

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

Rick Chessen
Neal M. Goldberg
NCTA – The Internet & Television
Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

April 29, 2019

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. ELIMINATION OF THE TOP-FOUR PROHIBITION WOULD REDUCE COMPETITION, PLACE UNDUE UPWARD PRICING PRESSURE ON RETRANSMISSION CONSENT FEES, AND INCREASE CONSUMER PRICES	2
II. ANY WAIVERS OF THE TOP-FOUR PROHIBITION SHOULD BE GRANTED ONLY UNDER EXCEPTIONAL CIRCUMSTANCES	5
III. THE COMMISSION SHOULD EXTEND THE TOP-FOUR PROHIBITION TO LPTV STATIONS AND MULTICAST STREAMS	8
CONCLUSION.....	12

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (“NCTA”) files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding, which initiates the 2018 quadrennial review of the Federal Communications Commission’s (“FCC” or “Commission”) media ownership rules.¹ In order to avoid the retransmission consent harms that the Commission acknowledges can flow from the common ownership of two top-four stations in a market, NCTA urges the Commission to retain the Top-Four Prohibition in the Duopoly Rule,² and to extend the prohibition to cover both low power television (“LPTV”) stations and secondary digital (“multicast”) streams. In today’s increasingly consolidated broadcasting marketplace, such protections are necessary to ensure that the Commission’s rules are effective in preventing broadcasters from exercising undue leverage in negotiating retransmission consent agreements to the detriment of consumers.

INTRODUCTION AND SUMMARY

The media marketplace has seen dramatic changes since the Commission began conducting its media ownership reviews two decades ago.³ Even in today’s marketplace, however, the four top-rated television stations in a market retain a unique position because they are typically affiliated with the most popular broadcast networks that provide access to marquee programming, such as sporting events. As the Commission and the Department of Justice (“DOJ”) have found, the common ownership of two such stations in a market would give the owner unfair leverage in retransmission consent negotiations that would harm competition and lead to unfair increases in retransmission consent costs and higher consumer prices. The Top-Four Prohibition therefore remains vital to

¹ See, e.g., *In re 2018 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC 18-179 (rel. Dec. 13, 2018) (“NPRM”).

² 47 C.F.R. § 73.3555(b)(1).

³ See NPRM ¶ 2.

protecting consumers and promoting competition among broadcast stations in local television markets.

Given the acknowledged consumer and competitive harms that would arise from top-four combinations, the Commission should permit waivers of the Top-Four Prohibition only under truly rare circumstances that do not present concerns about competitive harms, such as a case where a station temporarily has become a top-four due to a spike in viewership related to unique programming that occurs every few years. The Commission should also close a loophole in the Top-Four Prohibition that currently enables a single broadcaster in a market to control as many as four top-four stations using LPTV stations and/or multicast streams. Although LPTV stations and multicast streams by themselves do not raise ownership concerns, these increasingly popular outlets are now being used by broadcasters to circumvent the Top-Four Prohibition, and thus such arrangements should be considered subject to the rule.

I. ELIMINATION OF THE TOP-FOUR PROHIBITION WOULD REDUCE COMPETITION, PLACE UNDUE UPWARD PRICING PRESSURE ON RETRANSMISSION CONSENT FEES, AND INCREASE CONSUMER PRICES

Retention of the Top-Four Prohibition is necessary to preserve competition in local markets and to ensure that broadcasters do not engage in behavior that is anticompetitive and harmful to consumers. Without the Top-Four Prohibition, broadcasters would be free to amass greater leverage in retransmission consent negotiations through their ability to jointly own two top-four stations in any given local market. Such action would place upward pressure on retransmission consent fees, burdening consumers who would bear the brunt of these increased costs.

Critically, broadcasters have touted higher retransmission consent fees as a key “benefit” of recent mergers and acquisitions. For example, Nexstar said that its acquisitions of Tribune will result in a \$75 million retransmission consent windfall, reflecting nearly half of the merger’s \$160 million in anticipated first-year synergies.⁴ Likewise, Gray projected that approximately \$15

⁴ Nexstar Media Group, Inc., *Acquisition of Tribune Media Co.*, at 10 (Dec. 3, 2018), <https://www.nexstar.tv/wp-content/>

million of the expected \$80 million in first-year synergies from its purchase of Raycom stations would come from higher retransmission consent fees.⁵ Sinclair sought similar fee increases in its failed bid to acquire Tribune stations.⁶ The repeal of the Top-Four Prohibition will only exacerbate this trend by providing station owners with enhanced bargaining power relative to multi-channel video programming distributors (“MVPDs”).⁷

The Commission itself has acknowledged the increased leverage afforded to broadcasters in the same market that jointly negotiate retransmission consent agreements for two top-four stations in the same market, and the resulting harms. To prevent these harms, the Commission barred such joint negotiations after finding that they “give[] such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently.”⁸ The Commission “confidently conclude[d]” that “[w]ith regard to Top Four broadcasters, . . . the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.”⁹

uploads/2018/12/Nexstar-Tribune-Investor-Presentation-FINAL-12-3-18.pdf.

