The Potential Impact of the Comcast-NBC Merger on Minority Ownership of Broadcasting, Testimony of Professor Allen S. Hammond, IV, Phil and Bobbi Sanfilippo Professor of Law, Santa Clara University School of Law, and Director, *B*road*B*and *I*nstitute of *C*alifornia, before the House Judiciary Committee, Los Angeles, California, June 7, 2010.

The Problem:

The Federal Communications Commission is considering a merger of two very large competing video distribution and program providers that will potentially affect many small broadcast providers in absence of the Commission's own data on how that merger will affect media ownership.

In 2003, the Commission attempted to replace regulations against ownership of television, newspapers, and radio stations in a single market with a "diversity index" that would allow a mathematical formula to measure the diversity of media voices in a given market.[1] This "diversity index" did not take into account the importance of viewpoint diversity on the Internet or the effect of consolidation on minority-owned broadcast stations.[2] Additionally, it was poorly crafted, "employ[ing] several irrational assumptions and inconsistencies."[3]

Minority Ownership and Viewpoint Diversity

Studies have shown that Minority Ownership has enhanced diversity of news and public affairs programming provided to ethnic, minority and majority communities. Despite this fact, the FCC has too often failed to take this valuable contribution into account when formulating its multiple and cross ownership policies. Public interest and media organizations have argued this point for years.[4]

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1 *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 403 (3d Cir. 2004).
2 *Id*. at 407-08; 420.
3 *Id*. at 402. Specifically, the Third Circuit found that the Commission's methodology in creating its Diversity Index was fundamentally flawed, because "the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results." *Id.*
4 These organizations include the Broadband Institute of California at the Santa Clara University School of Law, the Media Access Project, the Free Press, the Citizens Communications Center, the Georgetown University Institute for Public Representation, the National Black Media Coalition, the Minority Media and Telecommunications Council, the National Association of Black Owned Broadcasters and Operation Push.

Policy Disconnect

The Third Circuit court, in issuing its stay of the Commission's ownership rules decision in *Prometheus Radio Project v FCC*, recognized that the Commission had failed to account for the impact of its policies on minority ownership.[5] The court's assessment of the FCC's policy myopia need not be limited to the specific instance before the court in 2003. Historically, the FCC has not given sustained serious consideration to the impact of policies allowing greater concentrations of ownership on small, minority, and women owned broadcasters.[6]

Inadequate Data and Ignorance of Policy Impact

This myopia has been facilitated and exacerbated by the FCC's failure to keep adequate data on minority and female ownership of broadcast facilities. Despite the fact that the FCC initiated minority ownership policies in 1978, it did not begin to acquire data on minority and female ownership of broadcast stations until 1999.[7] Because relatively reliable data on broadcast owner race and/or gender did not exist before 1998, there was no opportunity to examine the impact of the FCC's broader set of ownership rule changes on minority ownership. Because the television duopoly rule was the only ownership rule revised during the time period for which data on broadcast owner race and/or gender has been reliably recorded, researchers were constrained to examine its impact on minority and female broadcast television owners.

Adverse Impact of De-Regulation

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[5] *See generally* Prometheus Radio Project v. F.C.C., 373 F.3d 372, 435 (3rd Cir. 2004).

[6] *See* Catherine J. K. Sandoval, MINORITY COMMERCIAL RADIO OWNERSHIP IN 2009: FCC LICENSING AND CONSOLIDATION POLICIES, ENTRY WINDOWS, AND THE NEXUS BETWEEN OWNERSHIP, DIVERSITY AND SERVICE IN THE PUBLIC INTEREST, COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE 4 (Minna Aslama & Philip M. Napoli, eds.) (Fordham University Press 2009); S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States*, FREE PRESS, June 2007 at 12, *available at* http://www.freepress.net/files/off_the_dial.pdf.

[7] Allen S. Hammond, IV, Barbara O'Connor, Tracy Westin, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*, 2007 FCC MEDIA OWNERSHIP STUDIES 26, 2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf.

