Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations	MB Docket No. 17-179

COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

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SUMMARY

The American Television Alliance writes to express its concern that Sinclair's proposed acquisition of Tribune would give Sinclair ownership of multiple top-four affiliates in numerous markets, in violation of the Commission's local ownership rules. Because Applicants have not requested a waiver of these rules, we expect that Sinclair will not proceed with its proposed purchase of stations in places like Seattle, St. Louis, and Oklahoma City. We agree with Applicants that the Commission cannot permit Sinclair to acquire these stations at this time. Yet Applicants also suggest that, if the Commission relaxes its local ownership rules, they "may file amendments" to their Application in response. ATVA would object to any subsequent attempts by Sinclair to own new "top-four duopolies" because of the increased pricing power such duopolies would confer, the increased programming costs they would impose on MVPDs, and the higher bills consumers would pay as a result.

Three years ago, the Commission voted unanimously to prohibit a single entity from negotiating on behalf of two top-four stations in a market because such joint negotiation harms competition and gives that broadcaster pricing power in retransmission consent negotiations. All five Commissioners agreed this was sound policy because, when a single entity negotiates retransmission consent for two top-four stations, it can command fees between 20 and 43 percent higher than can a single top-four station. (Such increases, of course, come on top of the already high prices, record blackouts, and unwanted programming that broadcasters can already impose on MVPD subscribers *without* top-four duopolies.) A bipartisan Congress then ratified and strengthened the Commission's order to extend it to joint negotiation between *any* non-commonly owned stations in a single market. The Department of Justice later employed this reasoning in requiring Nexstar to divest Media General stations. We are unaware of any basis

for the Commission to find otherwise here. And Applicants—who, again, have not yet asked the Commission to approve the creation of such duopolies—have provided no such basis.

The Commission's findings match ATVA members' real-world experiences. ATVA's MVPD members operate today in numerous markets in which multicasting or some other arrangement has produced a top-four duopoly. They find that top-four duopolies possess significantly more pricing power and leverage in retransmission consent negotiations than do individual top-four stations. And they know that those who possess such duopolies exercise such leverage through higher prices, the imposition of more onerous terms, or both. The Commission has said that this may increase "pressure for retail price increases" on MVPDs.

In the *Media Ownership* proceeding, ATVA has argued that the Commission should not permit such top-four duopolies without amending its retransmission consent rules to mitigate the harms such duopolies would cause. The same holds here. If and when Applicants ultimately ask for authorization to create new top-four duopolies, the Commission should consider any such request only if it also addresses the attendant harms.

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COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance ("ATVA")[1] provides its comments on Sinclair Broadcast Group, Inc.'s ("Sinclair's") proposed acquisition of Tribune Media Company ("Tribune").[2] ATVA is concerned about how the creation of new "top-four duopolies" in numerous local markets would affect retransmission consent negotiations. In each of those markets, the transaction would give Sinclair control of at least two of the four highest-rated stations. In Seattle, for example, Sinclair would control the local ABC, Fox, Univision, and MyNetwork affiliates. In Saint Louis, it would control the ABC and Fox affiliates. In Salt Lake

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1 ATVA seeks to be a voice for the television viewer. Its members include large and small multichannel video programming distributors, cable programmers, and trade associations. A list of ATVA members can be found in Appendix A.

2 *Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose Ex Parte Status for the Proceeding*, DA 17-647, MB Docket No. 17-179 (rel. July 6, 2017) ("*Notice*"); *see also* "Comprehensive Exhibit" of Tribune Media Company and Sinclair Broadcast Group, *attached to* Letter from Mace Rosenstein to Marlene Dortch, MB Docket No. 17-179 (filed July 19, 2017) ("Application").

City, it would control the CBS and Fox affiliates. In Oklahoma City, it would control the NBC and Fox affiliates.

Applicants, however, do not actually seek the Commission's permission to create these new top-four duopolies. To the contrary: they concede that license transfers in those markets would violate the Commission's local ownership rule.[3] Applicants do not seek waivers of this rule to permit these combinations. Rather, they state that, *if* the Commission decides to change its local ownership rule, Applicants "may file amendments to the applications to address such changes."[4] Until Applicants actually file such amendments, then, we understand them not to be seeking authorization to create and operate these duopolies—since they concede that the Commission cannot grant the application as filed. We agree: under the existing local media ownership rules, the Commission cannot permit Sinclair to obtain new top-four duopolies. If the Commission *were* to relax its local media ownership rules, and Applicants were to then "file amendments" seeking approval to create new duopolies, we would expect the Commission to place those amendments on public notice to permit the public to comment on them. For the moment, however, we expect that Sinclair will either not purchase Tribune stations in these markets or divest its own stations before closing.

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3 *See* Application at 12; *see also* 47 C.F.R. § 73.3555(b)(1)(i) ("An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if . . . [a]t the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service . . . ."); *see also, e.g.*, Dominic Gates, *Current FCC Rules Bar Sinclair from Owning Both KOMO and KCPQ — But That Could Change*, The Seattle Times, (May 9, 2017), http://www.seattletimes.com/business/boeing-aerospace/current-fcc-rules-bar-sinclair-from-owning-both-komo-and-kcpq-but-that-could-change/ (describing circumstances in Seattle under existing rules, and Sinclair's expectation that the Commission will change these rules).

4 Application at 12; *see also Notice* at 2 (same).

As for any *future* amendments to this transaction that would grant Sinclair additional top-four duopolies, we find it inconceivable that such amendments would serve the public interest. We expect that the Commission would put such amendments out for public comment to allow a full evaluation of the public interest implications.

I. THE COMMISSION HAS ALREADY MADE FINDINGS INDICATING THAT THE CREATION OF "BIG FOUR" DUOPOLIES WILL INCREASE RETRANSMISSION CONSENT PRICES.

Three years ago, the Commission unanimously prohibited joint retransmission consent negotiations among non-commonly owned top-four broadcasters.[5] That *Joint Negotiation Order* made explicit and extensive findings about what happens when a single entity is responsible for negotiating retransmission consent for two of the top-four rated networks in a market.[6]

Citing economic theory, its conclusions in merger proceedings, and DOJ guidelines, the Commission found that "joint negotiation among any two or more separately owned broadcast stations serving the same DMA will *invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees*."[7] The Commission added: "With regard to Top Four broadcasters, we can confidently

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[5] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) ("*Joint Negotiation Order*").

[6] The entirety of Part III.A of the *Joint Negotiation Order*, describing the "Need for the Prohibition on Joint Negotiation," can be found in Appendix B.

[7] *Joint Negotiation Order* ¶ 10 (emphasis added); *see also id.* ¶ 13 ("Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down. The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs. This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.").

conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers."[8]

In making this determination, the Commission cited empirical evidence that joint negotiation by top-four stations increased retransmission consent prices by 20 percent (or, in some cases, as high as 43 percent).[9] Taking the more conservative of these estimates, a 20 percent increase in retransmission consent fees represents nearly *$2.3 billion* in additional fees annually by 2022, according to SNL Kagan.[10]

The Commission also found that a bright-line rule was appropriate to deal with concerns about joint negotiation among top-four stations in a single market. While such concerns could theoretically be addressed on a case-by-case basis, the Commission reasoned: "We believe that adopting a rule specifically directed at such negotiation is more effective in preventing the competitive harms derived therefrom than case-by-case adjudication, and is more administratively efficient—particularly because parties entering a negotiation will be advantaged by advance notice of the appropriate process for such negotiation."[11] Chairman Pai explicitly agreed with the *Order's* key findings in a separate statement.[12]

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8 *Id.* ¶ 10.

9 *Id.* ¶ 16 and n. 66.

10 *SNL Kagan Releases Updated Retransmission Projections*, PR Newswire, (June 29, 2016), http://www.prnewswire.com/news-releases/snl-kagan-releases-updated-retransmission-projections-300291457.html (estimating retransmission consent fees totaling $11.6 billion by 2022. This estimate assumes that the overwhelming majority of retransmission consent fees comes from top-four stations or stations bundled with top-four stations).

