Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Applications for the Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television, Inc., Including Top-Four Showings in Two Markets	)))))))	 MB Docket No. 18-230

COMMENTS OF
NCTA-THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA") submits its Comments in the above-captioned proceeding.

Last year, in its Order on Reconsideration and Notice of Proposed Rulemaking in the 2014 Quadrennial Regulatory Review proceeding, the Commission decided to retain its local television ownership rule generally prohibiting common ownership of two "Top-Four" stations in a market. The Commission, however, decided to permit broadcasters to make showings, on a case-by-case basis, that the public interest benefits of a particular Top-Four duopoly would so serve the public interest that the prohibition should not apply. Applicants seeking approval of such a transaction "must demonstrate that the benefits of the proposed transaction would outweigh the harms," and that the application of the Top-Four Prohibition is not in the public interest with respect to the specific transaction "because the reduction in competition is minimal and is outweighed by public interest benefits."[1] The Commission pledged that it would

[1] *In re 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9839 (2017).

"undertake a careful review of such showings in light of the record with respect to each such application."[2]

That decision is now beginning to engender a flurry of applications to permit Top-Four duopolies, of which the applications at issue here are the latest. There is a common thread to these applications. The applicants generally claim that common ownership of two Top-Four stations will result in cost savings and increased revenues, which applicants then assert will enable the stations to better serve their communities. And they generally ignore any downsides to the common ownership – any ways in which permitting the duopolies will *harm* the public interest.

Of course, if there were no generally occurring downsides to Top-Four duopolies, the Commission would not have adopted and retained a rule prohibiting them. As it explained,

> The Commission has repeatedly concluded that the Top-Four Prohibition is necessary to promote competition in the local television marketplace. As the Commission has consistently found, there is generally a significant cushion of audience share percentage points that separates the top four stations from the fifth-ranked stations. In the *Second Report and Order,* the Commission found that this pattern has not changed. Thus, top-four combinations would generally result in a single firm's obtaining a significantly larger market share than other stations and reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares.[3]

Moreover, the Commission – and Congress – have determined that allowing two Top-Four stations jointly to negotiate retransmission consent agreements virtually always has the anticompetitive effect of raising the costs of multichannel video programming distributors ("MVPDs") in a manner that harms consumers. The Commission had no doubts about this conclusion:

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[2] *Id.*

[3] *Id.* at 9837 n.230 (citations omitted).

> 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 higher than those that would have resulted if the stations competed against each other in seeking fees, the record amassed in this proceeding is centered largely around evidence regarding the impact of joint negotiation by Top Four broadcast stations. 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*.[4]

When Congress extended the statutory ban on joint negotiation for retransmission consent to *any* non-commonly owned stations in a market (not only Top-Four stations), it agreed that "such arrangements could give broadcasters an unfair advantage in negotiations, because a negotiating impasse would result in the loss of two local programming streams rather than one and may give the broadcaster the ability to demand retransmission fees above the market value each broadcaster could command alone."[5]

Neither the Commission's nor Congress's ban on joint negotiation applies to commonly owned stations. But that does not affect the finding that joint negotiation "invariably" results in higher retransmission consent fees. In any event, at the time that the Commission and Congress adopted their bans on joint negotiation, the Commission's ownership rules flatly prohibited common ownership of two Top-Four stations, so that joint negotiation by commonly owned Top-Four stations was not a possibility.

If all that an applicant needed to show to overcome the prohibition on joint ownership of two Top-Four stations were that joint ownership resulted in cost savings and increased revenues and supposedly better programming, the exception would swallow the rule. The prohibition is only meaningful if the exception is reserved for truly exceptional cases – cases in which the

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4 *In re Amendment of the Commission's Rules - Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3358 (2014) (emphasis added).

5 H.R. Rep. No. 113-518, 113th Cong., 2d Sess. 5-6 (2014).

anticompetitive harms associated with common ownership and joint negotiation are unusually constrained or in which the benefits to the viewing public are extraordinary. As the Commission's Order makes clear, the applicant bears the burden of demonstrating that it is an outlier and that its circumstances are exceptional.[6]

The applications under review in this proceeding involve two transfers of existing Top-Four duopolies. In one case – the existing common ownership of the top ranked CBS affiliate and the Telemundo affiliate in Amarillo, Texas – Gray notes that the Telemundo affiliate "is traditionally the fifth ranked station in the market" but "[d]ue to a spike in viewership attributable to KEYU(DT)'s coverage of events leading up to the World Cup, KEYU(DT) achieved fourth place (by a slim margin over the local Fox affiliate) in the May 2018 Nielsen ratings period."[7] This is the sort of exceptional circumstance that may warrant a finding that the prohibition on common ownership should not apply. Since the Commission's findings of invariable harm are limited to common ownership and joint negotiation by two Top-Four stations, it would not be unreasonable to exempt ownership of a station whose Top-Four status is a short-term aberration.

