets. More than 85 percent of these markets are outside the top-50 largest Designated Market Areas, and half are outside the top-100 DMAs.

Figure 4: Markets Where Covert-Consolidation Agreements Are Used to Evade FCC Rules



- Markets where operating agreement used to evade 8-voices rule and top-4 ranked rule (74)
- Markets where operating agreement used to evade 8-voices rule (21)
- Markets where operating agreement used to evade top-4 ranked rule (4)
- Markets where operating agreement used to evade newspaper-broadcast cross-ownership rule (2)
- Markets where operating agreement used to evade 8-voices rule and newspaper-broadcast cross-ownership rule (1)
- Markets where operating agreement used to evade 8-voices rule, top-4 ranked rule and newspaper-broadcast cross-ownership rule (1)

Sources: Company 10-K SEC filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014, as well as all stations in pending deals.

Sinclair Broadcast Group: Leading the Wave of Consolidation

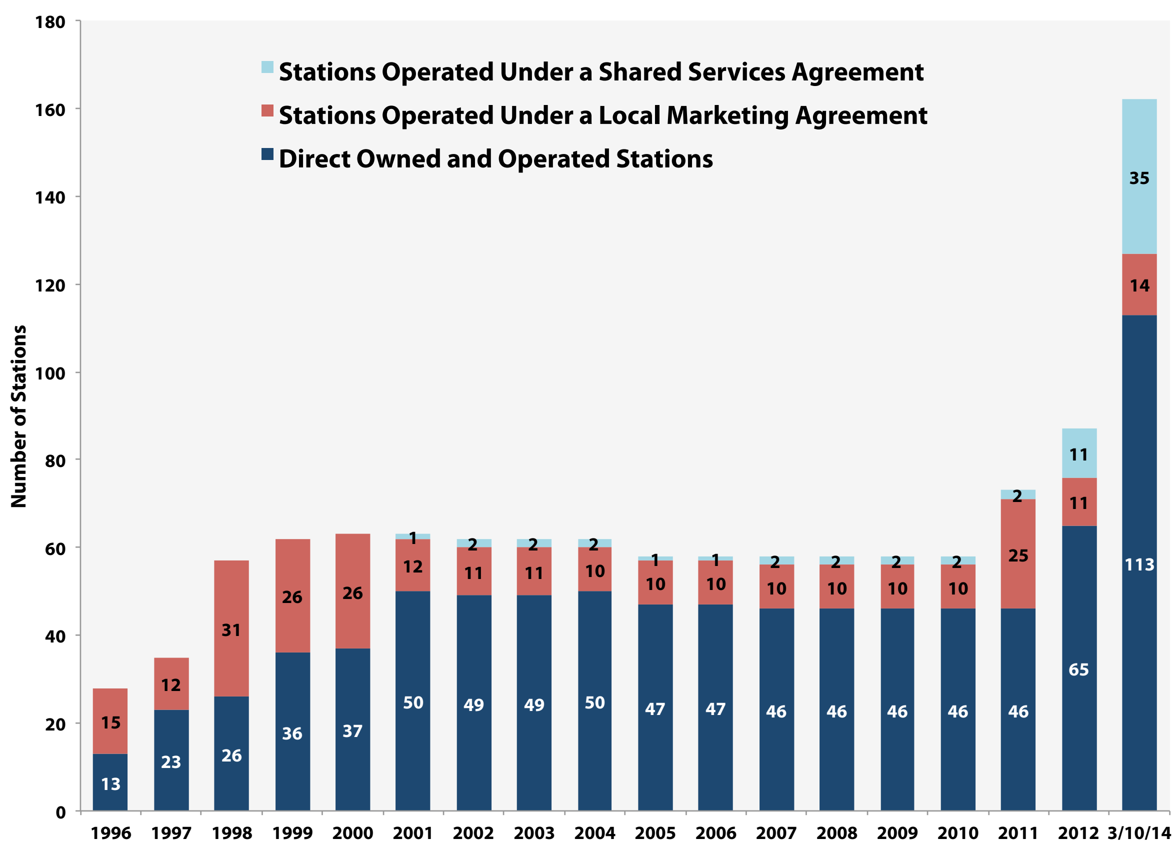
Though CBS, Disney, NBC and News Corp remain giants among their broadcast industry peers, these firms have not grown in recent years, though they have room to do so under the national ownership cap. These companies appear content to sit back and reap the high advertising and retransmission revenues from their O&O stations in the largest markets, while collecting a majority of the retransmission revenues their affiliates bring in throughout the rest of the country.

For the national network owners, the industry's new economics — governed by the rise in retransmission and reverse-retransmission fees — is a blessing. While the fiscal outlook for those who own and operate local stations is good, the profit margins the national networks can earn for simply licensing existing content are far better.

Thus, the changing media economics means a changing face of media consolidation. The national network owners that dominated prior periods of local TV market consolidation have given way to a number of smaller companies that have spent the past several years building the foundations of a new media empire.

Sitting atop this empire and leading this consolidation wave is Sinclair Broadcast Group.

Figure 5: Sinclair Stations (1996–2014)



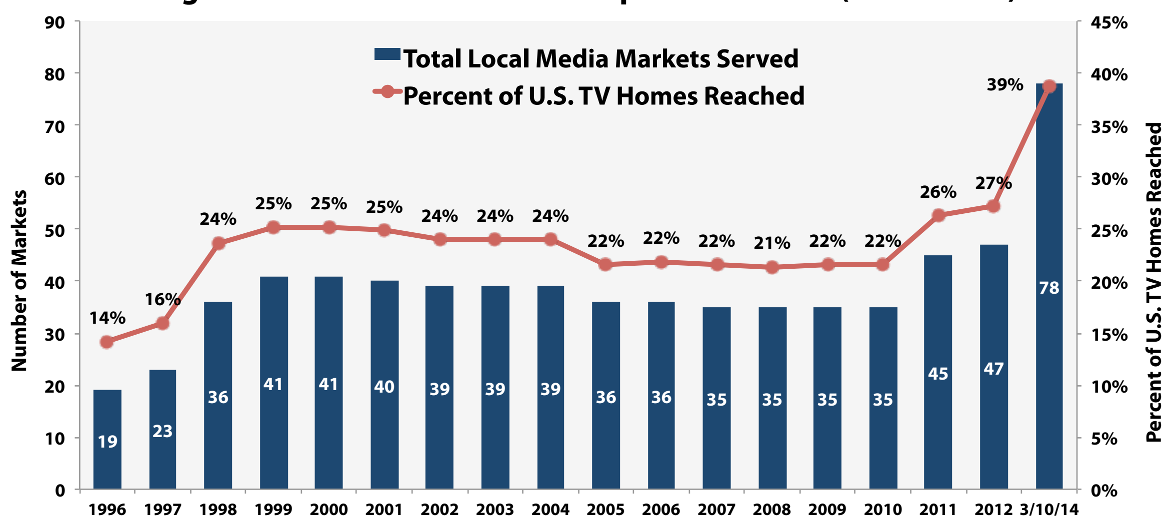
Sources: Sinclair 10-K filing, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014, as well as all stations in pending deals.

In 1991, Sinclair owned three stations and operated a fourth under a Local Marketing Agreement (LMA). By the end of 1996, Sinclair owned 13 stations and controlled another 15 via LMAs. After the FCC weakened its media ownership limits, Sinclair spent the next six years on a buying spree. In 2000, Sinclair owned 37 stations and used LMAs to control another 26. Taking advantage of the FCC's 1999 deregulation, it subsequently purchased half of those LMA stations (see Figure 5).

From 2002–2010, Sinclair's holdings remained flat (it had 62 owned or controlled stations in 2002, down to 58 at the end of 2010). But once the FCC made it clear that it would do nothing about covert-consolidation arrangements, Sinclair once again started snapping properties up. Over the past 30 months, Sinclair has announced or closed on deals that have increased its holdings from 58 to 162 owned or operated stations. Sinclair relied on Shared Services Agreements (SSAs) to secure many of these stations. At the end of 2011, Sinclair had used SSAs to control just two stations. That number now stands at 35 (it operates an additional 14 stations under Local Marketing Agreements).

In the past 30 months, Sinclair has increased its nationwide presence from 35 media markets to 78. This corresponds to a jump in its national reach from 22 percent of U.S. TV households to 38.8 percent (see Figure 6). This is just under the national cap of 39 percent. However, under the UHF discount, the FCC considers Sinclair's national reach to be just 25 percent. Unless the FCC scraps this outdated discount, Sinclair will have plenty more room to grow.

Figure 6: Sinclair Markets and Population Reach (1996–2014)



Sources: Sinclair 10-K filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014, as well as all stations in pending deals.

Sinclair's Early Years and the Invention of Covert Consolidation

Sinclair started off as a small independent broadcasting company. In 1971, Julian Sinclair Smith's Chesapeake Television Company launched WBFF, an independent TV station in Baltimore. Smith later launched two more independents (Pittsburgh's WPTT in 1978 and Columbus, Ohio's WTTE in 1984) and subsequently consolidated all three operations under the Sinclair Broadcast Group umbrella. In 1986, Sinclair affiliated WBFF and WTTE with the newly launched FOX network.

In 1990, Julian Sinclair Smith's son David took control of the company. One of his first moves was to push the boundaries of the law. At the time, FCC rules prohibited a single company from owning multiple stations in a single market. These rules were designed to promote local market competition and ensure that the maximum number of voices (i.e., owners) populated the public airwaves. The FCC's rules reflected the local nature of broadcast licenses, and implied that a local market could support a finite number of owners (due to the natural scarcity of the airwaves and the economic realities of the commercial broadcasting market).

But Sinclair is a business, and like most others, it views competition as bad for business.[23] So when WPGH (Pittsburgh's local FOX affiliate) went on the market in 1991, Sinclair decided to have its cake and eat it, too. It bought WPGH and "sold" WPTT's broadcast license (but not its non-license assets) to WPTT General Manager Eddie Edwards — a Sinclair employee — under very favorable terms.[24] As part of the deal, Edwards entered into an LMA with Sinclair, where WPGH would operate and program WPTT. Much of WPTT's programming moved to WPGH, and then WPTT began airing home-shopping content.[25]

The FCC did not bat an eye at this blatant evasion of its ownership rules.[26] So Sinclair got to work using this new tool to form "virtual" duopolies in other markets. In 1994, it acquired four stations from ABRY Communications, including Sinclair's chief rival in Baltimore, WNUV. To avoid violating the FCC's rules, Sinclair arranged for Edwards to "buy" WNUV's license, and for Sinclair to run the station under an LMA. But Edwards did not have the *legitimate* financing needed to fund these purchases. Thus begat Glencairn Ltd., a new company controlled on paper by Mr. Edwards but backed financially by Carolyn Smith, the mother of Sinclair's CEO.[27]

A Slap on the Wrist

By 1999, Sinclair owned 36 stations and ran another 26 under LMAs, half of which were with Glencairn. But Sinclair had gotten a little sloppy in its end run around the FCC's rules. In 1998, Sinclair, Glencairn and Sullivan Broadcast Holdings reached a deal where Sinclair would acquire five of Sullivan's stations (licenses and non-license assets). Meanwhile, Glencairn would purchase the licenses of another five stations located in markets where Sinclair already owned stations (as per usual, while Glencairn was the purchaser of the licenses, Sinclair bought the non-license assets).[28]

---

[23] This is a myopic viewpoint, since microeconomic theory and marketplace evidence suggests that in the long run increased competition among firms spurs greater innovation that leads to increased economic surplus. But no individual company would *prefer* heightened competition. As Sinclair tells investors in its boilerplate language on risk, its "television and radio stations compete for audience share and advertising revenue with other television and radio stations in their respective DMAs." Thus, any actions Sinclair takes, like operating or outright purchasing its competitors' stations, would by definition lessen the competition Sinclair might face. *See* Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year concluded on Dec. 31, 1996, Commission file number: 0-26076, Feb. 25, 1997 (*Sinclair 1996 10-K*).