The study conducted for the FCC[8] was initiated in response to the court's stay. The study found that the Commission's relaxation of the duopoly rule had no favorable impact on minority and women owned commercial television stations.[9] It provided no lasting increase in minority or women owned stations.[10] Only one minority owned station took advantage of the policy and that owner exited the market within two years.[11] Instead, the actual beneficiaries of the repeal were the largest broadcast station group owners (including the national networks).[12] Indeed, in markets in which duopolies were allowed, a minority owner was more likely to exit the market.[13]

The study found that from 1999 to 2006 the relaxation of the television duopoly rule (TVDR) did not appear to have a positive impact on minority and female ownership of television stations. Instead, the major beneficiaries were the largest twenty-five television broadcast station owners. Specifically, the study found:

- The relaxation of the TVDR codified the existing contractual relationships (local management agreements or LMAs) between group station owners and the stations they managed.

- Some group station owners leveraged their control of LMAs into control of access to attractive syndicated programming as well as access to programming affiliations with emerging networks.

- The majority of the broadcast group owners who benefited from the relaxation of the TVDR were the largest (top twenty-five) group broadcast owners (based on revenue, national market reach and/or number of stations owned). As of 2005, they accounted for 83 of the 109 (76%) duopolies identified.

- Many of the group owners that managed "sister" stations acquired them outright once the TVDR was relaxed.

- Only one minority-owned duopoly was created. It has since been dissolved.

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[8] Allen S. Hammond, IV, Barbara O'Connor, Tracy Westin, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*, 2007 FCC MEDIA OWNERSHIP STUDIES 31, 2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf.
[9] *Id.* at ??.
[10] *Id.* at ??.
[11] *Id.* at ??.
[12] *Id.* at ??.
[13] *Id.* at ??.

- There were no surviving minority-owned duopolies.
- Across all markets in which minority-owned television stations operated between 1999 and 2006, the number of minority-owned television stations dropped by twenty-seven percent.
- Within markets entered and or occupied by TV duopolies, the number of minority owned stations dropped by more than thirty-nine percent.
- By contrast, in non-duopoly markets the number of minority-owned stations dropped by ten percent.
- The duopolies created in markets in which female owned television stations operated were non-female owned.
- There were no female-owned television duopolies.
- 36% of the female owned stations operating in duopoly markets were sold. All of the stations were sold to non-female, non-minority-owners.
- Female owned stations were more likely to be found in non-duopoly markets.
- The change to the TVDR has not had a positive impact on minority or female ownership of television stations.

Economies of Scale Induced by De-Regulation

Many of the alleged market conditions that prompted group owners to circumvent the duopoly rule limitation and later successfully pressure the FCC to repeal the rule are the same ones cited by Comcast-NBC today: retention of station viewing audience in the face of alternative providers; control of programming costs; and access to advertising revenue. The acquisition of additional television stations in the same market allows owners to reduce head to head competition by one, increase audience reach, reduce programming costs, and pursue increased ad revenues. When national broadcast group owners became duopoly station owners as well, they were able to exercise some control over access to programming and advertising dollars within specific markets.[14] The net result of

[14] "Through LMAs, group owners such as Sinclair Broadcast Group and Clear Channel Television have been able to control two outlets in one market. That means that when it comes to negotiating with studios for programming, they can often dictate the terms of deals because they control the likely buyers. Sinclair, for example, controls two stations in several major markets including Baltimore, Pittsburgh, Milwaukee and Indianapolis." Christopher Stern, FCC Duopoly Delight, Variety, November 11, 1996 - November 17,

increased multiple station ownership within local markets coupled with substantial national ownership is an increase in duopoly owner control over market access to programming and ad dollars. The impact on stand alone broadcasters like minority owners is that they find it harder to compete as they cannot offer package deals across multiple outlets and or discounts.