In the other case – the existing common ownership of the second and third ranked network affiliates in Honolulu, Hawaii – Gray asserts that despite Raycom's common ownership of the second and third ranking stations for the past nine years, "the broadcast television market in the Honolulu DMA has remained competitive."[8] As evidence, it points to "the multitude of

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6 *2014 Quadrennial Regulatory Review Order*, 32 FCC Rcd. at 9839 (stating that applicants "must demonstrate that the benefits of the proposed transaction would outweigh the harms" and that "the reduction in competition is minimal and is outweighed by public interest benefits").

7 Comprehensive Exhibit at 27.

8 As Gray's application explains, Raycom's commonly owned stations in Honolulu did not become a Top-Four duopoly in Honolulu until it entered into an "affiliation swap" with the owner of a second Top-Four station in 2009. At the time, such affiliation swaps were not subject to the Top-Four prohibition, but "the Commission subsequently amended its attribution rules to provide that going forward, 'affiliation swaps' between in-market

diverse stations, including KITV (the local ABC affiliate), KHON-TV (the local Fox affiliate), and many independent stations."[9]

But a Top-Four duopoly will virtually *always* face competition from affiliates of the other two networks as well as independent stations and other non-broadcast entities. As noted above, the Commission's concern is that two Top-Four stations are likely to have a significantly larger combined market share than the other stations in the market, and that this will reduce incentives to compete for programming, advertising, and market shares. Gray's evidence of market shares of stations in the Honolulu market is redacted, but it makes no general representation – and there is no reason to believe – that the combined market shares of the CBS and NBC affiliates do not significantly exceed the share of any other station in the market. Gray states only that the redacted market shares show "that the Honolulu stations continue to face strong, effective competitors."[10] Nor does Gray offer any evidence that dual Top-Four ownership in Honolulu does not have the same harmful effect on retransmission consent negotiations as the Commission and Congress have found to occur generally.

Are there unusual benefits to the merger, apart from any economies, efficiencies, and increased revenues to the station owner, that outweigh and justify the anticipated harms? Beyond the truisms that joint ownership provides efficiencies, cost savings and revenue enhancements that could enable Gray to spend more on its broadcast stations (as it would in the case of any Top-Four consolidation), Gray suggests that the very viability of the third-ranked station would be threatened were it to try to operate independently of the second-ranked station

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stations will be subject to the Top-Four Prohibition." Comprehensive Exhibit, Attachment 1 at 3 n.5 Accordingly, in considering Gray's acquisition of the Top-Four duopoly under the current rules, the pre-existing nature of the duopoly does not signify any prior approval by the Commission and should be given no weight.

[9] *Id.* at 11.

[10] *Id.* at 12.

but does not explain why this is so.[11] Nor does Gray explain how the fourth-ranked or fifth-ranked station has managed to survive without a Top-Four duopoly or why eliminating the common ownership of the two Raycom stations would not enhance the competitive strength of that fourth-ranked or fifth-ranked station. Nor has it demonstrated that Raycom could not find another buyer for the third-ranked station with sufficient resources to make that station a sturdy separate voice in the community.

The Commission has determined that there may be exceptional circumstances where the benefits of a Top-Four combination somehow exceed the generally expected – and, in some respects, invariable – harms to the public interest. The burden is on the proponents of such a combination to demonstrate that such exceptional circumstances exist particularly in view of the recognized harmful effects of Top-Four combinations on retransmission consent negotiations.

CONCLUSION

For the foregoing reasons, the Commission should make clear in this and other applications seeking an exemption from the Top-Four Prohibition, that the case-by-case showings that it authorized when it voted to retain the general prohibition on common ownership of Top-Four stations requires applicants to demonstrate that the harms the Commission has recognized that are associated with common ownership are outweighed by real world benefits or

[11] *Id.* at 8 ("Even today, although the market has improved since 2009, the Honolulu Stations continue to rely on the efficiencies made possible by common ownership to remain financially viable.")

that there are other exceptional circumstances with regard to such common ownership.

Respectfully submitted,

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