[24] *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*).

[25] *See Sinclair 1996 10-K*, pp. 12–14 for the narrative on this and other early Sinclair LMAs.

[26] During the first few years of Sinclair's LMA with WPTT, it programmed all but a few overnight hours of the station's schedule. However, in 1999 the FCC finally tightened up its attribution rules, doing so only after it relaxed its multiple ownership rules to allow for duopolies in many markets. Under the current attribution rules, so long as any single entity programs less than 15 percent of a station's airtime, it is not considered an attributable owner for the purposes of the Commission's ownership rules. Under the 1999 Order, existing LMAs were temporarily grandfathered. *See* Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221 and 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, MMDocket No. 94-150, *Report and Order*, 14 FCC Rcd 12559 (1999).

[27] Carolyn Smith initially held 70 percent of Glencairn's equity, while Mr. Edwards held 100 percent of the voting shares. Over the years, Ms. Smith's share of the equity increased to 97 percent and Mr. Edwards' share decreased to 3 percent. Ms. Smith eventually bought out Mr. Edwards, and the equity was moved to a trust that benefited Sinclair CEO David Smith's children, while Carolyn Smith retained the entire voting share. *See Glencairn NAL.*

[28] The stations Glencairn initially agreed to purchase were WRGT (FOX) in Dayton, Ohio; WTAT (FOX) in Charleston, S.C.; WVAH (FOX) in Charleston, W.Va.; KOKH (FOX) in Oklahoma City; and W34BX in Bluefield, W.Va (a low-power translator for WVAH). However, at the time the deal was initially proposed, Sinclair owned or had agreements to purchase

Civil rights group Rainbow PUSH Coalition opposed the deal, arguing that Sinclair was the *de facto* owner of Glencairn. Rainbow's opposition raised enough red flags that the FCC couldn't simply rubberstamp the sale as it had with previous Sinclair-Glencairn transactions.

The first red flag Rainbow PUSH identified involved a separate transaction where Glencairn agreed to sell Sinclair five stations that Sinclair then operated under LMAs. The FCC's 1999 decision to allow companies to form duopolies in markets where there would remain at least eight independent owners (and where the combination did not involve a duopoly of two top-four ranked stations) prompted this sale.[29]

Free to abandon the LMA legal fiction in some of its markets, Sinclair began the process of acquiring the licenses of several Cunningham stations, including these first five.[30] But even though the market value for these five licenses was estimated to be between $90–220 million, Glencairn agreed to give them to Sinclair for a mere $8 million. What's more, Sinclair agreed to pay Glencairn with Sinclair stock instead of cash. You don't need an MBA to know that accepting a mere 3–8 percent of an asset's value is a bush-league business decision. Furthermore, that Glencairn would not only accept such a low payment, but accept it in the form of Sinclair stock, shows that Glencairn's financial health was tied directly to Sinclair's.

The second red flag Rainbow PUSH raised involved KOKH, the Oklahoma City FOX affiliate. Under the 1998 deal between Sullivan and Sinclair/Glencairn, Sullivan agreed to sell KOKH's license to Glencairn, and Glencairn agreed to let Sinclair run it under an LMA. But once the FCC relaxed its ownership rules in 1999, the deal was immediately changed so that Glencairn would walk away and allow Sinclair to outright purchase the station. And what did Glencairn get for being so gracious in letting Sinclair take the prize? Absolutely nothing. Either Eddie Edwards and Carolyn Smith were the worst businesspeople in the history of capitalism, or Glencairn was a shell company established to benefit Sinclair.

The third red flag Rainbow PUSH raised concerned the proposed transfer of Eddie Edwards' voting shares and his 3 percent equity share to Carolyn Smith, for which Edwards received a $1.5 million payment. Rainbow PUSH estimated that this *equity* stake alone could have been worth $3.68 million. But it was likely far higher considering that Edwards' equity stake consisted of 100 percent of the company's voting stock, which should have earned him a huge premium. This alone indicated who really called the shots at Glencairn. But the fact that Glencairn borrowed the full $1.5 million from Sinclair to pay Edwards proves that Glencairn was in no way financially independent.

There were many other red flags. The Sullivan/Glencairn deal was initially structured so that Sinclair would actually hold the promissory note that Glencairn would assume as consideration for its acquisition of the five stations, and the note also contained favorable terms like below-market interest rates. Rainbow PUSH also noted numerous advertisements and industry trade publications that referred to the Glencairn stations as Sinclair's stations.

But the biggest mistake Glencairn made involved the total price Mr. Edwards told the FCC his company was paying for the five Sullivan stations. Edwards first said that Glencairn would assume $80 million in debt as part of the transaction. A month later, he corrected himself, saying that the amount was actually $40.5 million. Edwards tried to explain away the discrepancy by saying he "relied on an employee to handle the task of determining the exact amount of Sullivan III station debt because he was busy with other Glencairn matters, such as the production of a local television program, management of Glencairn stations, and coordination of a golf and awards dinner."[31]

The FCC actually agreed with many of the charges Rainbow PUSH raised. "Sinclair," the FCC said, "exercised *de facto* control over Glencairn in violation of Section 310(d) of the Communications Act and the Commission's

---

WKEF (NBC) in Dayton, Ohio; WMMP (UPN) in Charleston, S.C.; WCHS (ABC) in Charleston, W.Va.; and KOCB (WB) in Oklahoma City.

[29] Indeed, promptly after the FCC decided in 1999 to allow duopolies, Sinclair exercised its purchasing option on 12 stations it then currently operated under LMAs.

[30] WVTV (WB), in Milwaukee, Wis.; WRDC (UPN) in Raleigh, N.C.; KRRT (WB) in San Antonio, Texas; WABM (UPN) in Birmingham, Ala.; and WFBC (independent) in Anderson, S.C.

[31] *See Glencairn NAL*, para. 8.

rules."[32] The FCC cited Mr. Edwards' ignorance of the total amount of debt his company was about to assume as part of its deal with Sullivan Broadcast Holdings as proof "he was not actively involved in the corporate management of Glencairn *with respect to these transactions*."[33]

The Commission also ruled that the financial structure of the Sullivan/Sinclair/Glencairn deal, where Sinclair would pay nearly the entire purchase price for these stations and Glencairn would obtain its stations at a small fraction of their value, indicated "that it was Sinclair, and not Edwards, that made the decision as to what stations Glencairn should acquire and at what price."[34]

The Commission couldn't help but notice that right after it relaxed its multiple ownership rules, Glencairn agreed to sell Sinclair stations at below-market rates, walk away from prior purchase agreements and allow Sinclair to take its place. On the latter, 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."[35]

These findings were damning, to say the least. The FCC's discovery that a Sinclair exercised illegal control over Glencairn should have been enough to unravel all of the Sinclair-Glencairn LMAs and shine a bright light on all of Sinclair's remaining outsourcing agreements, not to mention those that other broadcast chains used. But this is the FCC. So it instead decided to fine Sinclair $40,000 and approve all of the station sales to both Sinclair and Glencairn. In 2001, Sinclair brought in $710 million in revenues, meaning this fine cost about 0.006 percent of the company's revenues that year, or what it earned from about a half-hour's worth of commercials on its many stations.

How did the FCC defend this indefensible and illogical action? It simply stated that it had evidence only that Sinclair exercised illegal control over Glencairn with respect to the Sullivan/Sinclair/Glencairn deal. The FCC could have conducted a detailed investigation, compelling Sinclair and Glencairn to hand over internal communications and other records that could serve as the evidence the FCC said it did not have. But it didn't. Given the findings of illegal action in the Sullivan deal, the Commission could have also denied these specific transfers and any future deals involving Sinclair and Glencairn. But it chose not to, stating that Rainbow PUSH and other 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."[36]

Yes, that's right. According to the FCC, even though Sinclair illegally controlled Glencairn when it was nominally run by an unrelated person, the replacement of Eddie Edwards with the Sinclair CEO's elderly mother would put the arrangement on the up and up.

Sinclair's New and Improved Strategy for Dodging FCC Rules

The FCC sent a clear message to Sinclair and its industry peers with its 2001 decision in the Glencairn case. And this message was: We don't care about enforcing our rules.

So Sinclair plowed ahead, finding new ways to circumvent the law. 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.[37] He also previewed a new circumvention

---

[32] *See Glencairn NAL*, para. 23.

[33] *Id*. Emphasis added, as it's important to note that the FCC's decision involved only the Sinclair-Glencairn relationship for the Sullivan transactions, and not the numerous other stations that Sinclair operated for Glencairn.

[34] *See Glencairn NAL*, para. 24.

[35] *See Glencairn NAL*, para. 26.

[36] *See Glencairn NAL*, para. 31.

[37] *See* Sinclair Broadcast Group, 2001 Annual Report to Shareholders, Dec. 31, 2011. (CEO David Smith writes: "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

tool — which he called "outsourcing agreements." These agreements— now often called Shared Services Agreements, or SSAs — have replaced LMAs as the industry's preferred method of covert consolidation.[38]

Sinclair began the new century by reorganizing Glencairn at the end of 2001. Eddie Edwards was out and David Smith's mother was in. And perhaps because of Glencairn's status as a confirmed shell company and lawbreaker, Sinclair changed Glencairn's name to Cunningham Broadcasting Corporation. The following year, perhaps anticipating the new FCC's desire to weaken its broadcast ownership rules,[39] Sinclair moved to acquire Cunningham outright.[40] But the Commission denied this request, as the proposed transfers violated FCC rules in every single local market involved in the deal.[41] As soon as the FCC gutted its rules in mid-2003, Sinclair once again filed the paperwork to acquire Cunningham. The mere fact that Cunningham considered Sinclair its only viable suitor demonstrated that it was not an independent entity.