11 *Joint Negotiation Order* ¶ 12.

12 *Id.*, Separate Statement of Commissioner Pai ("[T]he harms [of joint negotiation] outweigh any such benefits. The record indicates that joint negotiations may result in supra-competitive increases in retransmission-consent fees. . . . The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule.").

Several months later, Congress ratified and strengthened the Commission's *Order* by promulgating its own, broader prohibition on joint negotiation—one that applied to joint negotiation among *all* non-commonly owned broadcasters in a single market.[13] It did so with support from both sides of the aisle.[14] The Congressional prohibition on joint negotiation was "broader than, and thus supersede[d], the Commission's [then] existing prohibition."[15]

The Commission's analysis dealt with joint *negotiation* of non-commonly owned stations because its rules already prohibited joint *ownership* of such stations. Accordingly, neither the Commission nor Congress had any reason to consider the effect of joint ownership of top-four stations on retransmission consent negotiations. The issues raised by joint ownership, however, are precisely the same. If a party can increase prices when it can negotiate on behalf of two non-commonly owned top-four stations in a market, it can also increase prices when it owns two top-four stations in that market and negotiates for both. Thus, the Department of Justice last year cited the very concerns raised in the *Joint Negotiation Order* when it required Nexstar to divest stations that it proposed to acquire from Media General.[16] The Commission then cited DOJ's

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13 STELA Reauthorization Act of 2014, Pub. L. No. 113-200 § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission. . .").

14 *See* STELA Reauthorization Act of 2014, All Actions H.R.5728 — 113th Congress (2013-2014), Congress.gov, https://www.congress.gov/bill/113th-congress/house-bill/5728/all-actions?q=%7B%22search%22%3A%5B%22STELA+Reauthorization+Act%22%5D%7D&r=2&overview=closed#tabs (showing that STELAR passed the House by voice vote and the Senate by unanimous consent).

15 *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd. 2380, ¶ 4 (2015).

16 *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp.* (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB), https://www.justice.gov/atr/case-document/file/910661/download ("Prior to the merger, an MVPD's failure to reach a retransmission agreement with Nexstar for a broadcast television station might result in a blackout of that station and threaten some subscriber loss for the

divestitures as a basis for approving the Nexstar-Media General transaction.[17] We are unaware of any factual or legal basis to prevent this reasoning from applying with equal or greater force to any proposal by Sinclair to create multiple new top-four duopolies by acquiring Tribune.

II. IF APPLICANTS SEEK AUTHORITY TO CREATE TOP-FOUR DUOPOLIES, THE COMMISSION SHOULD NOT GRANT SUCH AUTHORITY UNLESS IT ADDRESSES THE ATTENDANT HARMS.

ATVA members agree with the Commission's prior conclusions about the consequences of creating top-four duopolies in a single market. These correspond precisely with ATVA members' real-world experiences. ATVA's MVPD members negotiate retransmission consent agreements today in numerous markets in which multicasting or some other arrangement has produced a top-four duopoly.[18] They have found that, where a station group can negotiate retransmission consent on behalf of two top-four stations in a single market—whether through

MVPD. But because the MVPD would still be able to offer programming on Media General's major network affiliates, which are at least partial substitutes for Nexstar's affiliates, many MVPD subscribers would simply switch stations instead of cancelling their MVPD subscriptions. After the merger, an MVPD negotiating with Nexstar over a retransmission agreement could be faced with the prospect of a dual blackout of major broadcast networks (or worse), a result more likely to cause the MVPD to lose subscribers and therefore to accede to Nexstar's retransmission fee demands. For these reasons, the loss of competition between the Nexstar and Media General stations in each DMA Market would likely lead to an increase in retransmission fees in those markets and, because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees.").

17 *See Media Gen., Inc. et al.* 32 FCC Rcd. 183, ¶ 35 (2017) ("The Department of Justice, which entered into a consent decree with the Applicants resolving its competitive concerns regarding the transaction, recognized rising retransmission consent fees as a potential competitive harm posed by the transaction in certain local markets, but concluded that this potential harm was adequately addressed by the divestitures proposed in the seven overlap markets.").

18 *See, e.g.*, Letter from Stacy Fuller to Marlene Dortch, MB Docket Nos. 10-71, 09-182 (filed Dec 6. 2013) (listing markets in which DIRECTV negotiated with top-four duopolies).

joint ownership or some other arrangement—the station group eliminates rivalry and gains more pricing power than the stations would possess on their own.[19]

Examples of this power—and the harm it causes to consumers—were on display earlier this year, when Northwest Broadcasting pulled all four major networks from Cable ONE subscribers in Mississippi.[20] At the same time, Hearst blacked out both NBC and ABC programming from DIRECTV subscribers in Monterrey.[21] In these and other similar cases, the blackouts harmed the respective MVPD's subscribers significantly more than a single-station blackout would have. In both cases described above, for example, subscribers lost NFL playoff games from multiple networks. In Mississippi, Cable ONE's subscribers lost access to network programming altogether—and the entire slate of NFL playoff games.[22]

ATVA members have found that top-four duopolies can command higher retransmission consent fees than otherwise would be possible. Sometimes, this is reflected in higher prices in the duopoly market. More often, however, such increased fees are "spread out" in a contract

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19 In other words, they each consider network stations in a single market to be "at least partial substitutes" for one another. *Joint Negotiation Order* ¶ 13.

20 *See* Jon Lafayette, *Dispute Yanks Northwest Stations from Cable One*, Broadcasting & Cable (Jan. 1, 2017), http://www.broadcastingcable.com/news/currency/dispute-yanks-northwest-stations-cable-one/162100. In Biloxi-Gulfport, Mississippi, Northwest Broadcasting appears to negotiate on behalf of two stations—WXXV, owned by Morris Network of Mississippi, Inc., and WLOX, owned by WLOX License Subsidiary, LLC. Each of these stations carries two networks, one on its primary feed, another on its multicast feed. We are unaware of the basis by which Northwest Broadcasting negotiates on behalf of these stations.

21 *See Companies Should Own Only One TV Station Per Market*, The Californian: Letters to the Editor (Jan 11, 2017), http://www.thecalifornian.com/story/opinion/2017/01/11/companies-one-tv-station-per-market/96376470/ (In Monterey-Salinas, Hearst owns KSBW, which carries two networks, one on its primary feed, another on its multicast feed).

22 Northwest Broadcasting restored its stations to Cable ONE after the Conference Championship games, but prior to the Super Bowl. *See* Adam Jacobson, *Cable ONE, NW Broadcasting End Retrans War*, Radio & Television Business Report (Feb. 5, 2017), http://www.rbr.com/cable-one-nw-broadcasting-0205/.

covering a broadcaster's duopoly and non-duopoly markets alike. Thus, where a broadcaster obtains a top-four duopoly, *all* MVPD subscribers pay the price. Broadcasters with top-four duopolies can also exercise their leverage by imposing onerous terms on MVPDs, such as the compelled carriage of unwanted cable programming or multicast channels, carriage of such programming on more highly-penetrated tiers, unduly favorable channel positioning, and even allowances for out-of-market carriage. The Commission has found that this may create "pressure for retail price increases."[23]

Absent divestitures, the proposed transaction would permit Sinclair to create new top-four duopolies. This would cause exactly the harms cited by the Commission and Congress in prohibiting joint negotiation among non-commonly owned stations. That is, it would result in higher retransmission consent fees in all Sinclair markets. It would also result in Sinclair having even more leverage to compel carriage of unwanted and unpopular programming, as it has already compelled carriage of the Tennis Channel.[24] Indeed, obtaining such leverage is one of Sinclair's goals in this transaction, as evidenced by its statement to investors that the transaction presents a "[s]ignificant content vertical integration opportunity."[25] MVPD subscribers would ultimately bear the burden of paying for such channels.[26]

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23 *Joint Negotiation Order* ¶ 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.").