⁵ Gray Television, Inc., *Investor Presentation: Gray to Combine with Raycom to Become the Third Largest TV Broadcast Group*, at 7 (June 25, 2018), <https://gray.tv/uploads/documents/presentations/GrayTelevisionInvestorPresentationJune.pdf>.

⁶ See Diana Marszalek, *Sinclair, Tribune CEOs Push Advantage of Sizing Up*, *Broadcasting & Cable* (updated Mar. 16, 2018), <http://www.broadcastingcable.com/news/local-tv/sinclair-tribune-ceos-push-advantage-sizing/166006>; see also Sinclair Broadcast Group, *Investor Presentation at Slide 7* (May 8, 2017), http://sbgi.net/wp-content/uploads/2017/05/Sinclair_Tribune-Media-Investor-Presentation_vF.pdf (indicating that for net retransmission revenue there would be “[i]mmediate contracted step-ups to Sinclair’s rates.”); cf. Competitive Impact Statement, at 7-9, *United States v. Nexstar Broad. Grp., Inc.*, No. 1:16-cv-01772-JDB (D.D.C. Sept. 2, 2016), ECF No. 3 (“Nexstar-Media General Competitive Impact Statement”).

⁷ See Comments of NCTA – The Internet & Television Association at 13, MB Docket No. 19-30 (Mar. 18, 2019) (“NCTA Nexstar-Tribune Comments”).

⁸ *In re Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3358-59 ¶ 13 (2014) (“*Retransmission Consent Report & Order*”).

⁹ *Retransmission Consent Report & Order*, 29 FCC Rcd at 3358 ¶ 10 (footnote omitted); see also *id.* at 3363 ¶ 17 (“We believe that a rule barring joint negotiation may, by preventing supra-competitive increases in retransmission consent fees, tend to limit any resulting pressure for retail price increases for subscription video services. While there is an argument that at least a part of retransmission fee increases likely will be passed on to consumers, our decision to adopt a prohibition on joint negotiation is not premised on rate increases at the retail level. Cable operators are not required to pass through any savings derived from lower retransmission consent fees, and fee increases resulting from joint negotiation may not compare in magnitude to other costs that MVPDs incur. But artificially higher retransmission rates

Congress went further, recognizing that these harms arise in joint negotiations by *any* two stations, and therefore amended Section 325 of the Communications Act to prevent joint negotiations unless the stations are commonly owned.¹⁰ Significantly, Congress enacted this ban, including the exception for commonly-owned stations, against the backdrop of the Top-Four Prohibition. With the subsequent revisions to the Duopoly Rule permitting the common ownership of two top-four stations under certain circumstances,¹¹ the upward pressure on retransmission consent rates from joint negotiations is even greater.

The DOJ has also recognized the anticompetitive impact on common ownership of two top-four stations in a market. In connection with Nexstar’s purchase of Media General, for instance, the DOJ found that the proposed acquisition would “diminish competition in the negotiation of retransmission agreements with MVPDs” because Nexstar would have the ability to threaten “with the simultaneous blackout” stations affiliated with at least two major broadcast networks—its own and Media General’s—in the markets where the two companies were direct competitors.¹² Consequently, the DOJ found that the loss of competition between Nexstar and Media General in their overlapping markets “would likely lead to an increase in retransmission fees in those markets,” which in turn would lead to higher subscription fees given that retransmission fees are passed on to consumers.¹³ Accordingly, the DOJ required Nexstar to divest Media General stations in those

do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution”).

¹⁰ See 47 U.S.C. § 325(b)(3)(C)(iv). The Commission revised its rule to conform to the statute. See 47 C.F.R. § 76.65(b)(1)(viii).

¹¹ See *In re 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9838-39 ¶ 78 (2017) (“*Quadrennial Review Reconsideration Order*”).

¹² Competitive Impact Statement at 6, *United States v. Nexstar Broad. Group, Inc. and Media General, Inc.*, No. 15-cv-01772-JDB (D.D.C. Sept. 2, 2016), <https://www.justice.gov/atr/case-document/file/910661/download> (“Nexstar-Media General Competitive Impact Statement”); see also Competitive Impact Statement at 4-7, 11-13, *United States v. Gray Television, Inc. and Raycom Media, Inc.*, No. 18-cv-02951 (D.D.C. Dec. 14, 2018) (ordering divestitures in top-four overlap markets to “eliminate the substantial anticompetitive effects of the merger,” including the increased risk of retransmission consent fee increases and blackouts).

¹³ Nexstar-Media General Competitive Impact Statement at 9.

markets.

As the foregoing makes clear, the Commission should retain its Top-Four Prohibition to ensure that broadcasters do not gain undue leverage in retransmission consent negotiations. Despite denials by broadcasters,¹⁴ the harms from top-four combinations on retransmission consent fees are evident from the recent public statements of broadcasters themselves.¹⁵ Indeed, the Commission itself recently found that “[f]rom 2015 to 2016, total retransmission consent fees paid by cable systems to television broadcast stations increased, on average, by 31.8% per year.”¹⁶ Without the backstop of the Top-Four Prohibition, consumers inevitably will face unending and ever-higher price increases as a result of the excessive retransmission consent fee demands that this repeal would make more likely.