But the evidence that Cunningham is a shell corporation didn't stop there. In 2005, the voting and equity interests of Cunningham Broadcasting (formerly Glencairn) were transferred to a trust that benefited David Smith and his brothers, with their mother, Carolyn Smith, initially acting as the sole vote holder. The terms of Carolyn Smith's trust decreed that the voting shares be transferred to David Smith and his brothers upon her death. However, because the Smith brothers all hold attributable interests in Sinclair, this transfer of interest would run afoul of FCC ownership rules. Thus when Carolyn Smith died in 2012, Sinclair filed FCC applications to transfer the voting shares to Michael Anderson, a senior adviser at the New York law firm Waller Capital Partners. Anderson was also appointed trustee of the legal instrument that now controls Cunningham's equity (a trust that benefits Carolyn Smith's grandchildren).

The Smith brothers and Anderson also agreed to enter into an option agreement that grants the Smith brothers the option to purchase all of Anderson's voting shares. This agreement also gives Anderson the option of forcing the Smith brothers to purchase these voting shares on a pro rata basis. According to the agreement, Anderson is purchasing the Cunningham voting shares from the Smith brothers for a mere $405,640, even though these stations brought in more than $100 million in revenues in 2012.

Furthermore, FCC documents list Cunningham as a Baltimore-based firm (located at the same address as Sinclair's Baltimore station WBFF, which is where Cunningham's WNUV also operates from), even though Anderson works in New York and lives in Summit, N.J.

'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.")

[38] Sinclair's SSA with Tallahassee's WXTL (ABC) was the first any company had formed. It ran from 2001–2006, when new owners Calikins Media dissolved it and started their own newscast, the first in the market in HD.

[39] In his December 2001 note to investors, Sinclair CEO David Smith wrote: "For television broadcasters, the year 2001 will be remembered for many different reasons. It was the year of the terrorist attacks on America, a national economy in recession, and increased competition for national advertising dollars. ... 2002 is expected to also reserve its place in history for a very different reason than 2001. This will likely be the year remembered for deregulation of the television ownership rules and the unleashing of the industry to compete on a level playing field with other forms of media."

[40] *See, e.g.,* FCC Application # BALCT–20020718ABH, July 2, 2002.

[41] *See* Letter from Media Bureau to Sinclair in FCC Application # BALCT—20020718ABH, Sept. 13, 2002. ("Because Sinclair's ownership of Cunningham's stations would not comply with the television duopoly rule, we dismiss the transfer of control applications as defective under Section 73.3566 of the Rules. This dismissal is without prejudice to re-filing should the Commission's rules change. Accordingly, in view of the foregoing, the applications for transfer of control of WTTE (TV), Columbus, Ohio; WNUV (TV), Baltimore, Md.; WRGT (TV), Dayton, Ohio; WTAT (TV), Charleston, S.C.; WVAH (TV), Charleston, West Va.; ARE DISMISSED.") The FCC had previously denied Sinclair's request to acquire Cunningham's other station WBSC (then WFBC) in the December 2001 Sullivan decision. *See Glencairn NAL*, para. 36.

And Sinclair — with the FCC looking the other way — continues to use the same shady tactics that landed it in trouble in the Glencairn case. Sinclair is still financing its shell companies' purchases of stations.[42] And Sinclair, not its shells, is on the hook financially if any of these deals should fail to close.[43]

Also, even though the FCC found that Glencairn's willingness to walk away from station deals to the benefit of Sinclair was evidence of illegal control, Sinclair and Cunningham continue this practice. Sinclair entered the El Paso market earlier this year when it acquired Cox Enterprise's local FOX affiliate, KFOX. One month after this deal was announced, Sinclair entered into an agreement with Titan Broadcasting to purchase KDBC, El Paso's CBS affiliate. However, the FCC's rules prohibit a single company from owning two stations ranked in the top four of Nielsen's ratings, and the top four are usually the major network affiliates. So Cunningham stepped in as the purchaser of KDBC, with Sinclair operating the station under an outsourcing agreement.

The FCC approved Cunningham's transfer application on July 13. But just one week later, Sinclair exercised its purchase-option agreement, seeking to acquire the station outright. In doing so, Sinclair cited the most recent Nielsen ratings, which were released in June. These showed KFOX was in fact El Paso's sixth-ranked station, making the CBS-FOX duopoly legal under FCC rules.[44]

Sinclair's exercise option for KDBC was $21 million, the same exact price Cunningham paid for the station.[45] This is yet more proof that Cunningham is not a truly independent company; it exists solely to serve Sinclair.

Money for Nothing

Indeed, there's no difference between Sinclair and any of its sidecar companies; for evidence, consider that Sinclair is the sole financial beneficiary of these stations' profits and is also on the hook for any losses. The named owners in these arrangements earn little more than consulting fees despite owning all of the voting shares in supposedly independent companies.

For example, Deerfield's SSA for WHP-TV requires that it pay Sinclair $11.6 million in the first year, plus an undefined monthly performance bonus, for a station that SNL Kagan estimates earned just $12.6 million in advertising revenues in 2012.[46] While a million left over might not seem so shabby at first, consider that Sinclair's *initial* 92 percent fee here does not leave much capital for Deerfield to purchase or produce programming, since the FCC's rules mean that Sinclair can't program more than 15 percent of the weekly airtime on stations it does not own.

Deerfield's initial cut appears even less impressive when you consider that the terms of the Joint Sales Agreement (JSA) require that it use the remaining station revenues to cover other expenses like utilities, salaries for two employees (the station manager and one other unnamed position), FCC-related legal expenses, property taxes,

---

[42] For example, Sinclair is the guarantor of all of Deerfield's debt (Deerfield is the named owner of 11 stations that Sinclair controls pursuant to outsourcing agreements). *See* Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 000-26076, March 12, 2013.

[43] In many of its recent deals where Sinclair uses Cunningham, Deerfield or Howard Stirk Holdings to purchase licenses it is not legally allowed to control, Sinclair is required to fund the purchase price or find an alternative buyer should the deals fail to close. *See* Sinclair Broadcast Group, Inc., Quarterly Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the quarterly period ended March 31, 2012, Commission file number: 000-26076, May 7, 2013. ("In April 2013, Cunningham entered into an agreement to purchase the stock of TTBG El Paso OpCo, LLC, the owner of KDBC-TV in El Paso, Texas for $21.0 million, before any working capital adjustments, subject to FCC approval and customary closing conditions. Pursuant to the agreement, if Cunningham is unable to close on the purchase, we will be required to fund the purchase price or assign the rights to another party.").

[44] *See* FCC Application #BTCCDT–20130422ADR.

[45] *Id. See also* Equity Purchase Agreement by and between TTBG LLS and Sinclair Broadcast Group, Inc., April 8, 2013.

[46] *See* Shared Services Agreement, Attachment 13, FCC Application # BALCDT–20130809ADF, Aug. 9, 2013.

finance payments, insurance premiums and music-rights payments.[47] These same high service fees are found in Sinclair's arrangements with its other sidecar companies.[48]

But these deals don't leave Deerfield and the other station "owners" in the red. These JSAs stipulate that Sinclair is on the hook for any costs that exceed these stations' revenues — and nearly all of these costs come in the form of sky-high fees paid to Sinclair. So in other words, it appears that these outsourcing agreements guarantee that Sinclair keep 100 percent of the profits, with the nominal license holders functioning as consultants on retainer. This is exactly as it would be if Sinclair owned these stations outright. [49]Other Shared Services Agreements between companies that are not as intertwined as Sinclair and its sidecar companies have far lower fee structures.[50]

Thus, the nominal owners in these SSAs are getting money for nothing. They're not running these stations — Sinclair is. But as far as the FCC is concerned, Sinclair doesn't own these stations that are generating nearly $200 million in revenue for Sinclair — and no one else.

The SEC Doesn't Play the FCC's Shell Games

Other than the FCC, no one — not the SEC, not Sinclair's business partners,[51] not even Sinclair itself (unless it's speaking to the FCC) bothers to pretend that these LMA and SSA stations aren't under Sinclair's *de facto* control.

In all of Sinclair's filings with the SEC, Sinclair refers to the Cunningham stations (and all other stations it runs pursuant to LMAs and SSAs) as "*our* stations."[52] In the case of Cunningham (named owner of 13 Sinclair-operated stations), Deerfield (named owner of 13 Sinclair-operated stations), and the Armstrong Williams-fronted Howard Stirk Holdings (named owner of three Sinclair-operated stations), Sinclair refers to these firms as its "sidecar companies."[53]

But this is not simply shorthand language used to simplify the discussion of Sinclair's business dealings. No, under Generally Accepted Accounting Principles and SEC rules, there is no difference between Sinclair, Cunningham, Deerfield, Howard Stirk or most of the other companies that are named owners of Sinclair-operated stations; the law considers them to be one company. The SEC considers these companies to be Sinclair's Variable Interest

---

[47] *See* Joint Sales Agreement, Attachment 13, FCC Application # BALCDT–20130809ADF, Aug. 9, 2013.

[48] Under the Shared Services Agreement between Sinclair and Howard Stirk for WMMP, Howard Stirk is required to pay Sinclair $1.85 million in the first year alone. SNL Kagan Estimates that this station's net ad revenues were $2.8 million in 2012. That leaves $1 million to pay for programming and other expenses that Sinclair does not cover under the outsourcing agreement. If these expenses plus the SSA fee exceed the station's revenues, Sinclair covers the excess amount. In other words, Sinclair is likely to keep 100 percent of the station's profits. *See* Shared Services Agreement and Joint Sales Agreement, Attachment 13, FCC Application # BALCDT–20130809ADG, Aug. 9, 2013.

[49] *Id.* at Schedule 3.1, para. 2.

[50]*See, e.g.,* BALCT–20071105AEB (45 percent); BALCDT–20121129BGX (40 percent). Many outsourcing, sales and marketing agreements are never filed with the FCC, while others redact the terms of compensation. If the FCC truly wishes to determine whether these arrangements comply with the letter and spirit of its rules, it will need to require full disclosure of these agreements and their terms.

[51] For example, Nexstar Broadcasting Group operates WYZZ, the Cunningham-owned FOX affiliate in Peoria, Ill., pursuant to an SSA. But in Nexstar's official SEC filings, it describes WYZZ as a station "owned by Sinclair Broadcast Group, Inc." There is no mention of Cunningham at all. *See* Nexstar Broadcasting Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 000-50478, March 15, 2013.

[52] *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 ended Dec. 31, 2002, Commission file number: 000-26076, Feb. 28, 2003 ("We currently own, provide programming and operating services pursuant to LMAs or provide sales services to 62 television stations in 39 markets and for purposes of this report, these 62 stations are referred to as "our" stations or are similarly designated.")

[53] *See, e.g.,* Comments of David B. Amy, CFO, executive VP and head of investor relations, Sinclair Broadcast Group, Inc. (SBGI) Acquisition of Barrington Broadcasting Group, LLC by Sinclair Broadcast Group, Inc. Call, March 1, 2013. ("In addition, license assets of five stations will be purchased by our sidecar companies: Deerfield Media, Cunningham Broadcasting, and a newly formed minority-controlled entity owned by nationally known commentator Armstrong Williams.")