24 *See* Comments of the American Television Alliance, GN Docket No. 16-142 at 21 (filed May 9, 2017) (describing the Tennis Channel's carriage gains after Sinclair purchased it).

25 *Investor Presentation* at 11, Sinclair Broadcast Group (May 8, 2017) ("*Investor Presentation*"), http://sbgi.net/wp-content/uploads/2017/05/Sinclair_Tribune-Media-Investor-Presentation_vF.pdf.

26 Jeffrey Layne Blevins, *Sinclair's Proposed Purchase of Tribune Media is Bad News for St. Louis*, St. Louis Post Dispatch (July 4, 2017), http://www.stltoday.com/opinion/columnists/sinclair-s-proposed-purchase-of-tribune-media-is-bad-news/article_096f5b2b-7406-53b3-817b-06fe0b79180b.html ("And speaking of marketplaces, think of the advantage Sinclair will have over its competitors by owning two or three news stations in a single market. Local and national advertisers could get time on the

While Applicants have indicated that they do not intend to create new top-four duopolies due to the Commission's local media ownership rules, we have every reason to believe that Applicants' position would change were the Commission to relax those rules. Sinclair has made clear to investors that the merger will improve its pricing power—and that it would employ this power to increase rates for MVPDs and their subscribers.[27] As Sinclair Chief Executive Officer Christopher Ripley told *Multichannel News*, "Sinclair will gain an edge in negotiating with multichannel video programming distributors."[28] A prominent analyst explained why at least part of this "edge" would come from increased local ownership, noting that transactions such as this one raise "the potential for an improved retrans trajectory from dual ownership of two must-have TV stations [in a single market]."[29]

For these reasons, if the Commission were to relax its local ownership rules, and if Applicants were subsequently to submit amendments seeking authorization for new top-four duopolies, ATVA would strongly object. In the *Media Ownership* docket, ATVA has argued that the Commission should not relax the "top-four" prong of its local ownership rule without amending its *retransmission consent* rules to mitigate the harm such changes would cause.[30] If

ABC and FOX television affiliates, as well as the CW in St. Louis with a single buy. Sinclair would also have further leverage over satellite and cable service operators in negotiating carriage agreements.").

27 *Investor Presentation* at 7 (discussing improved "net retransmission revenue").

28 Diana Marszalek, *Sinclair, Tribune CEOs Push Advantage of Sizing Up*, Multichannel News (May 22, 2017), reprinted in Broadcasting & Cable, http://www.broadcastingcable.com/news/local-tv/sinclair-tribune-ceos-push-advantage-sizing/166006 ("Ripley said that while Sinclair will gain an edge in negotiating with multichannel video programming distributors, he has no plans to buck the current retransmission-consent model, 'because the ecosystem works.'").

29 Paul Gallant, Positive Outlook for Broadcast TV M&A—But Courts & Grassroots Are Important (Jan. 19, 2017).

30 *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, 04-256 (filed Feb. 17, 2017) (raising concerns about relaxation of the top-four prong).

Sinclair were to seek authority to create new top-four duopolies, the Commission would, at a minimum, need to provide such relief.

CONCLUSION

Applicants have not yet asked the Commission to grant them new top-four duopolies. Such duopolies would increase Sinclair's pricing power, permitting it to raise prices for, and force unwanted programming upon, millions of consumers. If Applicants *do* ask the Commission for permission to create new duopolies, the Commission should consider any such request only if it also addresses the harms such new duopolies would cause to consumers and MVPDs alike.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Laura Owsiany, hereby certify that on August 7, 2017, I caused true and correct copies of the foregoing to be served by electronic mail upon the following:

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APPENDIX A

ATVA Members

The Africa Channel
Altice USA
American Cable Association
American Public Power Association (APPA)
AT&T
Bend Broadband/TDS
CenturyLink
Charter Communications
Comporium
Discovery Communications
DISH Network
Eastern Rural Telecom Association
GMC
Metrocast
Independent Telephone and Telecommunications Alliance
MCTV
Mediacom Communications
Midcontinent Communications
New America Foundation
NTCA—The Rural Broadband Association
Outdoor Channel
Parents Television Council
Retirement Living TV
Rural Independent Competitive Alliance
NUVOtv
Starz Entertainment
USTelecom
Verizon
Wave Broadband and Astound Broadband

APPENDIX B

Part III.A of the *Joint Negotiation Order*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 31, 2014 **Released: March 31, 2014**

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O'Rielly issuing separate statements.

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A. Need for the Prohibition on Joint Negotiation

9. Based on our review of the record,[39] and pursuant to our authority in Section 325 of the Act,[40] we revise Section 76.65(b) of our rules to provide that it is a violation of the Section 325(b)(3)(C)(ii) duty to negotiate in good faith for a Top Four television broadcast station (as measured by audience share) to negotiate retransmission consent jointly with another such station if the stations serve the same geographic market and are not commonly owned.[41] We find persuasive the arguments of MVPDs and public interest groups who uniformly assert that adopting a rule prohibiting joint negotiation is necessary to prevent the competitive harms resulting from such negotiation.

10. In the *NPRM*, the Commission broadly sought comment on whether it should be a violation for any television broadcast station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.[42] However, the evidence in this proceeding persuades us to take a more limited approach, prohibiting outright only television broadcast stations that are ranked among the top four stations as measured by audience share from negotiating retransmission consent jointly with another such station, if the stations are not commonly owned and serve the same geographic market. Although economic theory supports a conclusion that joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are

[39] In this *Order*, we do not address arguments that are more appropriately considered in other Commission proceedings, such as those relating to possible attribution of agreements that provide for joint negotiation of retransmission consent under the Commission's ownership rules. *See 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*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, FCC 14-28 (adopted Mar. 31, 2014).

[40] Section 325(b)(3)(C)(ii) of the Act, which imposes on television broadcast stations a duty to negotiate retransmission consent in good faith, provides, in relevant part:

> The Commission shall . . . revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent. . . . Such regulations shall . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

47 U.S.C. § 325(b)(3)(C)(ii).

In addition, Section 325(b)(3)(A) of the Act directs the Commission, among other things:

> to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent. . . . The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable.

47 U.S.C. § 325(b)(3)(A).

[41] As noted above, Section 76.65 of the Commission's rules identifies specific actions or practices that are deemed to violate a television broadcast station's duty to negotiate retransmission consent agreements in good faith. *See supra* ¶ 3 n. 14. In adopting its good faith rules, the Commission stated that the *per se* standards "identify . . . situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties," and that the standards constitute a violation of the good faith duty in all possible instances. *See Good Faith Order*, 15 FCC Rcd at 5457, ¶ 31, 5462, ¶ 39.

[42] *See NPRM*, 26 FCC Rcd at 2731, ¶ 23.

higher than those that would have resulted if the stations competed against each other in seeking fees,[43] the record amassed in this proceeding is centered largely around evidence regarding the impact of joint negotiation by Top Four broadcast stations.[44] With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified[45] and that such negotiation on balance hurts consumers. Because the record lacks similar evidence with respect to other stations, we decline to adopt a prohibition that applies to all separately owned broadcast stations serving the same geographic market (*i.e.,* regardless of market share).[46]

11. Our decision to adopt a rule addressing joint negotiation by Top Four stations is consistent with the Commission's previous determination, in implementing Section 325(b)(3)(C) of the Act, that agreements not to compete or to fix prices are "inconsistent with competitive marketplace considerations and the good faith negotiation requirement."[47] In the *Good Faith Order*, the Commission stated:

> It is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.' Conduct that is violative of national policies favoring competition – that is, for example . . . an agreement not to compete or to fix prices . . . is not within the competitive marketplace considerations standard included in the statute.[48]

12. Although complaints about joint negotiation between or among same market, separately owned Top Four stations could be addressed under our existing rules pursuant to the "totality of circumstances" test, we believe that adopting a rule specifically directed at such negotiation is more effective in preventing the competitive harms derived therefrom than case-by-case adjudication, and is more administratively efficient – particularly because parties entering a negotiation will be advantaged by advance notice of the appropriate process for such negotiation.

