HWG | HARRIS, WILTSHIRE & GRANNIS LLP

August 17, 2017

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication in: MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent); MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership); 17-179 (Sinclair-Tribune Proceeding)

Dear Ms. Dortch:

On August 15, 2017, representatives of the American Television Alliance met with staff from the Commission's Office of General Counsel to discuss retransmission consent concerns in light of a broadcaster proposal to relax or eliminate the "top-four prong" of the local ownership rule. Present on behalf of the Commission were William Richardson and Susan Aaron of the Office of General Counsel. Present on behalf of ATVA were Alison Minea of DISH, Maureen O'Connell of Charter Communications, Mike Chappell of Fierce Government Relations, Cathy Carpino and Jeanine Poltronieri of AT&T, Mary Lovejoy of the American Cable Association, and Michael Nilsson and Mark Davis of Harris, Wiltshire & Grannis.

Broadcasters have asked the Commission to eliminate a variety of media ownership rules—including the top four prong—in Petitions for Reconsideration of last year's *Quadrennial Review Order*.[1] We take no position on this request as it relates to the vast majority of the local ownership rules. We believe, however, that the Commission would face substantial legal hurdles if it were to relax or eliminate the top-four prong without, at a minimum, both seeking further

---

[1] Petition for Reconsideration of the National Association of Broadcasters, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (filed Dec. 1, 2016); Petition for Reconsideration of Nexstar Broadcasting, Inc., MB Docket Nos. 14-50 *et al.* (filed Dec. 1, 2016); Letter from Rick Kaplan to Marlene Dortch, MB Docket Nos. 14-50 *et al*. (filed Feb. 9, 2017); 47 C.F.R. § 73.3555(b) (local television multiple ownership rule); *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*, 31 FCC Rcd. 9864 (2016) ("*Quadrennial Review Order*").

input on how this would affect retransmission consent prices *and* addressing the harms that it has already found would arise.

The Commission has dealt extensively with issues involving local concentration and retransmission consent. Three years ago, the Commission unanimously adopted an order prohibiting joint retransmission consent negotiations among non-commonly owned top-four broadcasters.[2] (Such joint negotiations were, at the time, sometimes conducted under a variety of contractual arrangements designed to give one broadcaster the ability to negotiate on behalf of another, often along with an economic interest in the outcome of such negotiations.[3]) 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*."[4] The Commission added: "With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers."[5]

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).[6] Taking the more conservative of these estimates, a 20 percent increase in retransmission consent fees represents nearly *$2.3 billion* in additional fees

---

[2] *See 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*"), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-29A1.pdf.

[3] *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 prior to the *Joint Negotiation Order* and the basis upon which entities possessed such duopolies).

[4] *Id*. ¶ 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.").

[5] *Id.* ¶ 10.

[6] *Id.* ¶ 16 and n. 66.

annually by 2022, according to SNL Kagan.[7] The Commission has found that such increases in wholesale programming costs may create "pressure for retail price increases."[8]

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."[9] Chairman Pai explicitly agreed with the *Order's* key findings in a separate statement.[10]

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.[11] It did so with support from both sides of the aisle.[12]

---

[7] *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).

[8] *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.").

[9] *Joint Negotiation Order* ¶ 12.

[10] *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.").

[11] 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. . .").

[12] *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&

Both the *Joint Negotiation Order* and the subsequent legislation dealt with joint *negotiation* because neither entity had any reason to consider the effect of joint *ownership* of top-four stations on retransmission consent negotiations. The Commission's analysis dealt with joint negotiation of non-commonly owned top-four stations because its rules already prohibited (and still prohibit) common ownership of such stations. And Congress legislated against the backdrop of this same rule. So when it adopted a formulation permitting joint negotiation among *commonly owned* stations, it had no reason to think this formulation would apply to top-four stations. To the contrary, the Congressional prohibition on joint negotiation was "broader than, and thus supersede[d], the Commission's [then] existing prohibition."[13]

In any event, issues raised by joint negotiation and joint ownership of top-four stations are exactly 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.[14] The Commission then cited DOJ's divestitures as a basis for approving the Nexstar-Media General transaction.[15]

---

r=2&overview=closed#tabs (showing that STELAR passed the House by voice vote and the Senate by unanimous consent).

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

[14] *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 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.").