II. ANY WAIVERS OF THE TOP-FOUR PROHIBITION SHOULD BE GRANTED ONLY UNDER EXCEPTIONAL CIRCUMSTANCES

In the *Quadrennial Review Reconsideration Order*, adopted just 17 months ago, the Commission found that the Top-Four Prohibition remains necessary to serve the public interest and that top-four combinations should not be allowed absent a waiver.¹⁷ There is no evidence warranting a change in the rule in the last year. Under this recently-adopted framework, the only exceptions to the Top-Four Prohibition that merit Commission approval¹⁸ are those where the applicants have demonstrated truly exceptional circumstances. As the Commission explained in the

¹⁴ See *Nexstar Media Group, Inc. Tribune Media Co. Consolidated Applications for Consent to Transfer Control*, MB Docket No. 19-30, Top-Four Showing at 9 n.17 (filed Jan. 28, 2019); *Applications of Tribune Media Co. and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to Comprehensive Exhibit, at 8 n.32 (filed Apr. 24, 2018).

¹⁵ See *supra* at 2-3.

¹⁶ See *In re Communications Marketplace Report*, Report, GN Docket No. 18-231, FCC 18-181, ¶ 75 (rel. Dec. 26, 2018) (footnote omitted).

¹⁷ See *Quadrennial Review Reconsideration Order*, 32 FCC Rcd at 9836 ¶ 78 (finding that, “the Commission’s decision in the *Second Report and Order* to treat combinations of two top-four stations differently from other combinations is supported in the record. We therefore deny the NAB Petition and the Nexstar Petition to the extent each requested complete elimination of the Top-Four Prohibition.”).

¹⁸ See NPRM ¶ 58.

Quadrennial Review Reconsideration Order, applicants seeking approval of such a combination “must demonstrate that the benefits of the proposed transaction would outweigh the harms,” and that the application of the Top-Four Prohibition is not in the public interest with respect to the specific transaction “because the reduction in competition is minimal and is outweighed by public interest benefits.”¹⁹

To aid in this effort, the *Quadrennial Review Reconsideration Order* identified the types of information that applicants could provide the Commission to justify an exception to the Top-Four Prohibition, such as ratings share data, revenue share data, and characteristics of the market served by the stations subject to the requests.²⁰ While opting not to articulate “a rigid set of criteria for [the] case-by-case analysis,” the Commission committed that it would “undertake a careful review of such showings in light of the record with respect to each such application.”²¹

Given the harms the Commission itself has recognized result from the joint negotiation of retransmission consent agreements, applicants should not be able to obtain a waiver of the Top-Four Prohibition simply by demonstrating that the joint ownership of two top-four stations would result in cost savings, increased revenues, and economies of scale. As the Commission previously explained:

Nor is the possibility that supra-competitive retransmission consent fees derived from joint negotiation might enable broadcasters to invest in higher quality programming, as some parties assert, a valid basis for permitting an anticompetitive arrangement that generates those fees. We reject the suggestion that the public interest is served merely because an arrangement generally increases the funds available to broadcasters, if that arrangement otherwise is anticompetitive and potentially harmful to consumers.²²

¹⁹ *Quadrennial Review Reconsideration Order*, 32 FCC Rcd at 9838-39 ¶ 82.

²⁰ *Id.* (“Such information regarding the impacts on competition in the local market could include (*but is not limited to*): (1) ratings share data of the stations proposed to be combined compared with other stations in the market; (2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees; (3) market characteristics, such as population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations); (4) the likely effects on programming meeting the needs and interests of the community; and (5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.” (emphasis added) (footnotes omitted)).

²¹ *Id.*

²² *Retransmission Consent Report & Order*, 29 FCC Rcd at 3363-64 ¶ 17.

Moreover, none of the efficiency-based justifications, noted above, by themselves or in conjunction with each other establish that the harms resulting from reduced competition in the affected local markets would be minimal, or that the public interest would be served by the common ownership of two-top four stations. To the contrary, these justifications simply reflect common benefits of joint ownership in practically every transaction. If such factors were sufficient, there would be no purpose for retaining the Top-Four Prohibition.

Given the documented consumer and competitive harms from the ownership of two top-four stations, the Commission should make clear from the outset that an exception to the Top-Four Prohibition is only warranted and in the public interest in the face of truly unique circumstances. These instances would require applicants to bear the burden of demonstrating that the anticompetitive harms that accompany common ownership and joint retransmission consent negotiations are convincingly restrained and the benefits to the public are so extraordinary as to merit exception of the rule.

For instance, the Commission recently approved Gray Television’s purchase of two top-four stations in Amarillo, Texas after finding that the need for a waiver was “based on an anomalous occurrence” and thus that “applying the prohibition to the Amarillo Stations would not serve the purposes of the prohibition.”²³ In this instance, the “anomalous occurrence” was the fact that one of the stations was in the top four at the time of the transaction because it carried a popular sporting event that occurs only once every few years, rather than on the historical characteristics of this market.²⁴ This narrow, targeted assessment should be the touchstone for any future waivers.²⁵ The

²³ See *In re Applications for Consent to Transfer Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc.*, Memorandum Opinion and Order, MB Docket No. 18-230, DA 18-1286 ¶ 24 (MB rel. Dec. 20, 2018) (“Gray/Raycom Order”).