Entities (VIEs), since Sinclair has the power to direct the sidecar companies' activities that most significantly impact its economic performance, and Sinclair is obligated to absorb the losses and receive the profits that are significant to these companies.[54]

So we have one set of rules for the FCC and another set of rules for the SEC. It's clear that the SEC's attribution rules reflect reality, while the FCC's approach reflects a politically useful fantasy.

It shouldn't take a lawyer (or even five FCC commissioners) to recognize this farce. Sinclair owns all the non-license assets of the stations it runs under LMAs and SSAs. Sinclair houses the operations of these stations in its own facilities (and Cunningham's "corporate headquarters" are located in a Sinclair-owned station). Sinclair sells all the ad time for these stations. Sinclair is paid the overwhelming majority of revenues these stations earn. Sinclair produces all local content these stations air. These owners in name all have agreements with Sinclair that only it can purchase these stations. And the FCC has already found Sinclair to have illegally controlled its initial and largest partner.

Yet in the FCC's eyes, these firms — which have no business relationships with any other broadcasters other than Sinclair — are completely independent companies that compete against Sinclair, and are good stewards of the public airwaves to boot.

Sinclair benefits from the FCC's apathy. In 2013 alone, Sinclair announced deals to acquire 74 new stations, with 24 of these going to its shell companies in markets where the FCC rules would otherwise prohibit Sinclair from owning two or more stations.

Free Press has challenged a number of these deals, primarily on the basis that Sinclair's use of shell companies violates the FCC's multiple ownership rules. But these deals and the Sinclair-led wave of consolidation are also bad for competition and localism, allegedly two of the FCC's top priorities.

Indeed, Sinclair has admitted that driving small local owners out of the market was a company goal. When it announced its deal with Barrington Broadcasting, Sinclair's CEO made it clear that consolidation will render the small local broadcast owner extinct.

---

[54] *See* Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 000-26076, March 12, 2013. ("In determining whether we are the primary beneficiary of a VIE for financial reporting purposes, we consider whether we have the power to direct the activities of the VIE that most significantly impact the economic performance of the VIE and whether we have the obligation to absorb losses or the right to receive returns that would be significant to the VIE. We consolidate VIEs when we are the primary beneficiary. The assets of each of our consolidated VIEs can only be used to settle the obligations of the VIE. All the liabilities, including debt held by our VIEs, are non-recourse to us except for Deerfield Media, Inc.'s (Deerfield) debt which we guarantee. ... We own the majority of the non-license assets of the Cunningham stations and our Bank Credit Agreement contains certain default provisions whereby insolvency of Cunningham would cause an event of default under our Bank Credit Agreement. We have determined that the Cunningham stations are VIEs and that based on the terms of the agreements, the significance of our investment in the stations and the cross-default provisions with our Bank Credit Agreement, we are the primary beneficiary of the variable interests because, subject to the ultimate control of the licensees, we have the power to direct the activities which significantly impact the economic performance of the VIEs through the sales and managerial services we provide and we absorb losses and returns that would be considered significant to Cunningham. ... We own the majority of the non-license assets of the Deerfield stations and we have also guaranteed the debt of Deerfield. Additionally, there is a lease in place whereby Deerfield leases assets owned by us in order to perform its duties under FCC rules. We have determined that the Deerfield stations are VIEs and that based on the terms of the agreements, the significance of our investment in the stations and our guarantee of Deerfield's debt, we are the primary beneficiary of the variable interests because, subject to the ultimate control of the licensees, we have the power to direct the activities which significantly impact the economic performance of the VIEs through the sales and managerial services we provide and we absorb losses and returns that would be considered significant to Deerfield. ... We have outsourcing agreements with certain other license owners, under which we provide certain non-programming-related sales, operational and administrative services. We pay a fee to the license owners based on a percentage of broadcast cash flow and we reimburse all operating expenses. We also have a purchase option to buy the License Assets. We have determined that the License Assets of these stations are VIEs.")

"When you look at a company of our scale," David D. Smith said, "when it comes to buying programming and doing things of that nature, I think we clearly have an advantage in terms of any market that we're in, and I think that gives us an advantage from the standpoint of looking at one-off operators or two-off or three-off, generally small operators. And my sense is that over the long term it's going to be somewhat difficult for small broadcasters to keep up given the competitive landscape out there ... *and I think that's the precise point*."[55]

Gannett, Media General, Nexstar and Tribune: Riding the Wave of Consolidation

Sinclair started the current wave of consolidation, but several other companies have come along for the ride. Firms like Gannett, Media General, Nexstar and Tribune have collectively gobbled up billions in TV assets over the past year, and there is likely more consolidation to come.

Gannett Company: A Quick Study in Covert Consolidation

Gannett is the nation's largest newspaper-publishing company, and one of the oldest. In the late 1970s, it entered the TV business through its acquisition of Combined Communications Corp. and its 17 stations. In the years that followed, Gannett was content to sit on the sidelines while others made major deals. From 1998–2012, Gannett's broadcast portfolio barely changed. The only major broadcasting deals Gannett conducted over the past 15 years were the formation of duopolies in the Atlanta, Denver and Jacksonville, Fla., markets.

But now Gannett is snapping up media properties. In June 2013, Gannett announced its acquisition of Belo TV's 20 full-power stations, in a deal valued at $2.2 billion. This deal, which was finalized at the end of 2013, almost doubled Gannett's broadcast portfolio (in terms of stations, markets and reach).

Gannett already owns newspapers in several of Belo's former markets (Phoenix and Tucson, Ariz.; Portland, Ore.; and Louisville, Ky.), and it owns the NBC affiliate in St. Louis, where Belo owned the local CBS affiliate. Gannett's intended station purchases in the first four of these markets ran afoul of the FCC's rule prohibiting a single owner from controlling a broadcast station and a daily newspaper in the same local market. Furthermore, the FCC's prohibition on joint ownership of two top-four stations should have prevented Gannett from taking over the St. Louis station.

But instead of divesting these stations to a legitimate third party, Gannett took a page from Sinclair's playbook by transferring the stations to two newly formed shell companies. As the deal was initially structured, Gannett intended Sander Media to pick up Belo's Tucson FOX affiliate, KMSB.[56] Sander was also to acquire Belo's Phoenix stations, KASW (CW) and KTVK (independent); the Portland station (KGW-TV, NBC); and the Louisville ABC affiliate, KHAS. Sander Media's named owner is Jack Sander, a former Belo executive. Gannett originally intended to run the Phoenix, Portland and Louisville stations under SSAs, while the Tucson station was to remain part of Raycom's "virtual triopoly" (i.e., Raycom operates three stations in this market but nominally owns only one).[57]

---

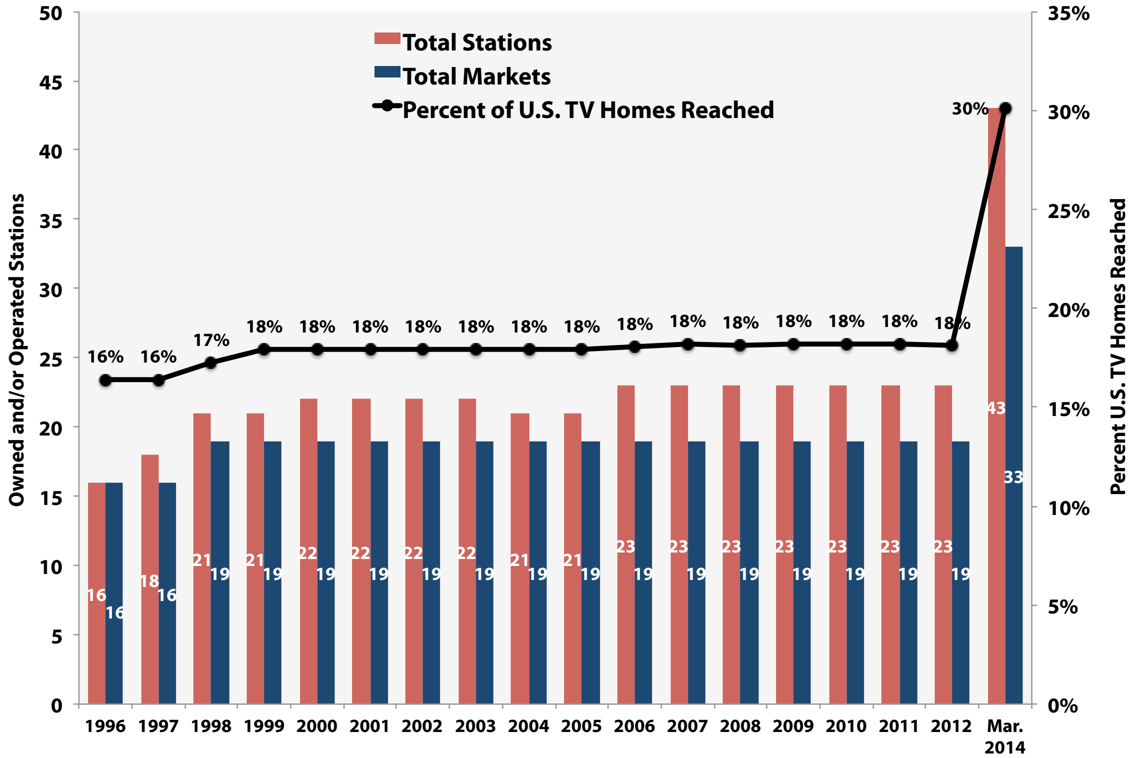
[55] *See* Comments of Chairman, President and Chief Executive Officer David D. Smith, Sinclair Broadcast Group, Inc. (SBGI) Acquisition of Barrington Broadcasting Group, LLC by Sinclair Broadcast Group, Inc. Call, March 1, 2013 (emphasis added).

[56] Sander cannot legally acquire both Belo stations in the Tucson market since only seven independent voices would remain after the transfer. (Belo had a waiver for the Tucson duopoly.) Thus Gannett has arranged for Tucker Operating Company to acquire KTTU, Tucson's MyNetworkTV affiliate. Tucker Operating Company is nominally owned by Ben Tucker, Fisher Communication's former CEO.

[57] After Belo and Raycom established the virtual triopoly, KMSB anchor Lou Raguse told viewers that "Beginning Feb. 1, Raycom will produce this newscast on Fox 11 as well as a two-hour morning newscast. For right now, it means that all the news, sports, engineering and production people here at Fox 11 are out of a job by that date."

Gannett and its partners claimed these deals were perfectly legitimate. They told the FCC that the named owners program 85 percent of the airtime on these stations. But the parent company in these arrangements owns all the assets, controls the purse strings, reaps all or nearly all of the financial benefits,[58] and programs all of the news hours — the most important part of the schedule in terms of both finances and viewpoint diversity.

Figure 7: Gannett Stations, Market and Reach (1996–2014)



Sources: Gannett 10-K filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of Sept. 25, 2013, as well as all stations in pending deals.