13. We conclude that joint negotiation by same market, separately owned Top Four stations is not consistent with "competitive marketplace considerations" within the meaning of Section 325(b)(3)(C) because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues.[49] Specifically, we find that joint negotiation gives 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

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[43] *See infra* ¶¶ 14-15.

[44] *See infra* ¶ 16.

[45] *See infra* ¶ 18.

[46] If parties were to present such evidence, however, we may revisit this issue in the future. *See supra* n. 5.

[47] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58. We therefore disagree with NAB's assertion that the Commission previously has found that joint negotiation is consistent with competitive marketplace considerations. *See infra* ¶ 21 (addressing NAB's argument that a rule prohibiting joint negotiation is inconsistent with Commission precedent).

[48] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

[49] Our decision to adopt a rule proscribing joint negotiation is not premised on a finding that joint negotiation by separately owned, same market Top Four stations could lead to negotiating delays and other complications, *see NPRM*, 26 FCC Rcd at 2731, ¶ 23, but rather on our conclusion that such negotiation diminishes competition and thus leads to supra-competitive increases in retransmission consent fees. Thus, we do not address the merits of arguments that joint negotiation does not result in negotiating delays or other complications. *See, e.g.,* LIN Comments at 19; NAB Comments at 23.

conducted negotiations for carriage of their signals independently.[50] Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another,[51] their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down.[52] The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs.[53] This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.[54]

14. We therefore disagree with assertions that joint negotiation does not result in increases in retransmission consent compensation paid by MVPDs.[55] Analyses in the record draw on basic economic

[50] *See* Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees, William P. Rogerson, May 18, 2010, at 3 (attached to ACA's Comments in response to *PN*) (stating that, in a number of local television markets, multiple Top Four stations act as a single entity in retransmission consent negotiations because such stations enter into agreements to jointly negotiate retransmission consent, and that such coordinated activity permits broadcasters to negotiate higher retransmission consent fees) ("Rogerson Joint Control Analysis").

[51] In this context, the term "substitute" means that "the marginal value to the MVPD of either network is lower conditional on already carrying the other network." *See id.* at 7-8. In his analysis, Rogerson emphasizes that, even when this condition holds, the MVPD still would desire to carry both networks and would make higher profits from carriage of both. The numerical example proffered by Rogerson reflects this condition—the MVPD is assumed to earn a profit of $1.00 per subscriber if it carries only one of the two networks and a profit of $1.50 per subscriber if it carried both of the networks. Rogerson observes that "[t]o the extent that customers appreciate and are willing to pay for increases in variety at a diminishing rate as variety increases, we would expect this condition to hold." *See id.* at 8-9. A good, although limited, example of partial substitution in this context would be local news and weather, which would typically be available on all Top Four broadcast stations in a market.

[52] *See* An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime, Michael L. Katz, *et al.*, Nov. 12, 2009, at 26-29, ¶¶ 38-43 (asserting that, "to the extent broadcast stations entering into local marketing agreements are substitutes, such agreements eliminate competition and raise stations' bargaining power, which result in higher fees and harm consumers") ("Katz Analysis of Consumer Harm"); Economic Analysis of Broadcasters' Brinksmanship and Bargaining Advantages in Retransmission Consent Negotiations, Steven C. Salop, *et al.,* June 3, 2010, at 53, ¶ 108 ("[J]oint negotiation eliminates competition between [local broadcast stations serving the same market], and the MVPD is unable to gain a bargaining advantage by playing one broadcaster off against another.") ("Salop Brinksmanship Analysis").

[53] *See* Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, William P. Rogerson, May 27, 2011, at 11 (attached to ACA's Comments in response to *NPRM*) ("Rogerson Coordinated Negotiation Analysis"). A 2007 Congressional Research Service report on retransmission consent made a similar observation with regard to top network affiliates:

> [W]here a broadcaster . . . controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor . . . in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.

See ACA Comments at 9, citing Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress,* at CRS-70 (July 9, 2007), available at http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.

[54] *See FNPRM,* Section IV *infra*.

[55] *See, e.g.*, Letter from Jane E. Mago, Executive Vice President and General Counsel for NAB, to Marlene H. Dortch, Secretary, FCC, at 3 (Dec. 5, 2013) ("NAB Dec. 5, 2013 *Ex Parte* Letter"); Letter from Jennifer A. Johnson and Eve R. Pogoriler, Counsels for Bonten Media Group, Inc., to Marlene H. Dortch, Secretary, FCC, at 4 (Jan. 22, 2013) ("Bonten Jan. 22, 2013 *Ex Parte* Letter").

principles to explain why coordinated conduct such as joint negotiation results in higher retransmission consent fees:

> [I]f two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless the broadcaster is satisfied. . . . [I]t is the ability to threaten collective withdrawal that creates the power to raise retransmission consent fees.[56]

The proposition that, when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user, has been validated in other economic contexts.[57] This general proposition is also reflected in the Federal Trade Commission ("FTC") and Department of Justice ("DoJ") merger[58] and collaboration[59] guidelines. DoJ has recognized that

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[56] *See* Rogerson Coordinated Negotiation Analysis at 3, 11. *See also* ACA Comments at 9, citing 2010 Rogerson Joint Control Analysis at 7-8. In his analyses, Rogerson presents a bilateral bargaining model to analyze the impact of joint negotiation on retransmission consent fees. The model considers a hypothetical example of two television broadcast stations negotiating for carriage with a cable operator, and compares the outcomes on the assumption of separate negotiations and on the assumption of joint negotiation. The model, illustrated by a numerical example, reflects the assumption that the two stations are partial substitutes. *See* Rogerson Joint Control Analysis at 7-8. *See also* Aviv Nevo, Deputy Assistant Att'y Gen. for Economics, Antitrust Div., Dep't of Justice, Remarks at the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries: Mergers that Increase Bargaining Leverage 3-5 (Jan. 22, 2014) (employing a similar model and assumptions to support an assertion that joint negotiation by two input providers leads to increases in the prices paid by a distributor).

[57] The quintessential example of joint negotiation by input providers is collective bargaining by union members. A paper by Horn and Wolinsky addresses the question whether, if a firm employs workers of two types, it is better for the workers to form two separate unions or one "encompassing" union. *See* Henrik Horn & Asher Wolinsky, *Worker Substitutability and Patterns of Unionisation*, 98 THE ECONOMIC JOURNAL 484-497 (1988). The paper "developed a bargaining model for the case in which two groups of workers face a single employer. . . [and] pointed out a fairly general principle whose implication . . . was that, when the two types of workers are substitute factors, they would benefit from coordinating their bargaining with the employer." *Id.* at 496. The paper begins with a bargaining model that involves two workers (one of each type) who negotiate with a single employer. The model shows that, when the workers are substitutes, total wages are higher if they negotiate jointly. The paper goes on to extend the model to the case of two groups of workers, with analogous results, but the base model has the same structure as that in the Rogerson Joint Control Analysis.

[58] *See* U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines*, issued August 19, 2010 (available at http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.) ("Merger Guidelines"). Section 6.2 of the Merger Guidelines reads, in pertinent part:

> In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another . . . . A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.