²⁴ See *id.*

²⁵ See Comments of NCTA – The Internet & Television Association, at 4, MB Docket No. 18-230 (Aug. 27, 2018) (arguing in the Gray/Raycom transaction that the temporary spike in viewership that occurred in the Amarillo market during the May 2018 Nielsen rating period “is the sort of exceptional circumstance that may warrant a finding that the prohibition on common ownership should not apply. Since the Commission’s findings of invariable harm are limited to common ownership and joint negotiation by two Top-Four stations, it would not be unreasonable to exempt ownership

Commission should also make clear that the impact on retransmission consent fees is relevant to any request for a waiver of the prohibition.²⁶

III. THE COMMISSION SHOULD EXTEND THE TOP-FOUR PROHIBITION TO LPTV STATIONS AND MULTICAST STREAMS

The Commission should extend the Top-Four Prohibition to multicast streams and LPTV stations to prevent broadcasters from continuing to utilize these means to circumvent the prohibition.²⁷ The opportunity to affiliate with two top-four networks in the same market confers market power in the negotiation of retransmission consent agreements, regardless of whether that affiliation is through the common ownership of full power or LPTV stations or through a multicast stream. Given the current exclusion of LPTV and multicast streams from the Top-Four Prohibition, it is unsurprising to find an increasing number of broadcasters turning to these means to avoid the rule.²⁸

Unlike when the ownership rules were originally adopted, broadcasters are now physically capable of transmitting the programming of multiple top-four networks from a single full power station in the same 600 megahertz channel they previously used to broadcast only a single network over the air. The use of a multicast stream for this purpose is not currently prohibited by the Commission because multicast streams are not considered stations for purposes of the local ownership rules.²⁹

of a station whose Top-Four status is a short-term aberration.”).

²⁶ Even when it adopted the current framework for considering waivers of the Top-Four Prohibition, the Commission acknowledged that retransmission consent was a relevant factor. See *Quadrennial Review Reconsideration Order*, 32 FCC Rcd at 9841 ¶ 82 n.239 (“we believe that the case-by-case review process will allow parties to advance any relevant concerns—including concerns related to retransmission consent issues—in the context of a specific proposed transaction if such issues are relevant to the particular market, stations, or transaction”).

²⁷ NPRM ¶¶ 67, 69.

²⁸ We recognize that in markets that lack four full-power stations, the use of LPTV stations and multicast streams to affiliate with top-four networks may be the only means for over-the-air viewers to receive the programming of all four of the top networks.

²⁹ See, e.g., *In re Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9156, 9164 ¶ 27 (MB 2014) (“Our local TV ownership rule does not restrict the use of multicast capability to form dual affiliations.”).

Similarly, since LPTV stations are not subject to the Commission’s ownership rules,³⁰ broadcasters have been able to own a full-power station with a top-four affiliation in a market as well as an LPTV station with another top-four affiliation in the same market and then negotiate retransmission consent—and command higher fees—for both of those stations. Top-four networks have increasingly been willing to affiliate with LPTV stations in dozens of markets,³¹ and in some cases station owners have moved a top-four affiliation from a full power station to an LPTV station in order to circumvent the Top-Four Prohibition.³² This practice not only harms competition but also harms over-the-air viewers by dramatically shrinking the station’s coverage area.

The Commission acknowledges in the NPRM that “there are a significant number of instances where a low power station is affiliated with a Big Four network,”³³ and similarly notes that there are “at least several dozen [Designated Market Areas (“DMAs”)] where a single entity holds affiliations with two Big Four networks by using a multicast stream to carry the second signal.”³⁴ In fact, the use of multicast streams and LPTV stations to broadcast a second top-four affiliation is extensive and growing. By NCTA’s count, as of 2018, there were **103** separate instances across 85 markets, of broadcasters transmitting up to four top-four stations using LPTV or Class A stations (32 markets) or multicast streams (77 markets).³⁵ This phenomenon is no longer limited to the smallest DMAs but now includes markets where at least four full-power stations already operate, such as

³⁰ See 47 C.F.R. § 74.732(b) (“Low power TV and TV translator stations are not counted for purposes of § 73.3555, concerning multiple ownership.”).

³¹ See Table A (Multiple Big 4 Affiliations Using Class A/LPTV Stations or Multicast Streams).

³² See, e.g., Mark K. Miller, *Redwood Television Closes on KIEM Buy*, TVNewsCheck (Dec. 4, 2017), <https://tvnewscheck.com/article/109346/redwood-television-closes-on-kiem-buy/> (describing a transaction in which Northwest Broadcasting affiliate Redwood Television Partners LLC acquired a full power NBC affiliate in the Eureka DMA while transferring its CBS affiliation in that DMA to an LPTV station in order to retain the CBS affiliation); see also Table A.