Free Press challenged these license transfers at the FCC. The agency and the Department of Justice stepped in to stop one aspect of the deal: the formation of a virtual top-four duopoly in the St. Louis market. Given the government's opposition, Gannett found a new buyer for the St. Louis and Phoenix stations (Meredith Corporation). That a third-party buyer stepped up so quickly to purchase the divested stations shows that enforcement of the FCC's rules can maximize the number of independent local owners.

Media General: Doubling Up

Media General was once a newspaper and broadcast company — most notably the owner of the *Tampa Tribune* and local NBC affiliate WFLA — and perhaps the strongest advocate for gutting the FCC's newspaper/broadcast cross-ownership rule. But in 2012, the company got out of the newspaper business altogether, selling most of its newspaper assets to Warren Buffett's Berkshire Hathaway Incorporated.

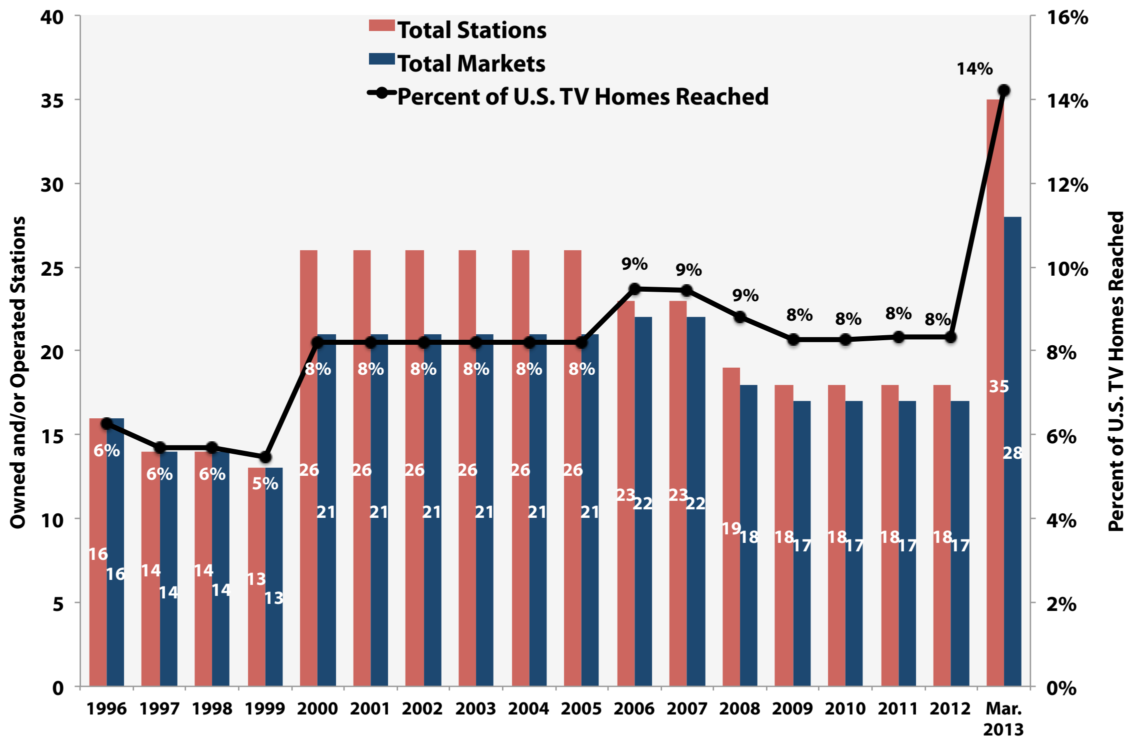
Media General actually shrank its broadcast holdings by 30 percent from 2005 to 2009. But now it's returned to the broadcast business in a big way: In June, Media General announced its buyout of Young Broadcasting, a deal that closed in November 2013. The nearly $700 million deal involved 12 owned-and-operated stations and another three

[58] While some of the SSAs for these stations disclose the service fees the nominal owners will pay Gannett (or Raycom), the financial terms of the management agreements are all redacted. However, given the terms contained in similar sidecar arrangements, it's highly likely that Gannett (and Raycom) reap most benefits of these arrangements. This is why the SEC considers these companies VIEs and not truly independent companies.

stations that Young operates pursuant to outsourcing agreements. The deal nearly doubled the number of Media General stations and its national reach (see Figure 8).

These outsourcing agreements give Media General a virtual duopoly in the Albany, N.Y., market (ABC affiliate WTEN and FOX affiliate WXXA) and a virtual triopoly in Lansing, Mich. (ABC affiliate WLAJ, CBS affiliate WLNS and MyNetworkTV affiliate WHTV).

Figure 8: Media General Stations, Market and Reach (1996–2014)



Sources: Media General 10-K filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014.

Wall Street investors are embracing Media General's refocus on broadcasting. The company's stock price has increased nearly 500 percent in the past two years. This investor enthusiasm — and the company's improved balance sheet — means Media General's acquisition of Young Broadcasting may be just the beginning. Even with the addition of the Young stations, Media General reaches only 14 percent of the nation's TV homes (9 percent under the UHF discount). Furthermore, Media General controls more than one station in only three of its 28 markets. Thus the company will likely try to maximize its profits by expanding its use of outsourcing agreements in markets where it already owns major network affiliates.

Nexstar: The SSA King

Nexstar may not be a household name, but it's built a mini empire in the nation's small- to mid-sized media markets. Nexstar got its start in 1996 when, shortly after selling most of its broadcast portfolio to Sinclair, ABRY Partners backed industry veteran Perry Sook's purchase of WYOU, Scranton, Penn.'s ABC affiliate.[59] From this purchase, Nexstar was born.

Though Sinclair invented outsourcing agreements, Nexstar was the first company to realize their full potential. Sook set up Mission Broadcasting as a shell company to help Nexstar evade FCC rules and form duopolies in markets that already had very few independent voices.[60] This strategy helped grow Nexstar from a single station in 1996 to 100 stations in 53 markets as of March 2014 (see Figure 9).

Nexstar's portfolio includes 35 stations operated under SSAs, 31 of which are owned by Mission. Though Mission remains Nexstar's primary shell company, it uses another shell — Rocky Creek Communications —to allow it to form triopolies in certain markets.[61]

There are many similarities between how Nexstar and Sinclair use shell companies. Nexstar runs all of Mission's stations. Nexstar guarantees all of Mission's debt.[62] Nexstar is considered the owner of Mission and all of its assets — *including its FCC licenses* — under Generally Accepted Accounting Principles and SEC rules.[63] Mission sends all of its revenues to Nexstar, and Nexstar covers any losses.[64] Thus, Mission's "owners" receive only a nominal fee for their participation in this shell game, while Nexstar's owners are lavishly compensated.[65] And as with Sinclair's shell Cunningham, Mission's founding CEO had another profession — in this case, as a preacher at an Ohio church.[66]

---

[59] Harry A. Jessell, "Perry Sook: Broadcasting's Action Figure," *TVNewsCheck*, Sept. 9, 2011.

[60] *Id.* ("Mission Broadcasting, the company [Sook] set up long ago to be his virtual duopoly partner in markets where FCC rules prohibit real duopolies.")

[61] As part of its deal to buy out Communications Corporation of America and its 25 FCC licenses, Nexstar spun off some of these stations to a new entity, Rocky Creek Communications, in two specific markets where Nexstar will now run three stations. In the Evansville, Ind., market Nexstar runs WEHT (ABC; Nexstar-owned), WEVV (CBS; Rocky Creek-owned) and WTVW (Me-TV, Mission-owned). In Shreveport, La., Nexstar runs KTAL (NBC, Nexstar-owned), KMSS (FOX, Mission-owned) and KSHV (MyNetworkTV, Rocky Creek-owned).

[62] *See* Nexstar Broadcasting, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 000-50478, March 15, 2013 (*Nexstar 2012 10-K*).

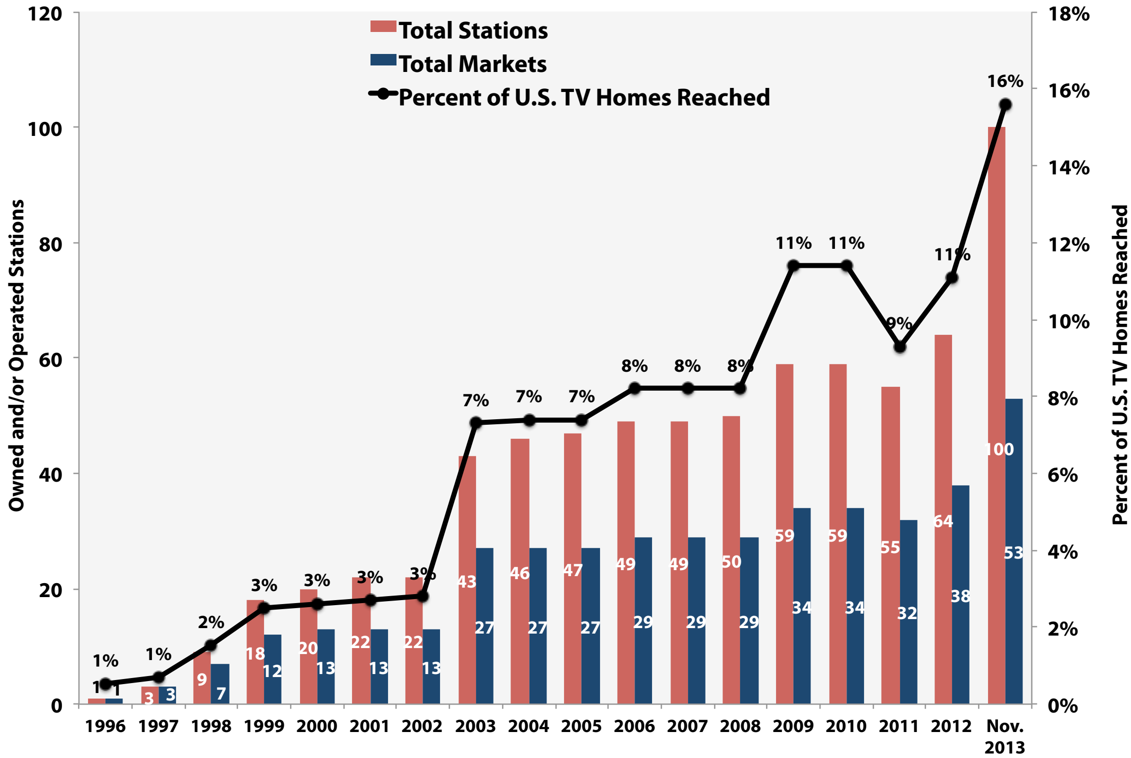
[63] *See Nexstar 2012 10-K* ("We are deemed under U.S. GAAP to have a controlling financial interest in Mission because of (1) the local service agreements Nexstar has with the Mission stations, (2) Nexstar's guarantee of the obligations incurred under Mission's senior secured credit facility, (3) Nexstar having power over significant activities affecting Mission's economic performance, including budgeting for advertising revenue, advertising sales and hiring and firing of salesforce personnel and (4) purchase options granted by Mission that permit Nexstar to acquire the assets and assume the liabilities of each Mission station, subject to FCC consent. ... These option agreements (which expire on various dates between 2013 and 2022) are freely exercisable or assignable by Nexstar without consent by Mission or its shareholders. Therefore, Mission is consolidated into these financial statements. We expect our option agreements with Mission to be renewed upon expiration.") *See also Nexstar 2012 10-K*, p. F-3 (showing that Mission's FCC licenses accounted for $22 million of Nexstar's assets).