Id. at 22. The Merger Guidelines note that the mechanism and the magnitude of the effect on price can vary with certain structural characteristics, and the specific discussion refers to situations when the products are complete substitutes, *e.g.*, the buyer would not necessarily purchase from both providers separately. Nevertheless, the "collective withdrawal" mechanism of the Rogerson model is analogous to the ability of two merged, formerly competing sellers to prevent a buyer from playing one against the other. And the result is the same as in the Rogerson model—enhanced ability and incentive of the merged entity "to obtain a result more favorable to it, and less favorable to the buyer." *Id.* Thus, the cited proposition from the Merger Guidelines also applies to joint negotiation by entities that are not seeking to merge. In a recent *ex parte* filing in the Quadrennial Review

(continued….)

collaboration by competing broadcast stations could "harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another."[60]

15. In its review of the Comcast-NBCU transaction, the Commission stated that this theory of harm "is a well-established concern in antitrust enforcement" and concluded that coordinated negotiations of carriage rights for two blocks of "must have" programming (in that case, an NBC owned and operated station (O&O) and a Comcast Regional Sports Network ("RSN")) would give increased bargaining leverage to the programmer and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly desirable signals if negotiations failed to yield an agreement.[61] In particular, the Commission

(Continued from previous page)
proceeding, DoJ stated that, "[w]here a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them . . ., [DoJ] analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled. . . ." *See Ex Parte* Filing of the Department of Justice, MB Docket Nos. 09-182, 07-294, 04-256, February 20, 2014, at 10 ("DoJ Feb. 20, 2014 *Ex Parte* filing").

[59] *See* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000) (available at http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf .) ("Collaboration Guidelines"). The Collaboration Guidelines state, in relevant part, that:

> Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Id. at 14.

[60] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 17.

[61] *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, 26 FCC Rcd 4238, 4294 ¶¶ 135-136 (2011) ("*Comcast-NBCU Order*"). The Commission stated:

> If failing to reach an agreement with the seller will result in a worse outcome for the buyer – if its alternatives are less attractive than they were before the transaction – then the buyer's bargaining position is weakened and it can expect to pay more for the products. . . . If not carrying either the NBC [O&O] or the RSN places the MVPD is a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates.

The Commission employed the type of bargaining model proposed by Rogerson to analyze this situation and then validated its theoretical analysis by examining the impact of the integration of a Fox O&O station with a Fox RSN. Using a control group of Fox RSNs not jointly owned with a local television station, the empirical analysis indicated that integration allowed Fox to charge a higher price for the RSN than it could have realized without the integration. *Id.* at 4398, Appendix B, ¶ 54. The Commission approved the transaction, but only on the condition that the newly combined entity not discriminate against competitor MVPDs or raise their costs by charging them higher programming fees. The Commission also imposed a "baseball-style" arbitration to enforce this non-discrimination requirement. *Id.* at 4259, ¶ 50.

found that common "ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the RSN relative to what would be observed if the RSN and local broadcast affiliate were separately-owned."[62] Although the Commission in that context was considering the competitive effects of combining a broadcast network and an RSN, we believe that two (or more) broadcast stations that are ranked among the top four stations in a market by audience share offer at least a comparable level of substitution to an MVPD bargaining for carriage rights.[63] Furthermore, Rogerson's bargaining model suggests that the more valuable the stations' programming is, the greater is the increase in retransmission consent fees resulting from joint negotiation.[64] We thus find it reasonable to infer that the magnitude of fee increases derived from joint negotiation is larger for Top Four station combinations than for other stations.

16. Empirical data in the record lends support to the theory that joint negotiation by Top Four stations leads to increases in retransmission consent fees. In particular, ACA references an example indicating that, where a single entity controls retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees paid for such stations was more than twenty percent higher than the fees paid for other Top Four stations in those same markets.[65] Data filed in the record from three cable operators also lends support to our conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees.[66] We find these empirical data to be persuasive evidence of how joint negotiation can affect the level of retransmission consent fees in cases involving Top Four stations operating in the same market. In view of the apparent widespread nature of joint negotiation involving

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[62] *Id.* at 4399, Appendix B, ¶ 55.

[63] We thus disagree with NAB's suggestion that same market, separately owned Top Four stations are not substitutes for one another. *See* Supplemental Comments of the National Association of Broadcasters at 15 ("NAB Supplemental Comments"), citing Reply Declaration of J.A. Eisenach and K.W. Caves at 14 (attached to NAB Comments) (arguing that same market stations that are not commonly owned do not compete against each other for retransmission consent fees).

[64] Because Rogerson's model assumes that the percentage split between the broadcast stations and the MVPD of the joint profits of carriage does not vary as the value of the stations' programming increases, it follows as a matter of arithmetic that as the value of the stations' programming increases, so does the magnitude of the retransmission consent fee.

[65] Rogerson Joint Control Analysis at 11-12, citing *Ex Parte* Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint*, Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc.*, *Defendant*, CSR No. 8233-C, 8234-M, at 5. The Suddenlink data on which ACA and Rogerson rely was filed in the context of a Commission complaint proceeding. Rogerson asserts that, although the Suddenlink study represents only one data point, the widespread use of non-disclosure clauses in retransmission consent agreements limits the amount of publicly available information that would permit a more comprehensive analysis of how joint negotiation affects retransmission consent fees. *Id.* at 11.

[66] *See* Letter from Scott Ulsaker, Pioneer Telephone Cooperative, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 20, 2014) (reporting that the average fees paid to separately owned, same market stations affiliated with Top Four networks that coordinated their retransmission consent negotiations in 2010 were thirty percent higher than the average fees paid to stations affiliated with Top Four networks that did not engage in coordinated negotiations); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Feb. 20, 2014) (reporting that the average retransmission consent fees for Top Four stations that coordinated their retransmission consent negotiations in 2010 were more than thirty percent higher than the fees for separately negotiated Top Four stations, and that current data reflect that the average retransmission consent fees paid to Top Four stations that engage in joint negotiation are almost 19 percent higher than the average fees paid to Top Four stations that negotiate independently); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 24, 2014) (reporting that the average retransmission consent fees paid to separately owned, same market Top Four network affiliates that coordinated their retransmission consent negotiations in 2010 were 43 percent higher than the fees paid to Top Four stations that negotiated separately).

Top Four stations[67] and the expected growth of retransmission consent fees,[68] we find that the record provides ample support for our decision to adopt a rule barring joint negotiation by same market, separately owned Top Four stations.

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.[69] 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.[70] Cable operators are not required to pass through any savings derived from lower retransmission consent fees,[71] and fee increases resulting from joint negotiation may not compare in magnitude to other costs that MVPDs incur.[72] But artificially higher retransmission rates do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution. Nor is the possibility that supra-competitive retransmission consent fees derived

[67] *See* ACA Comments at 7; ACA Reply at 33-35 (identifying 56 instances where multiple Top Four broadcast affiliates in the same DMA operate pursuant to a sharing agreement and confirming that in 36 of those instances, there was a single negotiator for two broadcast stations, and reaching carriage terms for one station was contingent on reaching terms for the other); Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 20, 2012) (stating that ACA has documented 48 instances of joint negotiation in 43 DMAs among separately owned broadcasters). *See also* DIRECTV Dec. 6, 2013 *Ex Parte* Letter and Attachment (reporting 42 instances in which DIRECTV negotiates retransmission consent with a single entity that negotiates for two "Big Four" affiliated stations in the same DMA due to contractual arrangements).

[68] *See* Rogerson Coordinated Negotiation Analysis at 23; Salop Brinksmanship Analysis at 16-18. In their analysis, Salop, *et al.* assert that total retransmission consent fees for MVPDs increased from $214.6 million in 2006 to $1.1 billion in 2010, and project that such fees will grow to $2.6 billion by 2016. *See id. See also* Video Program Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach, Steven C. Salop *et al.,* June 1, 2010, at 5 n.10 ("Salop Video Program Costs Analysis"), citing Morgan Stanley, *Cable/Satellite Pricing, Programming, and Payout Keys to 2010,* January 26, 2010 (discussing a Morgan Stanley report's conclusion that "programming cost growth remains a structural problem for the industry, and the addition of retransmission consent payments will accelerate cost growth in the near-term. . . . We expect retransmission payments to drive 30-40% of total programming cost growth in 2010E-2014E."); http://www.snl.com/InteractiveX/articleabstract.aspx?ID=25877327&KPLT=2 (visited February 3, 2014) (projecting retransmission consent fees to reach $7.6 billion by 2019); Morgan Stanley Retransmission Revenue Primer, Morgan Stanley & Co. LLC, Dec. 12, 2013 at 7 (projecting retransmission consent fees to reach $9.1 billion by 2020). The fact that retransmission consent fees may continue to escalate even absent a rule barring joint negotiation does not justify permitting stations to engage in conduct that inflates those fees beyond competitive levels.