³³ NPRM ¶ 69.

³⁴ *Id.* ¶ 67.

³⁵ See Table A. The sum total of markets exceeds 85 because in some markets both LPTV stations and multicast streams are utilized by broadcasters to affiliate with more than one network.

Albuquerque, New Mexico; Evansville, Indiana; and Augusta-Aiken, Georgia.³⁶

While broadcasters of all sizes use this practice, the biggest beneficiaries of the current loopholes are the largest broadcasters in the country. For example, Gray accounts for more than a quarter of these instances, broadcasting one or more top-four affiliations using an LPTV station or multicast stream in 29 markets,³⁷ over 30 percent of its total footprint. One such market is Augusta-Aiken, Georgia, where Gray transmits the primary affiliates of both CBS (WRDW-TV) and NBC (using a low power station, WAGT-CD).³⁸ Another striking example is the Harrisonburg, VA market, where Gray transmits ABC (using full-power WHSV), Fox (using low power station, WSVF-CD), and CBS (using a multicast stream of low power station, WSVF-CD). Moreover, because the Harrisonburg DMA lacks an in-market NBC affiliate, following consummation of Gray's recently-approved acquisition of WVIR (the NBC affiliate in the neighboring Charlottesville DMA),³⁹ Gray will have effective control over *all four* Big Four affiliates in the market.

Likewise, Nexstar currently owns at least nine stations that multicast more than one of the four major broadcast networks on their digital signal.⁴⁰ For example, KRQE, a Nexstar station in the Albuquerque, New Mexico DMA, multicasts both CBS and Fox.⁴¹ Sinclair has also availed itself of the benefits of this loophole in the Commission's rules, broadcasting a second top-four

³⁶ *Id.*; see also Station Index, Broadcasting Information Guide, <https://www.stationindex.com/tv/> (last visited Apr. 28, 2019) (listing the individual television broadcast stations in a given market).

³⁷ See Table A.

³⁸ *Id.* To circumvent the Top-Four Prohibition as part of its merger with Schurz Communications, Gray ceased operation of the full power NBC affiliate, WAGT-TV (whose spectrum Gray had sold in the 600 MHz incentive auction for more than \$40 million), and moved the NBC affiliation, programming, and staff to a low-power station, which Gray had renamed WAGT-CD. See Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, FCC, to Schurz Communications, Inc. & Gray Television Group, Inc., 31 FCC Rcd 1113, at 7 (2016); FCC, Public Notice, Media Bureau Call Sign Actions (Oct. 7, 2015), https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1007/DOC-335718A1.pdf.

³⁹ See FCC, Public Notice, Broadcast Actions (Apr. 19, 2019), <https://docs.fcc.gov/public/attachments/DOC-357079A1.pdf>.

⁴⁰ Nexstar Media Group, Inc., Annual Report (Form 10-K) 9-12 (Feb. 27, 2019).

⁴¹ *Id.* at 9. To circumvent the Top-Four prohibition as part of its merger with Media General, Nexstar sold Media General's KASA, but only after KASA had been stripped of its Fox affiliation, which Nexstar placed on the multicast stream of KRQE. See, e.g., *Switching Channels: Purchases Will Move Telemundo, Fox*, Albuquerque Journal (July 19, 2016), <https://www.abqjournal.com/810810/switching-channels-purchases-will-move-telemundo-fox.html>.

station in eight markets, including in Kearney, Nebraska, where it multicasts both ABC and Fox.⁴²

Unsurprisingly, Sinclair stations account for a 41.6 percent share of retransmission consent revenues in the Kearney DMA, according to SNL Kagan estimates.⁴³

Finally, Northwest currently operates a quadropoly in Greenwood-Greenville, Mississippi. There, Cala Broadcast Partners LLC, a subsidiary of Northwest, multicasts both ABC and FOX on WABG-TV, and also owns two LPTV stations that transmit NBC (WNBD-LD) and CBS (WXVT-LD).⁴⁴ As all of these cases demonstrate, a single broadcaster is negotiating retransmission consent for access to at least two Big Four networks.

In the *2014 Quadrennial Review Order*, the Commission declined to apply the Top-Four Prohibition to the use of multicast streams, finding that “based on the record, dual affiliations involving two Big Four networks via multicasting are generally limited to smaller markets.”⁴⁵ Nonetheless, the Commission promised to “continue to monitor this issue and take action in the future, if appropriate.”⁴⁶ As demonstrated above, the increasingly widespread use of these strategies, made possible by improvements in compression technology, warrants Commission intervention.

Given the consolidation in today’s television marketplace and the leverage that broadcasters already possess, broadcasters should not be allowed to exploit the loopholes in the Commission’s rules to effectively negotiate retransmission consent for multiple top-four stations in a single market. Allowing a single owner to control the broadcast of two of those networks creates the same

⁴² Sinclair Broadcast Group Inc. Annual Report (Form 10-K) 7-10 (Mar. 1, 2019); *see also* Table A.

⁴³ *See* SNL Kagan, TV Stations by Market and Affiliation - Lincoln & Hastings-Kearny, NE (Oct. 15, 2018).