[64] *See* Mission Broadcasting, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the fiscal year ended Dec. 31, 2012, Commission file number: 333-62916-02, March 29, 2013 ("Nexstar indemnifies Mission for Nexstar's activities pursuant to the local service agreements. Under these local service agreements, Nexstar has received substantially all of our available cash, after satisfaction of operating costs and debt obligations. We anticipate that Nexstar will continue to receive substantially all of our available cash, after satisfaction of operating costs and debt obligations.").

[65] In 2012, Mission's two sole executives received a combined $284,509 in compensation, which consisted solely of salary (i.e., it included no cash or stock bonuses). Nexstar's executives received a combined $14.2 million in compensation last year, which included salaries, bonus awards, stock awards, automobile allowances, life insurance premiums and 401(k) contributions. Thus, even though on paper the Nexstar-owned stations generated 20 times the revenues of the Mission-owned stations, Nexstar's executives received 50 times the compensation. *See Mission 2012 10-K*; *See also* Nexstar Broadcasting Group, Inc., Definitive Proxy Statement, Schedule 14A, April 30, 2012.

[66] "Mission Broadcasting's David Smith Has Died," *Radio and Television Business Report*, March 31, 2011.

Figure 9: Nexstar Stations, Market and Reach (1996–2014)



Sources: Nexstar 10-K filings, FCC Consolidated Database System and Free Press Research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014, as well as all stations in pending deals.

In 26 of its 53 markets, Nexstar uses SSAs to operate virtual duopolies between two Big Four-affiliated stations (or more in the case of its triopolies). In Binghamton, N.Y., Nexstar controls the local ABC, FOX and NBC affiliates, as well as the MyNetworkTV station.[67] In some of these locations, Nexstar dominates the local news market. But in other markets Nexstar's stations offer no local news whatsoever. Consider Nexstar's operation in Billings, Mont. When Nexstar acquired the local FOX and ABC affiliates in 2003, it promptly shut down both stations' news operations.[68]

In fact, closing newsrooms is part of Nexstar's business strategy. A recent example involving Nexstar and Mission was particularly egregious. In 2012, Nexstar reached a deal to acquire two stations in the Little Rock, Ark., market (KLRT and KASN, the local FOX and CW affiliates). But since Nexstar already owned the local NBC and MyNetworkTV affiliates (KARK and KARZ), the company's go-to shell corporation stepped in and purchased the licenses, letting Nexstar operate the stations under outsourcing agreements. One month after closing the deal,

[67] On Sept. 16, Nexstar and Mission announced a $103 million deal where Nexstar will acquire three stations from Citadel Broadcasting, and Mission will acquire two stations from Stainless Broadcasting. The new Mission stations — WICZ (FOX) and WBPN-LD (MyNetworkTV) — are in the Binghamton, N.Y., market, where Nexstar already owns and operates WBGH-CA (ABC) and WIVT (NBC).

[68] Jan Falstad, "KULR Sold; ABC-6/Fox-4 Drop Local News," *Billings Gazette*, Sept. 30, 2003. In this article, the local police chief describes these stations' news reporters (under the prior owners) as "aggressive." "It was the Sherman-through-Atlanta philosophy. ... They just went full-speed ahead with the story for that day, not sometimes considering the aftershocks and repercussions for their actions." Usually, an arms-length distance from local law enforcement is considered a healthy journalistic practice. Nonetheless, the Billings police chief did applaud the now-defunct news operations for doing good things for the community, like airing segments that helped local police track down suspected criminals.

Nexstar consolidated the operations of all four stations into one facility, and fired 30 employees, including a number of longtime journalists at the FOX station.[69]

Like its peers, Nexstar has had a busy year. In 2013, the company announced or closed on acquisitions of 43 stations in deals valued at nearly $558 million. Nexstar will operate 15 of these 43 new stations using Shared Services Agreements.

Tribune Company: Out of Bankruptcy and Over the Limit

In July, after months of searching for a buyer for its newspaper assets (which include the *Chicago Tribune* and the *Los Angeles Times*), Tribune announced it would split its broadcasting and newspaper operations into two separate companies.[70]

This move followed similar splits by former cross-ownership kingpins like Belo, Media General and News Corp. Even though Tribune's newspapers brought in more than its broadcasting division last year ($2 billion vs. $1.14 billion), investors see the newspaper business and its low margins as a drag on the broadcast segment over the near-to-medium term.

But just one year after emerging from bankruptcy, Tribune announced its purchase of 20 full-power TV stations from private equity group Oak Hill Capital Partners in a deal valued at $2.7 billion.[71] Oak Hill's portfolio consists primarily of mid-sized-market stations acquired since 2006 from CBS, News Corp and the New York Times Company.

This multibillion-dollar deal, which closed late last year, nearly doubled the number of stations and markets in Tribune's portfolio (see Figure 9). It also pushed Tribune's reach to 44 percent of the nation's households. However, under the FCC's outdated UHF discount, Tribune's reach is counted as just 27 percent. So even though it already reaches nearly half the country, Tribune still has plenty of room to grow if the FCC doesn't complete its proposal to close this loophole.

Like Gannett, Tribune is taking a page from the covert-consolidation playbook. To avoid violating the FCC's newspaper-broadcast cross-ownership rules in the Norfolk, Va., and Scranton, Penn., markets, Tribune spun off its newly acquired TV stations in those markets to a new company, Dreamcatcher LLC. Tribune operates the stations pursuant to Shared Services Agreements.

However, unlike almost all other SSA arrangements, Tribune does not operate any other stations in these two markets. This means Tribune can't use the "operational efficiencies" excuse that companies trot out to defend these kinds of outsourcing arrangements. This further exposes the Tribune-Dreamcatcher deals as a direct attempt to evade the FCC's rules.[72]

---

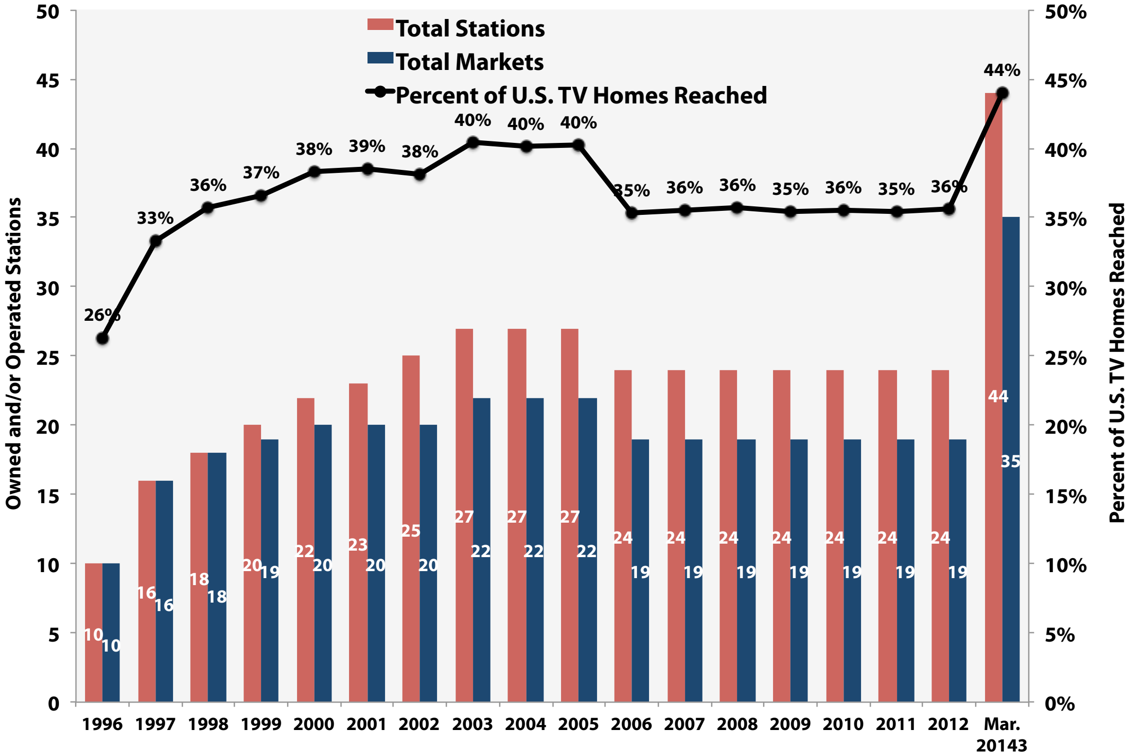
[69] *See* Kate Knable, "Almost 30 Lose Jobs at KARK, KLRT as TV Owners Consolidate," *Arkansas Business*, Jan. 29, 2013.

[70] Christine Haughney and David Carr, "To Cut Taxes, Tribune Is to Split Into Broadcasting and Publishing Units," *New York Times*, July 10, 2013.

[71] The deal includes 19 full-power stations and one full-power satellite station (KFCT). *See* "Tribune to Acquire Local TV, Creating Content and Distribution Powerhouse," Tribune Company Press Release, July 1, 2013.

[72] The same is true of the Gannett-Sander SSAs in the Portland and Louisville markets: Gannett will operate the stations in these markets, despite having no other broadcast presence there.

Figure 10: Tribune Stations, Market and Reach (1996–2014)



Sources: Tribune 10-K filings, FCC Consolidated Database System and Free Press research. Values include all owned and operated stations as well as all stations operated under outsourcing agreements. Ownership data reflect stations owned or operated as of March 10, 2014.

Dreamcatcher's named owner is Ed Wilson, former head of Tribune Broadcasting and chief revenue officer for the Tribune Company from 2008–2010. (Heading these shell companies is apparently now a revenue source for retired broadcast executives.) Though Tribune is a private company and not subject to SEC accounting rules, its control over Dreamcatcher's stations appears so significant that the latter would likely be considered a Variable Interest Entity under Generally Accepted Accounting Principles.

So in addition to mocking the FCC's national ownership cap, Tribune is also joining a crowded field of companies violating the spirit, if not the letter, of the FCC's local ownership limits.

Cease to Resist: FCC Apathy Starts the Wave

The evidence makes it all too clear: The FCC has no interest in enforcing its own rules.

But the rules remain on the books, as do the justifications for these limits: To promote and preserve competition, localism and diversity among broadcast media outlets — and in recognition of the scarcity of broadcast spectrum — the FCC places some limitations on the ownership of broadcast licenses.