Barriers to Entry Exacerbated by De-Regulation

The impact of increased economies of scale is not the only consequence. In the past, FCC relaxations of multiple ownership rules have caused an increased market demand for stations that were attractive as second TV properties in a market. The increase in demand generated by relaxing ownership rules adversely affected minority broadcast station owners seeking to acquire more desirable properties. "[S]oaring station prices after…(FCC relaxation of the multiple ownership rules) put minority outlets in 'double jeopardy.'" Minority station owners, who are generally single-station owners, can't afford to trade up to the better facilities in their markets, because they can't compete against the prices group owners are willing to pay and the stations against which they are competing rapidly become parts of large broadcast groups, capable of bringing significant economies of scale to the market. Further rule relaxation would only exacerbate an already negative situation.[15]

Prometheus Stay Lifted

In March 2010, the Third Circuit lifted the stay of the media ownership rules imposed in *Prometheus*, allowing the Commission to reconsider regulations on cross-media

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1996, Pg. 76. In response to Sinclair's $1.2 billion dollar acquisition of a broadcast station group, program syndicators expressed concern because between its owned stations and its LMAs Sinclair had garnered "incredible leverage when it comes to buying programs. And that extends beyond the LMA markets. Many syndicators privately complain[ed] of having to sell a show to Sinclair in one market if they want clearances in other markets where the broadcaster has two outlets." Joe Flint, Sinclair's Power Play, Daily Variety, April 12, 1996, Pg. 1.

[15] Sikes Unscathed at Hearing: FCC May Settle On Permitting Ownership Of 30 AMs, 30 FMs; Change Duopoly Rule, Communications Daily, March 12, 1992, Pg. 1. Quoting Pierre Sutton, Chairman of Inner City Bro casting and the National Assn. of Black Owned Bcstrs. and Amancio Suarez, Secretary and Treasurer of American Hispanic Owned Radio Stations and of WAQI(AM).

ownership in light of the influence of the Internet.[16] This decision is contemporaneous with the Commission's quadrennial review of media ownership rules.[17] Under the Telecommunications Act of 1996, the Commission is obligated to perform quadrennial reviews regarding media ownership to determine whether or not its rules serve the public interest.[18] During the quadrennial reviews, the Commission conducts workshops and seeks to determine whether its rules on media ownership foster competition, localism, and diversity.[19]

The Commission's quadrennial reviews are a crucial step. During these reviews, the Commission should examine its own policies on diversity in media ownership and begin compiling statistics on minorities and women owning broadcast stations. The Commission's Annual Ownership Report form, FCC Form 323, includes a section requiring owners to identify their race or ethnicity and their gender; however, the Commission currently does not rely on that data for rulemaking, nor does it provide that data in a form conducive to statistical analysis.[20] The Commission cannot know how its changing policies on media ownership affect minorities and women until it starts compiling and analyzing its own statistics.

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[16] *See* Prometheus Radio Project v. FCC, 2010 WL 1133326 No. 08-3078 at *1 (3rd Cir. March 23, 2010). Former FCC Chairman Michael Powell expressed hope that the Commission would use this opportunity to remedy what he saw as the *Prometheus* court's failure to consider the power of the Internet in terms of a competing voice in the news market. *See* John Eggerton, Third Circuit Lifts Stay On Media Ownership Rules, Broadcasting & Cable, March 23, 2010 http://prometheusradio.org/Third_Circuit_Lifts_Stay.

[17] *See* 2010 Review of Media Ownership Rules, Fed. Commn'ns Commission, http://www.fcc.gov/ownership/.

[18] *See* 47 U.S.C. § 202(h).

[19] *See* 2010 Review of Media Ownership Rules, *supra* note 5.

[20] *See* Allen S. Hammond, IV, Barbara O'Connor, Tracy Westin, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006*, 2007 FCC MEDIA OWNERSHIP STUDIES 26, 2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf; Catherine J. K. Sandoval, MINORITY COMMERCIAL RADIO OWNERSHIP IN 2009: FCC LICENSING AND CONSOLIDATION POLICIES, ENTRY WINDOWS, AND THE NEXUS BETWEEN OWNERSHIP, DIVERSITY AND SERVICE IN THE PUBLIC INTEREST, COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE 4 (Minna Aslama & Philip M. Napoli, eds.) (Fordham University Press 2009); *see also* S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States*, FREE PRESS, June 2007 at 12, *available at* http://www.freepress.net/files/off_the_dial.pdf [hereinafter Off The Dial].