⁴⁴ *See* DeltaNews.tv, *About Us*, <https://www.deltanews.tv/site/about.html> (last visited Apr. 28, 2019) (indicating that Cala Broadcast Partners LLC, a subsidiary of Northwest, owns WABG (ABC), WXVT (CBS), WNBD (NBC), and WABG-DT2 (Fox); *see also* Table A.

⁴⁵ *In re 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864, 9892-93 ¶ 72 (2016) (“*2014 Quadrennial Review Order*”).

⁴⁶ *Id.*

concentration of market power, and the same leverage in retransmission consent negotiations, regardless of whether the combination arises from the ownership of two full power stations, the ownership of an LPTV station, or the use of a multicast stream.

The Commission should close these loopholes in its Top-Four Prohibition, just as it applied the Top-Four Prohibition to the acquisition of a second top-four station through an affiliation swap in 2016.⁴⁷ Like an affiliation swap, acquiring a second network affiliation using LPTV stations and multicast streams “result[s] in identical harm the top-four prohibition is meant to prevent.”⁴⁸ Applying the Top-Four Prohibition to a second top-four affiliation on an LPTV station or multicast stream is likewise necessary to prevent circumvention of the prohibition.⁴⁹

CONCLUSION

For the foregoing reasons, the Commission should retain the Top-Four Prohibition and limit waivers of this rule to only the most extraordinary of circumstances. It should also extend the prohibition to arrangements where a broadcaster affiliates with two national networks in a market through the use of an LPTV station or a multicast stream. By adopting these proposals, the Commission will protect consumers and competition from the exercise of undue market power by broadcasters in retransmission consent negotiations.

⁴⁷ *Id.* at 9881-85 ¶¶ 45-52.

⁴⁸ *Id.* at 9881 ¶ 45.

⁴⁹ As in the case of affiliation swaps, the Commission could apply the Top-Four Prohibition to existing combinations involving LPTV and multicast streams when the holders of those combinations come before the Commission in a future transaction. *See Gray/Raycom Order* ¶ 28 (“When the Commission clarified in the *Quadrennial Report and Order* that the Top-Four Prohibition applied equally to affiliation swaps, it did so prospectively, and rather than requiring divestiture at that time, the Commission affirmatively grandfathered then-existing top-four combinations previously achieved by affiliation swaps . . . The Commission, however, also stipulated that future transactions would be required to comply with the Commission’s rules then in effect.”); *see also* NCTA Nexstar-Tribune Comments at 23-25 (requesting that the Commission adopt a condition that would require Nexstar “to divest one of its affiliations with a top-four network in markets where it currently broadcasts a second network feed via a multicast stream or on an LPTV station.”).

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Neal M. Goldberg
NCTA – The Internet & Television
Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

April 29, 2019

Table A
Multiple Big 4 Affiliations Using Class A/LPTV Stations or Multicast Streams

<i>DMA</i>	<i>TV Market</i>	<i>Ultimate Parent</i>	<i>Network Affiliation</i>	<i>Station Type</i>
47	Albuquerque	Nexstar	CBS	full power
			FOX	digital multicast
72	Springfield-MO	Gray	NBC	full power
			ABC	digital multicast
83	Chattanooga	Sinclair	ABC	full power
			FOX	digital multicast
99	South Bend-Elkhart-IN	Sinclair	CBS	full power
			FOX	digital multicast
101	Fort Smith-Fayetteville-Springdale-Rogers-AR	Nexstar	NBC	full power
			FOX	digital multicast
			FOX	full power
			NBC	digital multicast
102	Tri-Cities-TN-VA	Nexstar	CBS	full power
			ABC	digital multicast
103	Evansville, IN	Bayou City Broadcasting Evansville, Inc.	CBS	full power
			FOX	digital multicast
104	Fort Wayne, IN	Quincy Media, Inc.	ABC	full power
			NBC	digital multicast
105	Augusta-Aiken-GA	Gray	CBS	full power
			NBC	WAGT-CD2 is a low power station
106	Johnstown-Altoona-State College-PA	Palm Television, LP	ABC	full power
			FOX	digital multicast
		Horseshoe Curve Communications	FOX	full power
			ABC	digital multicast
108	Springfield-Holyoke-MA	Meredith	ABC	full power
			CBS	digital low power
111	Lincoln & Hastings-Kearney-NE	Gray	CBS	full power
			NBC	digital multicast
			NBC	full power
		Sinclair	ABC	full power
			FOX	digital multicast
			FOX	full power
112	Tallahassee-Thomasville-FL-GA	Sinclair	NBC	full power
			FOX	digital multicast
113	Peoria-Bloomington-IL	Quincy Media, Inc.	NBC	full power
			ABC	digital multicast
117	Fargo	Gray	NBC	full power
			CBS	digital multicast
118	Macon	Sinclair	FOX	full power
			ABC	digital multicast
120	Traverse City-Cadillac-MI	Cadillac Telecasting Co.	FOX	full power
			CBS	digital multicast
		Cunningham Broadcasting Corporation	ABC	full power
			NBC	digital multicast
		Heritage Broadcasting Co. of Michigan	CBS	full power
			FOX	digital multicast
		Sinclair	NBC	full power
			ABC	digital multicast
121	Lafayette, LA	Bayou City Broadcasting Lafayette	FOX	full power
			NBC	digital multicast
			NBC	digital low power
122	Bakersfield-CA	Sinclair	CBS	full power
			FOX	digital class A
124	Santa Barbara-Santa Maria-San Luis Obispo-CA	News-Press and Gazette Company	ABC	full power
			FOX	digital class A
125	Youngstown, OH	Nexstar	CBS	full power
			FOX	digital multicast
			FOX	digital low power
126	Monterey-Salinas-CA	Hearst	NBC	full power
			ABC	digital multicast
129	Wilmington, NC	Morris Multimedia, Inc.	ABC	full power
			CBS	digital multicast
133	Columbus-Tupelo-West Point-Houston-MS	USA Television Holdings LLC	NBC	full power
			ABC	digital multicast
134	Wasau-Rhineland-WI	Gray	CBS	full power
			FOX	digital multicast
136	Columbia-Jefferson City-MO	News-Press and Gazette Company	ABC	full power
			FOX	digital multicast
			FOX	digital low power