The goals of competition, localism and diversity are enshrined in the Communications Act and reflect the longstanding public interest bargain between the broadcast industry and the American people. Broadcasters, unlike all the other companies that build profitable businesses using the public's airwaves, pay absolutely nothing for their valuable spectrum. All that we the people ask for in return is a little public service — and assurances that companies won't monopolize our airwaves.

Make no mistake: Limits on local ownership are the law of the land. The FCC opted to maintain its current local limits in a 2008 order. Responding to a legal challenge to this decision, the U.S. Court of Appeals for the 3rd Circuit upheld the FCC's ownership rules to protect competition for viewers in local television markets. The court stated that competition "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers."

But as documented here, television stations that are not permitted to merge under the FCC rules are nonetheless consolidating their core operations, staff and news production. In most of these cases, one station subsumes another, while the name of an absentee owner on an FCC form provides the only evidence of the station's supposed independence. Yet the FCC seems intent on preserving the legal fiction behind the outsourcing agreements used to form otherwise illegal duopolies and triopolies in dozens of markets across the country.

The companies behind the new wave of consolidation are merging facilities, closing newsrooms and firing reporters — and passing off their repurposed, re-run news products as public service. But no amount of window dressing can hide the truth: Covert consolidation diminishes viewpoint diversity and content diversity.

A 2011 University of Delaware study found that these arrangements have a "profound effect on the local news broadcasts in the markets in which they operate." The study highlights markets like Peoria, Ill., where all five of the commercial television stations participate in outsourcing arrangements, with each group relying on identical scripts and video for 90 percent of their stories.[73]

Covert consolidation also means higher cable bills. The American Cable Association estimates that common control or ownership of multiple Big Four network affiliates in a single media market results in retransmission-fee increases of at least 21.6 percent. These fees that cable and satellite companies pay to local broadcasters are ultimately passed along to pay-TV subscribers.

Instead of keeping its co-opted head in the sand, the FCC needs to stop this wave of consolidation. If it doesn't, the impact on competition and ownership diversity will be devastating and irreversible. Job losses will continue. More newsrooms will close. Communities will suffer. Local owners who have served their communities won't be able to survive.

The 15 Percent Programming Fiction

The main purpose of the FCC's ownership limits is to facilitate competition and viewpoint diversity. But how can Sinclair compete against Cunningham when Sinclair controls every aspect of Cunningham's day-to-day operations? How can Howard Stirk Holdings be considered independent of Sinclair if Sinclair financed Howard Stirk's station purchases and is ultimately responsible for these loans? How can the FCC consider Deerfield the actual owner of its stations when it sends Sinclair all of its revenues and profits? Why does the FCC believe that Mission Broadcasting controls its FCC licenses when Nexstar lists them as its own assets in filings with securities regulators?

There's a simple answer: The FCC has chosen to believe that the license holders are in charge of programming the majority of airtime on these stations.

Under the FCC's rules, it doesn't matter if one owner controls all the physical assets of another in-market station, or if they control every aspect of that station's day-to-day operations. So long as the company that operates the station programs less than 15 percent of the second station's airtime, the FCC will consider the two separate competing companies.[74]

So how did the FCC come up with the figure of 15 percent?

---

[73] *See* Danilo Yanich, "Local TV News & Service Agreements: A Critical Look," University of Delaware (2011).

[74] *See* 47 C.F.R. 73.5555, Note 2(l)(2). "Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

Before it adopted the LMA attribution rules in 1999, the FCC used the 15 percent figure to identify attributable interests in the local radio market. However, the FCC ignored the advice of many parties, including the National Telecommunications Information Administration (NTIA), which urged the FCC to recognize the fundamental differences between radio and TV markets.

The FCC also settled on the 15 percent figure because it was the sweet spot for ensuring that out-of-market financial backers (who held more than 33 percent of a station's debt plus equity) would be allowed to program some of a station's airtime without triggering attribution (this is known as the "Equity Debt Plus rule," or EDP rule).[75] The Commission was concerned that a level higher than 15 percent might sweep in some syndicators or even the networks themselves.[76] However valid this concern might have been, it doesn't explain why the FCC felt the need to apply the same 15 percent threshold to both the EDP and in-market attribution rules.

Having a national network control a minority equity stake in a license while also supplying the station's primetime programming is certainly an indicator of outsized influence. But while that situation should raise concern, so too should a situation where a station's entire daily news schedule is programmed by its major in-market competitor. But under the FCC's current rules, the latter scenario is perfectly acceptable, since most stations air less than 25 hours of local news each week.[77]

The FCC's in-market attribution rules ignore the economic realities of local TV broadcasting. They also disregard the need to foster diverse viewpoints — ostensibly the very purpose of the ownership rules.

To generate enough ad revenues to profit in today's consolidated media market, commercial broadcast TV stations generally air:

- Local news programing. With the exception of the network's primetime schedule, local news is by far the most popular content that stations air and produces most of a station's ad revenues, especially during election years.
- An affiliated network's primetime, midday and morning programming blocks. Network programming is very popular (e.g., the *Today Show* in the morning hours, *American Idol* in primetime) and generates good local spot revenues for the broadcast station owner. And primetime provides a strong lead-in audience for the late local news programming.
- Syndicated fare (e.g., *Judge Judy* or reruns of *The Big Bang Theory*). This content, which fills out the midday, early evening and weekend schedules, is somewhat popular (depending on the content) and remains a safe revenue generator for local station owners.
- Paid programming (i.e., infomercials). This content generates revenue during the otherwise dead overnight hours.
- Public affairs programming. While few broadcasters bother with public affairs content (syndicated fare is relatively cheaper, certainly for the large chains), if done correctly it can both attract an audience and fulfill a broadcaster's public interest obligations.

In every single case where a station that airs local news is operated under an outsourcing agreement, the nominal owner does not produce the local news content. Sinclair and the other covert consolidators are producing and programming the most popular and most profitable parts of the schedule — and the *only* part of the schedule that matters in terms of local viewpoint diversity.[78]

[75] *See* 47 C.F.R. 73.5555, Note 2(j).

[76] *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MMDocket No. 94-150, *Report and Order*, 14 FCC Rcd 12559 (1999), at paras. 56 and 60.

[77] For example, Sinclair programs all of the news content on WTTE, the Cunningham-owned Columbus, Ohio, FOX affiliate. But this programming, which consists of a multi-hour morning and nightly one-hour newscast, falls just under the weekly 25.2-hour attribution threshold.

[78] Of course, many of the non-Big Four network-affiliated stations air no local content whatsoever.

In the FCC's eyes, there is no undue influence so long as the nominal owner is the one *ultimately* responsible for programming decisions involving the approximate 12 hours of daily airtime not otherwise filled by the network's morning, primetime and late-night content, or the local news day parts programmed by the in-market competitor. So long as the nominal owner spends a few minutes each year deciding between *Dr. Oz* and *Dr. Phil*, or between a ShamWow or Thighmaster infomercial, the FCC considers that person an independent owner.

Indeed, under the FCC's rules, the FCC considers the nominal owner a fully independent, competing voice in the local TV market even if that individual delegates programming decisions to the outsourcing partner (in effect, allowing the partner to program 100 percent of the schedule). All that matters is that on paper, the license holder is ultimately responsible for these programming decisions.

Even if there really is a growing number of octogenarian ex-broadcasting executives spending long hours deciding what syndicated shows and infomercials should air on the stations they own but don't operate, the FCC's rules still fail to capture the economic incentives driving these outsourcing arrangements. The FCC, in other words, neglects to acknowledge that these incentives influence the decisions about what to program with that 85 percent time.

In other words, Sinclair's financial influence over Deerfield itself influences what is or isn't done with that 85 percent of airtime.

All the Big Waves Start in Hawaii

The economics of outsourcing agreements and the FCC's utter failure to enforce its rules created the latest wave of consolidation. Sinclair might have discovered this legal loophole, but other companies are now using covert consolidation to grow their media empires at the expense of local competition, public service and viewpoint diversity.

But why now? Why are we seeing such a dramatic uptick in the use of SSAs in the past year alone, given that this particular tool of evasion has been around for more than a decade?

The credit — or rather, the blame — belongs to the FCC. Even as the agency fought in court to maintain its ownership limits, it signaled to the market that it had no intention of even scrutinizing covert-consolidation agreements, much less identifying them as the blatant violations of the rules they obviously are.

The latest wave began in Hawaii, in a deal that involved one company exploiting loopholes in the FCC's rules to gain control of three stations, including two Big Four affiliates.

In 1999, Raycom Media purchased KHNL, Hawaii's NBC affiliate, along with the LMA rights to KFVE, Hawaii's UPN affiliate.[79] Raycom purchased KFVE outright shortly after the FCC relaxed its ownership rules in late 1999 and permitted duopolies between two stations outside the top four.[80]

But a permissible duopoly wasn't good enough for Raycom. In August 2009, it entered into a Shared Services Agreement with MGC Capital Corporation, owner of Hawaii's CBS affiliate, KGMB. As is the case with most SSAs, Raycom consolidated all three stations under one roof. It also fired more than 60 people.[81]

This semi-covert union of three stations *still* wasn't good enough for Raycom. As soon as it entered into the SSA with MGC, Raycom and MGC swapped call signs and station affiliations. Raycom was now the named owner of Hawaii's NBC and CBS affiliates, as well as the operator of the local MyNetworkTV station.

But don't think that the FCC would lift a finger to stop this blatant evasion of its duopoly rule prohibiting common

---

[79] *See* FCC Application #BALCT–19990709RA.

[80] *See* FCC Application #BALCT–19991116AAA.

[81] *See* Rick Daysog, "Watchdog Asks FCC to Revoke Licenses of KGMB, KHNL, K5 TV Stations," *Honolulu Advertiser*, May 20, 2010.

ownership of two top-four ranked stations. After local activists challenged Raycom's takeover of the Hawaii market, the FCC — in one of its most pathetic displays — wrote:

> "Because the local television ownership rule specifically refers to 'at the time of application,' however, the applicability of the top-four prohibition in the case presented here, where no application was required, is unclear. Nonetheless, we agree with Media Council insofar as it suggests that the net effect of the transactions in this case — an extensive exchange of critical programming and branding assets with an existing in-market, top-four network affiliate — is clearly at odds with the purpose and intent of the duopoly rule. For this reason, *we include in the ongoing 2010 quadrennial review proceeding the duopoly rule issues that this and similar cases raise*." (emphasis added).[82]

Let's recap. Raycom approaches one of its major competitors in Hawaii, and makes an offer that any honest person would summarize as sounding something like this:

> We'll give you $22 million if you stop competing with us, let us take over your station, and give us your valuable affiliation with top-rated network CBS, your call letters, and all of your physical assets. To make this illegal deal appear legal, we'll give you a piece of paper that says you control an FCC license for another station that we will run, a station that's affiliated with the lowest-ranked national broadcast network. For your ongoing troubles, you'll receive a pittance of the revenues of the station you now "own."