[69] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 9 ("MVPDs typically pay per-subscriber fees to retransmit the broadcaster's signal, known as retransmission consent fees. The size of these fees affects the rates that consumers are charged for an MVPD subscription. Although MVPDs may carry hundreds of channels altogether, the local broadcast television stations usually have the highest viewership.").

[70] Thus, we do not address arguments that joint negotiation does not adversely affect cable rates. *See* NAB Comments at 42; Comments of the Walt Disney Company at 14 ("Disney Comments"). *See also* Comments of Entravision Holdings, LLC in the 2010 Quadrennial Review at 15; Comments of LIN Television Corp. in the 2010 Quadrennial Review at 14-15; Comments of the Coalition to Preserve Local TV Broadcasting in the 2010 Quadrennial Review at 16; Comments of Sinclair Broadcasting Group, Inc. in the 2010 Quadrennial Review at 20.

[71] *See* NAB Dec. 5, 2013 *Ex Parte* Letter at 4.

[72] *See, e.g.,* NAB Comments at 27; NAB Supplemental Comments at 2-3 (arguing that ACA expresses the purported increases in retransmission consent fees in percentage terms, rather than dollar amounts, because any such increases are so small); Nexstar Comments at 21 (asserting that the negotiated rate for retransmission consent would not change if Nexstar were required to cease joint negotiation); Reply Comments of the Broadcaster Associations at 24 ("Broadcaster Associations Reply") ("[I]f Suddenlink [pays] more to Big 4 stations involved in joint negotiations, that amounts to only three cents more per subscriber per month for each station.").

from joint negotiation might enable broadcasters to invest in higher quality programming, as some parties assert,[73] 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.

18. We are not persuaded by opponents of a prohibition on joint negotiation who argue that joint negotiation promotes efficiency by reducing transaction costs, and that the cost savings, in turn, lead to lower retransmission consent rates.[74] NAB further asserts that, to the extent joint negotiation lowers transaction costs, broadcasters are able to devote resources to programming and services that more directly serve the viewing public.[75] Moreover, NAB asserts that joint negotiation permits retransmission consent agreements to be completed expeditiously by reducing the total number of agreements that must be negotiated, thus decreasing the administrative burdens for both broadcast stations and MVPDs.[76] The claimed efficiencies are not ongoing operational efficiencies, but rather asserted savings of transaction costs in connection with isolated transactions that occur for any broadcaster at three-year or even longer intervals.[77] We therefore believe that any such efficiencies are likely to be modest and outweighed by the harm from an anticompetitive practice that the record indicates generates supra-competitive retransmission consent fees.[78]

19. Sinclair contends that prohibiting joint negotiation would arbitrarily harm certain broadcasters based on spectrum allocation and market size. In particular, Sinclair asserts that, because common ownership is permitted in markets with a sufficient number of stations (thereby allowing a

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[73] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves, May 27, 2011, at 11 (Attachment A to NAB Comments); Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis, Michael G. Baumann, May 27, 2011, at 22-23 (Exhibit 1 to Sinclair Comments). *See also* Belo Comments at 3, 6; Comments of CBS Corporation at 12 ("CBS Comments"); Disney Comments at 9; Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. at 19 ("Fox Comments"); Comments of Gilmore Broadcasting Corp. *et al.* at 3 ("Gilmore *et al.* Comments"); LIN Comments at 10, 14-15; NAB Comments at 3, 5-6, 43; NBC Affiliates Comments at 21; Comments of the Named State Broadcasters Association at 3-5 ("NSBA Comments"); Sinclair Comments at 2, 8-9; WGAW Comments at 3, 12; Reply Comments of the Director's Guild of America at 2-4 ("DGA Reply"); Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. at 3 ("Fox Reply"); Reply Comments of the Indiana Utility Regulatory Commission at 3 ("Indiana Commission Reply"); LIN Reply at ii; NAB Reply at 7-8; Reply Comments of Univision Communications Inc. at 2-3 ("Univision Reply") (all generally asserting that, without sufficiently high retransmission fees, broadcasters will be unable to compete for premium programming, and that programming will migrate to pay television).

[74] *See* Belo Comments at 23; CBS Affiliates Comments at 19; NAB Comments at 27; NBC Affiliates Comments at 18; Nexstar Comments at 20-22; Sinclair Comments at 23; Journal Reply at 4; LIN Reply at 19-20; NAB Reply at 47, 50-52; Letter from Jonathan D. Blake and Eve R. Pogoriler, Counsels for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 21, 2011) ("CSMTS Dec. 21, 2011 *Ex Parte* Letter"); Letter from Jonathan D. Blake and Jennifer A. Johnson, Counsels for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 1, 2012) ("CSMTS Feb. 1, 2012 *Ex Parte* Letter"); Bonten Jan. 22, 2013 *Ex Parte* Letter at 2.

[75] *See* NAB Comments at 27.

[76] *Id.*

[77] As ACA notes, the costs that are spared by allowing stations to engage in joint negotiation likely are limited to the cost of hiring a negotiator and related administrative expenses. *See* ACA Reply at 36. In addition, these costs are borne by stations relatively infrequently because retransmission consent negotiations typically occur only every three years. Rogerson Coordinated Negotiation Analysis at 18.

[78] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 13-15 ("Cooperative agreements between broadcasters may . . . raise substantial competitive concerns. . . . [T]o avoid being deemed per se illegal [under antitrust law], activities such as . . . *joint retransmission consent negotiations* would have to be shown to be reasonably necessary to some other efficiency-enhancing combination of the operations of the stations.") (emphasis added).

broadcaster to negotiate on behalf of two co-owned stations), a ban on joint negotiation would unfairly single out broadcasters located in markets having too few broadcast stations to permit common ownership under the Commission's rules.[79] We find that unpersuasive. We note that the local television ownership rule prohibits Top Four stations from being commonly owned in markets of any size.[80] Therefore, the rule that we adopt today will not, as Sinclair suggests, have a disparate adverse impact on separately owned Top Four stations in small markets.

20. We reject assertions that the Commission should permit joint negotiation because it promotes a level playing field for stations in small and medium sized markets where an MVPD has significant bargaining leverage.[81] The size and bargaining power of individual broadcasters and MVPDs vary significantly from market to market, depending on market size, concentration, popularity of programming, and many other factors. We do not consider it the Commission's role in the retransmission consent process to adjust bargaining power between suppliers and their customers by countenancing anti-competitive practices. But we do see it as our role to prohibit arrangements among competitors that eliminate competition among them and thereby generate supra-competitive retransmission consent fees, because "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" imposed by Congress.[82]

21. We disagree with NAB's assertion that the Commission previously has found that joint negotiation is consistent with competitive marketplace considerations.[83] In particular, NAB contends that adopting a prohibition on joint negotiation is inconsistent with the Commission's statement in the *Good Faith Order* that "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market" are "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement."[84] However, the cited language in the *Good Faith Order* can reasonably be read to address the issue of whether broadcasters may lawfully seek in-kind retransmission consent compensation in the form of carriage of

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[79] *See* Sinclair Comments at 25.

[80] *See* 47 C.F.R. § 73.3555(b).