Source: Kagan - S&P Global Market Intelligence (2018)

Table A
Multiple Big 4 Affiliations Using Class A/LPTV Stations or Multicast Streams

<i>DMA</i>	<i>TV Market</i>	<i>Ultimate Parent</i>	<i>Network Affiliation</i>	<i>Station Type</i>
137	Monroe-El Dorado-LA-AR	Gray	CBS	full power
			ABC	digital multicast
140	Beaumont-Port Arthur-TX	TEGNA, Inc.	ABC	full power
			NBC	digital multicast
141	Topeka, KS	Nexstar	NBC	full power
			FOX	digital class A
144	Duluth-Superior-MN-WI	Quincy Media, Inc.	NBC	full power
			CBS	digital multicast
146	Minot-Bismark-Dickinson-ND	Gray	NBC	full power
			FOX	digital multicast
			FOX	digital low power
150	Panama City-FL	Gray	NBC	full power
			CBS	digital multicast
			CBS	digital low power
152	Albany, GA	Gray	NBC	full power
			ABC	digital multicast
153	Joplin-Pittsburg-MO-KS	Morgan Murphy Media	CBS	full power
			FOX	digital multicast
155	Bangor, ME	Rockfleet Broadcasting Inc.	ABC	full power
			FOX	digital multicast
			FOX	digital low power
			ABC	digital low power multicast
156	Biloxi-Gulfport-MS	Gray	ABC	full power
			CBS	digital multicast
		Morris Multimedia, Inc.	FOX	full power
			NBC	digital multicast
158	Terre Haute, IN	USA Television MidAmerica Holdings	CBS	full power
			FOX	digital multicast
159	Sherman-Ada-TX-OK	Gray	CBS	full power
			FOX	digital multicast
		Lockwood Broadcast Group	NBC	full power
			ABC	digital multicast
160	Binghamton-NY	Nexstar	ABC	full power
			NBC	digital multicast
			NBC	digital class A
161	Idaho Falls-Pocatello-ID-WY	News-Press and Gazette Company	ABC	full power
			FOX	digital low power
			CBS	digital low power multicast
162	Wheeling-Steubenville-WV-OH	Nexstar	CBS	full power
			ABC	digital multicast
		Sinclair	NBC	full power
			FOX	digital multicast
163	Bluefield-Beckley-Oak Hill-WV	Nexstar	CBS	full power
			FOX	digital multicast
164	Missoula, MT	Cowles Company	ABC	full power
			FOX	digital multicast
166	Yuma-El Centro-AZ-CA	News-Press and Gazette Company	FOX	full power
			ABC	digital multicast
168	Hattiesburg-Laurel-MS	Gray	NBC	full power
			ABC	digital multicast
169	Utica, NY	Heartland Media LLC	NBC	full power
			CBS	digital multicast
170	Clarksburg-Weston-WV	Nexstar	NBC	full power
			ABC	digital multicast
171	Rapid City, SD	Gray	ABC	full power
			FOX	digital multicast
			NBC	full power
172	Lake Charles, LA	American Spirit Media, LLC	FOX	full power
			ABC	digital multicast
173	Dothan, AL	Gray	CBS	full power
			NBC	digital low power
174	Quincy-Hannibal-Keokuk-IL-MO-IA	Quincy Media, Inc.	NBC	full power
			FOX	digital multicast
		Sinclair	CBS	full power
			ABC	digital multicast
175	Harrisonburg, VA	Gray	ABC	full power
			CBS	digital multicast
			FOX	digital class A
			CBS	digital class A multicast

Table A
Multiple Big 4 Affiliations Using Class A/LPTV Stations or Multicast Streams