Comcast-NBC Merger

This is especially important in the disputed merger of Comcast and NBC Universal. The Commission is considering this merger before it has completed its 2010 quadrennial review, and before it has examined the current state of media ownership in America. The Commission has not begun to compile its own statistics on competition, localism, and diversity, and cannot know how the merger of such powerful media corporations will affect competition among single-station broadcast owners and local media outlets.

Additionally, the Internet provides a wealth of diversity in media,[21] and the Commission should consider how this merger will affect the voices of minorities and women on the Internet. NBC owns 30% of Hulu,[22] and Comcast could not only stifle diversity by controlling the content on Hulu, it could throttle competitors to Hulu such as YouTube, BlackTV247, or web sites owned by individual television stations.[23] Moreover, Comcast already owns Fancast.com,[24] which is a competitor to Hulu. Thus, Comcast has already entered the market for offering content online, and by acquiring NBC Universal and its stake in Hulu, it stands to dominate the online television distribution market and its growing advertising revenue.[25]

Exacerbating the Already Tilted Playing Field

Similar to the experience in the aftermath of the duopoly rule relaxation, the Comcast-NBC merger would eliminate "head-to-head" competition in the 11 major markets where

[21] *See, e.g.*, BlackTV247, http://www.blacktv247.com/.
[22] *See* Kenneth Corbin, Comcast CEO defends NBC deal, unsure on Hulu, InternetNews, March 11, 2010, http://blog.internetnews.com/kcorbin/2010/03/comcast-ceo-defends-nbc-deal-u.html.
[23] In the past, Comcast has throttled traffic it has deemed unwanted for reasons that may be anticompetitive. *See Comcast Corp. v. Federal Communications Commission,* 600 F.3d 642, 642 (D.C. Cir. 2010).
[24] *See* Fancast, http://www.fancast.com/.
[25] *See* Dianna Dilworth, Marketers expect increase in ad revenue this year, Datran Media, April 01, 2010 http://www.dmnews.com/marketers-expect-increase-in-ad-revenue-this-year-datran-media/article/167059/ ("As the economy rebounds, marketers are spending more money on online channels, which are both cost effective and measurable". A survey found that 93.6% of marketers will increase their budgets for online marketing next year.)

NBC owns broadcast stations and Comcast operates a cable franchise. These markets currently account for almost 25% of U.S. TV households.[26] Each of these markets would lose a competitor for local and political advertising.[27] This could lead to a significant decline in competition in local advertising markets and excessive domination by the merged company. As a result, advertisers would lose an alternate outlet.[28]

Meanwhile, other local broadcasters - particularly smaller, independent ones - already facing ad revenue declines in an economic downturn – would be unable to offer package deals and volume discounts for advertising across multiple channels the way that a merged Comcast/NBC could. These stand alone stations would have less money to produce local news and hire staff. In order to remain competitive, these broadcasters would have to fire staff and reduce production of local news and information, or consolidate in order to compensate for market share lost to the merged company. This result could adversely affect local diversity.

Finally, the merger would prompt other requests for similar mergers as other media market players seek to keep pace with Comcast-NBC economies of scale in the same manner that the lax LMA policy and the duopoly relaxation caused increased consolidation. Stand alone stations like minority owned facilities will have to weather yet another wave of consolidation.

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[26] Statement of Dr. Mark Cooper Director of Research Consumer Federation of America, before the Committee on Senate Commerce, Science and Transportation, CQ Congressional Testimony, March 11, 2010.

[27] *Id*. ("In fact, in 2006 NBC told the Federal Communications Commission that local cable operators present the single biggest threat to broadcasters in terms of securing local and political advertising. . . . The concentration of local markets and increase in concentration created by this merger, as measured by local advertising vastly exceed the level that should trigger close antitrust scrutiny under the DOJ/FTC Merger Guidelines.")

[28] *Id*.