[81] *See* NAB Comments at 29-30 (asserting that, even in cases where a "small" MVPD is involved, broadcasters still are at a disadvantage due to the large local market share held by the MVPD; thus, MVPDs have significant leverage over broadcasters in retransmission consent negotiations); Comments of Morgan Murphy Media to the *PN* in MB Docket. No. 10-71 at 8-9 ("Not every retransmission consent dispute pits a large broadcasting company against a large MVPD; thus, adoption of 'one-size-fits-all' national rules, such as those proposed by the Petitioners, would ignore the particular facts and circumstances that apply in local markets, to the detriment of local small broadcast businesses."); WGAW Comments at 10 (claiming that joint negotiation helps small broadcasters that must negotiate with MVPDs possessing significant market power); CSMTS Dec. 21, 2011 *Ex Parte Letter* at 4-6 (asserting that MVPDs have significant "economic clout" relative to some broadcasters, and noting the annual revenues of large MVPDs and the trend towards market concentration). *See also* CBS Affiliates Comments at 20; Joint Broadcasters Comments at 21; NAB Reply at 48.

[82] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58. In addition, as ACA asserts:

> [E]ven if one were to accept the idea that collusion between sellers should be permitted when they negotiate prices with a large buyer, it would be a 'huge leap to conclude that the fact that there are some local markets that have a single buyer implies that sellers in ALL markets should be allowed to collude in negotiations with ALL buyers'; and (ii) the idea that it would be good public policy to let separately owned sellers collude in negotiations with a large buyer is itself 'highly problematic to say the least,' and not widely accepted among competition policy scholars.

See ACA Reply at 37, citing Rogerson Joint Control Analysis at 17.

[83] *See* NAB Comments at 24-25.

[84] *Id.* at 25.

other programming owned by the broadcaster itself, not programming owned by other entities.[85] Interpreting that language to permit a broadcast station to tie carriage of its signal to carriage of a signal transmitted by a separately owned broadcast station in the same market would be at odds with the Commission's statement later in the *Good Faith Order* that "an agreement not to compete or to fix prices . . . is not within the competitive marketplace considerations standard included in the statute."[86] We thus reject NAB's reading of the *Good Faith Order*.

22. We believe that prohibiting joint negotiation is harmonious with antitrust law, which generally prohibits contracts or combinations in restraint of trade.[87] In particular, we find that joint negotiation between or among Top Four stations that are not commonly owned and that serve the same market is akin to the type of coordinated conduct disfavored by antitrust law because, as discussed above, the stations negotiating jointly are programming inputs for an MVPD that are at least partially

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[85] *See* ACA Reply at 13-14.

[86] *See Good Faith Order,* 15 FCC Rcd at 5470, ¶ 58.

[87] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade," including price fixing and collusive arrangements. *See* 15 U.S.C. § 1. We note that DoJ has brought one antitrust action based on the theory that joint negotiation results in anticompetitive increases in retransmission consent fees. In *U.S. v. Texas Television, Inc., et al.,* DoJ alleged that the ABC, NBC and CBS affiliates operating in the Corpus Christi, Texas market violated Section 1 of the Sherman Act by entering into "combinations and conspiracies in unreasonable restraint of interstate trade and commerce" that consisted of "agreements, understandings and concerted actions . . . to increase the price of retransmission rights to cable companies." *See* Complaint, *U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64 (S.D. Texas, 1996) at 5, *available at* http://www.justice.gov/atr/cases/f0700/0745.htm. The court appended to its final judgment DoJ's Competitive Impact Statement, which identified alleged harms resulting from the defendants' joint negotiation. *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C-96-64, 1996 WL 859988 at *5 (S.D. Texas, Feb. 15, 1996). The Competitive Impact Statement stated:

> The Supreme Court has long recognized that certain types of concerted refusals to deal or group boycotts [are] *per se* violations of the Sherman Act, even when they fall short of outright price-fixing. The agreements between the broadcasters fell into this category because they had the purpose and effect of raising the price of retransmission rights . . . . Moreover, the Supreme Court has held that an agreement between rival companies that restrains competition between them is illegal when it lacks, as did the agreements among these broadcasters, any pro-competitive justification. 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.

Id. at 6-8. While *Texas Television* addressed a specific factual scenario that is not before us here, DoJ's action supports our conclusion that joint negotiation by Top Four stations not commonly owned is harmful to competition. As noted above, DoJ, in its *ex parte* filing in the Quadrennial Review proceeding, reinforced this conclusion. *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 14-15. Thus, antitrust principles point in the same direction as the prohibition we adopt today although, of course, our authority under Section 325 is not limited to the prohibition of conduct that falls within the scope of the Sherman Act and a showing that, in a particular case, joint negotiation would not be actionable under Section 1 of the Sherman Act would not defeat the exercise of the statutory power that Congress separately and specifically has provided to the Commission. Although DoJ's action was targeted at coordinated behavior by broadcast stations with significant market share like the rule we adopt here, we find that the adoption of targeted, prescriptive rules is more efficient and effective in preventing the competitive harms derived from joint negotiation than case-by-case antitrust litigation, which Sinclair has suggested. *See* Sinclair Comments at 23.

substitutable.[88] In other words, absent their coordination, such stations would compete head-to-head for distribution on MVPD systems and the associated retransmission consent revenues.

23. The Commission on multiple occasions has drawn on antitrust principles in exercising its responsibility under the Act to regulate broadcasting in the public interest.[89] Indeed, the Commission's authority under Title III of the Act to regulate broadcasting in the public interest empowers us to prescribe regulation that not only prevents anticompetitive practices, but also affirmatively promotes competition.[90] And we have concluded that conduct that violates our national policies favoring competition is "not within the competitive marketplace considerations standard" set forth in Section 325(b)(3)(C) of the Act.[91]

[88] *See* Salop Brinksmanship Analysis at 53 n.126 (asserting that, to the extent joint negotiation eliminates competition between stations and strengthens broadcasters' bargaining position, it may violate the antitrust laws); OPASTCO *et al*. Comments at 11; ACA Reply at 6; Response of the National Cable and Telecommunications Association to Supplemental Comments of the National Association of Broadcasters at 2 (asserting that joint negotiation thwarts competition and is akin to price-fixing by sellers).

[89] In establishing its early chain broadcasting regulations, for example, the Commission stated:

> The prohibitions of the Sherman Act . . . apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many . . . practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the . . . practices violate the antitrust laws. We are issuing these regulations because we have found that the . . . practices prevent the . . . utilization of radio facilities in the public interest.

See Report on Chain Broadcasting, Docket No. 5060, pp. 46, 83, 83 n. 3 (1941), *aff'd, NBC v. United States*, 319 U.S. 190, 223-24 (1943). *See also Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, ¶ 8 (1994), citing *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)) ("The public interest standard includes examination of competitive issues – indeed, the Commission is empowered to 'make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.'"); *Representation of Stations by Representatives Owned by Competing Stations in the Same Area*, Report and Order, 87 FCC 2d 668, 669, ¶ 3 n.4 (1981) ("Although the Commission does not enforce the antitrust or other laws relating to unfair trade practices, it takes cognizance of the policies expressed in these statutes in its interpretation of the public interest standard found in the Communications Act of 1934. . . . The core of the antitrust law is found in the Sherman Act, 15 USC §§ 1 and 2 (1958) . . . Forbidden under these sections are contracts, combinations, conspiracies which restrain trade. . . ."); *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1049 ¶ 11 (1975) ("Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."); *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Inquiry, 9 FCC Rcd 1649, ¶ 9 (1994) ("It is not our intention to adjudicate whether specific contracts violate the antitrust laws. Consistent with our statutory mandate, however, we will address . . . whether and to what extent . . . contracts are prohibited by existing statutes, including the antitrust laws. . . . [A]nalytical tools drawn from antitrust law are an appropriate and useful component of our broader public interest examination of . . . contracts.").

[90] *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, Third Memorandum Opinion and Order, 9 FCC Rcd 6908, ¶ 31 ("Our principal goals for PCS include affirmatively promoting competition and preventing anticompetitive behavior. The former goal flows from our explicit mandate under the Communications Act to promote competition in telecommunications and widely disseminate telecommunications licenses.").

[91] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

Congress created the retransmission consent regime over 20 years ago. Since that time, we have witnessed significant changes in the marketplace and been able to observe how the parties have operated in the process. The actions we take respond to what we have learned and facilitate the fair and effective completion of retransmission consent negotiations, to the ultimate benefit of consumers.