[15] *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

The Commission's *Joint Negotiation Order*, in other words, was in substance a finding that the top-four prong remains "necessary in the public interest."[16] This is what it means to determine that "the harms from joint negotiation outstrip any [associated] efficiency benefits."[17] Congress ratified this finding immediately thereafter, and DOJ made a similar finding last year.

Under the Administrative Procedure Act prohibition against "arbitrary" or "capricious" agency action,[18] the Commission may reverse this explicit finding only if it offers a "reasoned explanation" for doing so.[19] We believe the Commission could not provide such an explanation based on the existing record.

The Commission, for example, would have no basis to conclude that its earlier findings about the effect of top-four concentration on retransmission consent prices are no longer valid. There is no new evidence on the record on this point and considerable new evidence *supporting* the Commission's prior findings.[20]

Nor could the Commission provide a "reasoned explanation" for the proposition that pro-competitive effects of same-market, two-network consolidation outweigh concerns about retransmission consent pricing. Here again, no record evidence exists upon which the Commission might reverse its explicit finding on this point in the *Joint Negotiation Order*.

---

potential harm was adequately addressed by the divestitures proposed in the seven overlap markets.").

16 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act").

17 *Joint Negotiation Order* ¶ 10.

18 5 U.S.C. § 706(2)(A); *see Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–549 (1978).

19 *See Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . Sometimes [an agency must provide a more detailed explanation]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.") (internal citations omitted).

20 *See* Petition to Dismiss or Deny of DISH Network at Exs. D and E, MB Docket No. 17-179 (filed Aug. 7, 2017) (economic analyses of the effect of top-four duopolies on retransmission consent pricing).

Equally unavailing would be a claim that case-by-case resolution of transfer or assignment applications works better to address the problems it identified than does a bright line rule. Yet again, such a claim could not be squared with the *Joint Negotiation Order*, which specifically concluded otherwise. Such an explanation would be especially difficult to construct because the problem identified in the *Joint Negotiation Order* stems *precisely* from negotiation on behalf of *any* two of the top four networks in a single market. No "case by case" regime could possibly address this problem more efficiently than a ban on top-four duopolies. Nor, for that matter, would a prohibition on ownership of the top two-ranked stations address these harms, because such a prohibition would allow top-four network combinations that the Commission has found would lead to price increases.

Indeed, a "procedural efficiency" argument would be doubly problematic here. Even if it could pass muster under the APA (and it could not), such an argument could not be used to provide the relief broadcasters request here under the Quadrennial Review statute. Congress directs the Commission to review certain media ownership rules every four years "to determine whether [they] are necessary in the public interest *as the result of competition*."[21] As the *Prometheus I* court described it:

> The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an "ongoing mechanism to ensure that the Commission's regulatory framework *would keep pace with the competitive changes in the marketplace*" resulting from that Act's relaxation of the Commission's regulations, including the broadcast media ownership regulations. Put another way, the periodic review provisions require the Commission to "*monitor the effect of ... competition* ... and make appropriate adjustments" to its regulations.[22]

A conclusion about the supposed efficiency of a case-by-case regime for considering top-four duopolies has nothing to do with "competitive changes in the marketplace." The Commission could not lawfully use it to conclude that the top-four rule is no longer "necessary in the public interest as a result of competition."[23]

---

21 1996 Act § 202(h) (emphasis added). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act).

22 *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 391 (3d Cir. 2004) ("*Prometheus I*") (emphasis added) (internal citations omitted). The court continued: "[T]he relationship between the [statute's] first and second instruction is evident. Under the second instruction, the Commission must repeal or modify the regulations that it has determined under the first instruction do not satisfy that same standard." *Id*. at 394.

23 1996 Act § 402(a).

We have suggested elsewhere that it might be possible to address concerns raised by top-four duopolies in other ways, such as through changes to its retransmission consent rules.[24] We have even proposed language that might serve as the basis to begin such discussions.[25] In our view, however, the Commission cannot eliminate the top-four prong of its local ownership rules in this proceeding without, first, seeking public comment on the harms that doing so would cause in retransmission consent negotiations—including the ways in which the Commission might otherwise address those harms—and, second, explaining how elimination of the top-four rule is justified from the standpoint of competition, given the conclusions reached in the *Joint Negotiation Order*.

* * *

In accordance with the Commission's rules, I will file one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted,

Michael Nilsson
Mark Davis
Jared Marx
Counsel to the American Television Alliance

cc: Meeting Attendees

---

24 *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).

25 *Id.*