<i>DMA</i>	<i>TV Market</i>	<i>Ultimate Parent</i>	<i>Network Affiliation</i>	<i>Station Type</i>
176	Elmira (Corning)-NY	Lilly Broadcasting, LLC	ABC	full power
			CBS	digital multicast
177	Jackson, TN	Bahakel Communications, Ltd.	ABC	full power
			CBS	digital multicast
178	Watertown, NY	United Communications Corporation	CBS	full power
			FOX	digital multicast
			FOX	digital class A
179	Alexandria, LA	Gray	NBC	full power
			CBS	digital multicast
180	Jonesboro, AR	Gray	ABC	full power
			NBC	digital multicast
181	Bowling Green, KY	Gray	ABC	full power
			FOX	digital multicast
		Marquee Broadcasting Inc.	NBC	full power
			CBS	digital multicast
182	Marquette, MI	Gray	NBC	full power
			FOX	digital multicast
183	Charlottesville, VA	Gray	CBS	full power
			FOX	digital multicast
			ABC	digital low power
			FOX	digital class A
184	Laredo, TX	Gray	NBC	full power
			ABC	digital multicast
			CBS	digital low power
185	Butte-Bozeman-MT	Cowles Company	ABC	full power
			FOX	digital multicast
186	Bend, OR	News-Press and Gazette Company	NBC	full power
			FOX	digital multicast
			FOX	digital class A
		TDS, Inc.	ABC	full power
			CBS	digital low power
187	Grand Junction-Montrose-CO	Gray	NBC	full power
			ABC	digital low power
		Nexstar	CBS	full power
			FOX	digital multicast
189	Twin Falls, ID	Gray	CBS	full power
			FOX	digital multicast
			FOX	digital low power
190	Lima, OH	Block Communications, Inc.	NBC	full power
			FOX	digital multicast
		West Central Ohio Broadcasting	ABC	digital class A
			CBS	digital class A multicast
191	Meridian, MS	Waypoint Media, LLC	FOX	full power
			NBC	digital multicast
192	Great Falls, MT	Cowles Company	ABC	full power
			FOX	digital multicast
		EPI Group, LLC	CBS	full power
			NBC	digital low power
193	Greenwood-Greenville-MS ¹	NBI Holdings, LLC	ABC	full power
			FOX	digital multicast
			NBC	digital low power
			CBS	digital low power
194	Parkersburg, WV	Gray	NBC	full power
			CBS	digital multicast
			FOX	digital multicast
			FOX	digital low power
			CBS	digital low power
195	Eureka, CA ²	NBI Holdings, LLC	NBC	full power
			CBS	digital low power
197	Cheyenne-Scottsbluff-WY-NE	Gray	CBS	full power
			NBC	digital multicast
			NBC	analog low power
		Wyomedia Corporation	FOX	full power
			ABC	digital multicast
198	Casper-Riverton-WY	Mark III Media, Inc.	CBS	full power
			ABC	digital multicast
		Wyomedia Corporation	FOX	full power
			ABC	digital multicast

¹ See DeltaNews.tv, *About Us*, <https://www.deltanews.tv/site/about.html> (last visited Apr. 28, 2019).

² See *Applications to Transfer Control of NBI Holdings, LLC, and Cox Enterprises, Inc., to Terrier Media Buyer, Inc.*, MB Docket No. 19-98, Comprehensive Exhibit, Attachment 1 (filed Apr. 8, 2019); TV Passport, TV Schedule for CBS (KVIQ) Eureka, CA, <https://www.tvpassport.com/tv-listings/stations/cbs-kviq-eureka-ca/2314> (last visited Apr. 28, 2019).

Table A
Multiple Big 4 Affiliations Using Class A/LPTV Stations or Multicast Streams

<i>DMA</i>	<i>TV Market</i>	<i>Ultimate Parent</i>	<i>Network Affiliation</i>	<i>Station Type</i>
199	Mankato, MN	United Communications Corporation	CBS	full power
			FOX	digital multicast
200	Ottumwa-Kirksville-IA-MO	Gray	FOX	full power
			NBC	digital multicast
		Sinclair	ABC	full power
			CBS	digital multicast
201	St. Joseph, MO	News-Press and Gazette Company	FOX	digital low power
			CBS	digital low power multicast
			NBC	digital low power
			CBS	digital low power
202	Fairbanks, AK	Gray	NBC	full power
			CBS	digital multicast
203	Victoria, TX	Morgan Murphy Media	ABC	full power
			NBC	digital multicast
			CBS	digital multicast
			NBC	digital low power
			CBS	digital low power
205	Helena, MT	Cowles Company	ABC	digital low power
			FOX	digital low power multicast
		EPI Group, LLC	NBC	full power
			CBS	digital low power
206	Presque Isle, ME	Gray	CBS	full power
			FOX	digital multicast
207	Juneau, AK	Qurate Retail, Inc.	NBC	digital low power
			CBS	digital low power
			CBS	full power
			CBS	full power
208	Alpena, MI	Lake Superior Community Broadband	CBS	full power
			FOX	digital multicast
			ABC	digital multicast
209	North Platte, NE	Gray	NBC	full power
			FOX	digital multicast
			FOX	digital class A
			CBS	digital low power
210	Glendive, MT	Glendive Broadcasting Corporation	CBS	full power
			NBC	digital multicast