Congress intended that retransmission consent agreements be negotiated by parties one-on-one. Increasingly, though, stations in local markets have banded together to negotiate for retransmission consent fees, even though they otherwise would compete against each other for those fees.

Joint negotiations by the largest stations were shown in one study to raise prices to cable systems by around 20 to 40%. This puts upward pressure on the prices paid by consumers of subscription video services.

The action we take to address joint negotiation by broadcasters will return retransmission consent to one-on-one negotiations as Congress intended, rather than many against one. This should benefit the consumer by removing the leverage of collusion to inappropriately drive up retransmission fees and with them consumer prices.

The actions we take regarding joint negotiation are supported by basic economic principles and antitrust law.

In light of the changes in the video marketplace since we adopted our network non-duplication and syndicated exclusivity rules, it is time for the Commission to undertake a comprehensive review of those exclusivity rules. We need to determine whether these rules are still needed as a Commission mechanism for enforcing the private exclusivity agreements entered into between broadcasters and providers of programming.

Thank you to the Media Bureau for their work on this item.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

I am pleased to support the Chairman on this Order, addressing the issue of joint retransmission negotiations.

In 2011, the average bill for paid television was $86 per month. By 2015, the same average is expected to reach $123, reflecting an annual retail rate increase of about 6%. While consumer income and spending have remained relatively flat, and the inflation rate has risen only by 1.5%, cable companies claim programming costs are increasing by 10% per year – mostly due to retransmission consent negotiations.[1]

Although the amendments to the Act in 1992 gave broadcasters the ability to charge fees for content that is free over the airwaves, Section 325 states that broadcasters are prohibited from "failing to negotiate [retransmission consent] in good faith."

Many of the larger broadcast companies already own stations in a number of markets that do not compete with each other, and have more leverage to negotiate large retransmission fees. But when it comes to Top Four stations, separately owned, within the same market – essentially competitors – joint negotiation may violate the "good faith" clause.

When top broadcasters in the same market negotiate higher prices – or threaten to pull the plug – MVPDs, both large and small, basically have no choice. And where do those extra fees come from--the consumer's pocket?

As for the FNPRM on the non-duplication rule, I look forward to a full record on this issue, but believe in upholding the rule because it promotes competition and localism.

I appreciate the good work of the Media Bureau, the Office of General Counsel, the Chairman's office, and my staff on this item.

[1] http://www.forbes.com/sites/amadoudiallo/2013/10/14/cable-tv-price-hikes-unsustainable/

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

Few Americans have heard of the term "retransmission consent." It is one of those wonky and lawyerly things we bandy about in these halls and in this town. Fewer still know that more than two decades ago Congress prohibited retransmitting a broadcast television station's signal without the station's consent—and at the same time directed parties negotiating for this consent to do so in "good faith."

But far too many Americans know what happens when retransmission consent negotiations go wrong.

First, it is pretty clear to consumers that something is not right when they turn on the television for the news, their favorite show, or the game, and instead get saddled with a dark screen. They may not know how and why retransmission consent negotiations between broadcasters and their cable or satellite company have failed, but they know a blackout means they are not getting the programming they paid for. When this happens, I think they are owed a refund.

Second, it is pretty clear to consumers that what they pay for television programming packages goes up too far too fast. I am under no illusion that retransmission consent is the main driver of increased programming costs. But it is a piece of a larger system that deserves attention.

So it is for these two reasons—the incidence of extended blackouts and the creep upward of rates—that I support today's action. By limiting joint negotiations by local broadcasters, I am hopeful we can reduce the extent of retransmission consent blackouts. I am also hopeful we can help keep consumer rates more level. Because the record reflects that when stations jointly negotiate, retransmission consent fees are higher, and those higher charges get passed on to consumers. So I think our efforts today are a good development—not only because I am a regulator, but because I am a consumer who watches and pays bills, too.

STATEMENT OF COMMISSIONER AJIT PAI

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

When it comes to retransmission consent negotiations, I take counsel from two wise communications experts—Rob Base & DJ E-Z Rock—whose hit song reminds us, "It takes two to make a thing go right."[1] After carefully reviewing the record and meeting with numerous parties to this proceeding, I have concluded that good-faith retransmission-consent negotiations generally involve two parties: one multichannel video programming distributor (MVPD) and one broadcast company. Adding a third or fourth party to the mix raises troubling competitive concerns.

Accordingly, I am pleased to support today's item. The order states that the joint negotiation of retransmission consent agreements by separately-owned, top-four stations in the same market violates the statutory duty to negotiate in good faith.

To be sure, such joint negotiations may bring some benefits. But given that retransmission consent negotiations usually occur only once every three years, the cost savings are at best intermittent and do not compare with the efficiencies produced by television stations sharing sales staff or other backroom operations.

And in my judgment, the harms outweigh any such benefits. The record indicates that joint negotiations may result in supra-competitive increases in retransmission-consent fees.[2] This suggests that such conduct is collusive and could be a "contract, combination . . . or conspiracy, in restraint of trade" that is prohibited by the Sherman Act.[3] The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule.

Also crucial to my vote is that the Commission today carefully remains within its limited authority over retransmission consent. Section 325(b)(3)(C) of the Communications Act instructs the FCC to enact regulations to prohibit a television broadcast station or MVPD from "failing to negotiate in good faith." This provision allows the Commission to proscribe certain negotiating tactics in order to ensure good faith negotiations between broadcast stations and MVPDs, such as refusing to respond to a retransmission consent proposal.[4] But it does not give the Commission the power to mandate the substantive outcome of retransmission consent negotiations. This will remain the case after today's vote.

I appreciate my colleagues' willingness to incorporate many of my suggestions into the item. In particular, I am pleased that today we are not extending the so-called "sweeps prohibition" to direct broadcast satellite providers. The record did not reveal a need for such regulation, and we should not impose new regulatory mandates where there is not a concrete problem to solve.

Finally, I support the Commission's decision to seek additional comment on whether we should eliminate or modify our network non-duplication and syndicated exclusivity rules. In particular, I encourage parties to focus their feedback on whether the interests these rules are designed to advance can

[1] Rob Base & DJ E-Z Rock, *It Takes Two* (It Takes Two, 1988).

[2] *See* Order at para. 16.

[3] *See* 15 U.S.C. § 1.

[4] *See* 47 C.F.R. § 76.65(b)(1)(v).

and should be protected through private contractual arrangements or whether the compulsory copyright license would render such a scheme unworkable.

Many thanks to the Media Bureau for its efforts. It took more than two to make this item outta sight, so I particularly want to recognize Raelynn Remy, Diana Sokolow, Kathy Berthot, Michelle Carey, Nancy Murphy, Mary Beth Murphy, and Steven Broeckaert. For this recovering antitrust lawyer and staffer on the 2007 *MDU Order*,[5] the item truly was a pleasure to read.

[5] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), *aff'd, National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

This item seeks to improve the retransmission consent process between television broadcasters and MVPDs. The order acts upon evidence in the record that joint negotiations between two top-four, non-commonly owned broadcast stations in a market raises consent fees above market rates. It, therefore, adds such activity to the list in our rules of *per se* "good faith" violations.

While I find the record somewhat thin, and I may not have gone in the same direction if I had the pen, the order aims to shield consumers from unreasonable price increases and I am willing to support it. I do so with the reservation that while we have legal authority to act, this order partially relies upon one provision that is unnecessary.

Similarly, I support the further notice, but will keep an open mind and do not subscribe at this time to any of the particular tentative conclusions or proposed legal authority. I am sympathetic to the argument that it may not be necessary for the Commission to continue enforcing network non-duplication and syndication exclusivity rules when these can be addressed through private contracts. These are complicated questions and I hope a full record from interested parties will help clarify the Commission's responsibility and consumer's best interests in this area.

Finally, this item is the result of a tremendous amount of hard work. I thank the Chairman, his excellent staff, and the Media Bureau for their time and willingness to incorporate some of my feedback.