And the *very best* the FCC could do after acknowledging that Raycom had violated the law and concocted an elaborate scheme to eliminate a competitor was to ... promise to think about the pros and cons of this particular kind of lawbreaking?

The FCC's decision in the Raycom Hawaii case sent a strong message to the broadcast industry: The FCC's rules are meant to be broken. And the industry responded.

Between the November 2011 decision and October 2013, the Big 20 companies entered into 61 new outsourcing agreements, more than half of all such agreements in place by that date for these companies. Since the FCC handed down the Raycom Hawaii decision, Sinclair alone went from a mere two SSA stations to 35.

---

[82] *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).

Mr. Wheeler, Stop This Wave

It's bad enough that companies are skirting the FCC's rules in ways that have become boilerplate.[83] What's worse is that the FCC has drawn these companies an easy-to-follow map on how to break the law, complete with an understanding that any lawbreaking will be grandfathered should the political winds start to blow in a different direction.[84]

But this dereliction of duty is par for the course at the FCC. The agency has an embarrassing record of encouraging companies to sidestep its rules. Raycom is not the first company to establish an illegal duopoly between two top-four stations; Gannett did it in 1999.[85] Several of the Big 20 companies, including Tribune and Sinclair, have exploited the FCC's "failing station" waiver policy to establish duopolies in markets where they would otherwise not be permitted.[86] The FCC allowed both Gannett and Tribune to run illegal cross-ownerships for years — before finally granting these companies permanent waivers.[87]

Over the past decade, under the leadership of three very different chairmen, the FCC has joined with industry to treat the public's broadcast airwaves as nothing more than an ATM for a few privileged companies.

However, the FCC is now under the leadership of a new chairman, Tom Wheeler. Mr. Wheeler's stated major focus for the agency is, in his words, "competition, competition, competition." And unlike his predecessor, he may actually be willing to put some policies behind this slogan. The FCC is poised to vote on a proposal Mr. Wheeler floated that would close the Joint Sales Agreement loophole, a major component of the outsourcing agreements used to evade the FCC's local ownership rules. Mr. Wheeler is also reportedly interested in closing the remaining loopholes that make up the structure of Shared Services Agreements used by companies like Sinclair and Nexstar.

It's encouraging that the new chairman is willing to take steps to end the farce of covert consolidation. But there is much work to do, including work that remains unfinished. For example, under the leadership of Acting Chairwoman Mignon Clyburn, the FCC issued a proposed rulemaking that will finally close the UHF discount loophole. The FCC is proposing to end the discount: Thanks to the technical realities of digital broadcasting, the

---

[83] Most of the outsourcing agreements on file with the FCC (which represent a small subset of these agreements, some of which redact the financial terms) are written from the same cookie-cutter legal documents. The rate and rent that the license holder pays to the operator from the station's revenues are set. The JSA defines the overall fiscal structure. The option agreement lays out the bargain-basement price the operator may purchase the license for (but the license holder can't sell at will, since the terms of the agreement are usually for a perpetually renewing eight years).

[84] The list of grandfathered ownerships is far too lengthy to list here, as is the long list of pending license renewal and transfer challenges — some dating back more than a decade — that the FCC has yet to rule on.

[85] In November 1999, Gannett, which already owned Jacksonville, Fla.'s NBC affiliate WTLV, acquired WJXX, the local ABC affiliate. Due to engineering problems, WJXX's viewership had declined in the two years prior to the purchase. Since it was the market's fifth-ranked station at the time, the duopoly was permissible under the FCC's rules. The station's ratings predictably improved, but since the FCC's rule applies only to each station's ranking *at the time* the transfer application is filed, Gannett was allowed to keep both stations.

[86] In 2006, Tribune sold WCWN, Albany's CW affiliate, to Freedom Communications, owner of the local CBS affiliate (WRGB). However, this was an impermissible duopoly due to the low number of voices in the market. To get around the rule, Freedom and Tribune applied for, and received, a failing station waiver, granted based on claims that the station was unprofitable for the prior three years. In 2011, Sinclair acquired Freedom. However, waivers are not transferable, so Sinclair applied for and received a failing station waiver for WCWN. Sinclair claimed that on a *pro forma* basis, WCWN would have never turned a profit (ignoring the fact that there are CW affiliates in similarly situated markets — such as WXCW and WQCW — that remain profitable as standalone stations). Such claims are difficult to prove *or* disprove since most CW stations in these mid-sized markets are already part of a duopoly and subject to whatever *pro forma* accounting tricks the owners choose to perform for the FCC. But since the FCC always gives the benefit of the doubt to the companies seeking rule waivers, these pleadings are now mere formalities.

[87] In 2000, Gannett (owner of the *Arizona Republic*) purchased the Phoenix NBC affiliate. The FCC did not formally approve this cross-ownership until the end of 2008. In 2000, Tribune (owner of the *Los Angeles Times*) purchased the local CW affiliate. After a dozen years of operating KTLA in violation of the cross-ownership rule, Tribune was granted a permanent waiver for this combination in November 2012.

UHF band is no longer inferior to the VHF band. Indeed, many stations elected to move their channels from the VHF band to the UHF band when they switched to digital broadcasting in 2009.

Mr. Wheeler should quickly move this item to a vote. But he shouldn't compound the FCC's mistakes by permanently grandfathering existing holdings of firms above the cap, as the FCC's notice proposes. He certainly should not do as many in the industry would like and grandfather every current owner, whether or not their actual reach is above or below 39 percent.

Mr. Wheeler should also recognize that if the truth is good enough for Wall Street, it should be good enough for Main Street. The FCC needs to close the gaping outsourcing loophole in its ownership rules. While some of these outsourcing arrangements *may* be truly arms-length relationships, the vast majority of the SSAs are obvious attempts to thwart the FCC's ownership limits (and either way they're bad for local journalism). At a minimum, if a company is considered a Variable Interest Entity of another company under Generally Accepted Accounting Principles, then the FCC needs to do what the SEC does and treat the firms as one and the same when attributing ownership.

Chairman Wheeler should also update the FCC's attribution rules to better reflect the realities of the broadcast TV market and the stated purpose of the rules. If one station programs the entire news schedule of another, the FCC should consider the two companies to be one voice.

The chairman can signal that he's serious about closing loopholes and protecting the public interest by blocking all pending deals that use covert-consolidation arrangements to dodge the Commission's ownership rules. By doing so, the FCC will send the message that the rules exist for a reason, and are not merely minor roadblocks industry can evade through sneaky legal tricks.

Finally, Mr. Wheeler must confront the industry's waste of local broadcast spectrum. The FCC must recognize this newfound multicasting capability by returning to a one-owner/one-license per market policy.

Over-the-air broadcasting remains important for millions of Americans, particularly low-income families who have been priced out of the pay-TV market. But there is simply no reason why a company like Nexstar needs four separate broadcast licenses to air four separate network feeds in the same local market (as it does in Little Rock, Ark.). Digital broadcasting enables digital multicasting: A single over-the-air "channel" (i.e., a single FCC license for 6 megahertz of broadcast TV spectrum) can broadcast more than a dozen so-called "subchannels."[88]

At the core of the one-owner/one-license per market policy is the recognition that if a company is not a real owner, it doesn't need a real license. There's no reason for the FCC to squander scarce spectrum so one owner can air multiple network feeds, as multicasting now enables that with a single license.

Instead of granting fake owners real licenses, the FCC should ensure that real owners who actually want to serve their communities hold these licenses. If license holders produce local news, which the market amply compensates them for, the FCC should let them keep their free spectrum. If the owner exists only on paper and outsources all content production and operational responsibilities to another party, then that owner is neglecting his public interest obligations and shouldn't hold a license to the public airwaves.

If the FCC can't find a unique owner to use the surrendered spectrum after it clears out the fake owners, the agency should return this spectrum to the people. For example, it could permit unlicensed use for so-called white-space deployments.

While the FCC is slowly becoming aware that it needs to restore the rule of law, the Department of Justice has already made it clear that it thinks these outsourcing arrangements harm competition. The DoJ blocked Gannett's attempt to use a shell company to form an illegal top-four duopoly in the St. Louis market. And in February of this

[88] For example, WBGH, the Nexstar-owned NBC affiliate in Binghamton, N.Y., is using its six megahertz allotment to broadcast a low-power analog signal. Nexstar, recognizing that there are probably few if any TV's capable of receiving this signal, carry the channel's feed as a digital subchannel on the main channel for WIVT (the Nexstar-owned local ABC station).

year, the DoJ sent a letter to the FCC stating that these outsourcing arrangements "often confer influence or control of one broadcast competitor over another. Failure to account for the effects of such arrangements can create opportunities to circumvent FCC ownership limits and the goals those limits are intended to advance." The Department agreed with the FCC's proposal to require attribution for Joint Sales Agreements, and further stated that "even where a sharing agreement does not create an attributable interest under the Commission's bright-line rules, the Commission should scrutinize agreements on a case-by-case basis and take action where those agreements do not serve the public interest."[89]

This recent letter is consistent with the DoJ's historical position of viewing covert consolidation in a negative light. In a 1996 decision involving Gulf Coast Broadcasting, Justice stated that "although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised individually and independently by broadcasters. When competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals … their conduct violates the Sherman Act."[90]

Given that purportedly independent and competing stations controlled by Sinclair and others are coordinating retransmission negotiations in many of the nation's media markets — in fact, openly touting the ability to coordinate as the main factor behind their rush to consolidate — it's time for the FCC to listen to the Department of Justice's sound analysis.

Conclusion: Enough Is Enough

The FCC's broadcasting policy is a farce. It deprives Americans of the local news diversity that our democracy requires. This farce perpetuates a system that places private profits above the public interest and keeps one of our most valuable natural resources — the airwaves — in the hands of a few politically well-connected companies, instead of in the hands of the people, who are the rightful owners.

The current wave of consolidation shows no sign of slowing down. Since the FCC has indicated it will abide by the legal fiction of outsourcing agreements, the mad rush to form otherwise illegal duopolies and triopolies will continue to destroy newsrooms across the country.

Market consolidation feeds on itself — if you're not busy buying, you're busy being bought. With room to grow and money to burn, firms like Nexstar, Sinclair and Tribune will continue to gobble up stations. Analysts expect that smaller firms like Granite Broadcasting, Hoak Media Corporation and London Broadcasting will be gone within a year's time.[91] The Washington Post Company is likely to sell its broadcast portfolio, which includes major-market stations in Detroit, Houston and Miami.

And it won't stop there. If the FCC continues to ignore covert consolidation, nothing will stop the Big 20 companies from merging with each other, dividing the nation's media markets into separate local monopolies. Enough is enough.

---

[89] *See* Ex Parte Submission of the United States Department of Justice, MB Docket No. 09-182, Feb. 20, 2013.

[90] *See* Competitive Impact Statement, U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc., Civil No. C-96-64 (S.D. Texas, 1996) (citing Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290 (1985)).

[91] *See* Sarah Barry James, "Broadcast M&A Boom: It's Not Over Yet," SNL Kagan, Sept. 13, 2013.