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

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| In the Matter of: | ) | |
| | ) | |
| Rules and Policies Concerning | ) | MB Docket No. 04-256 |
| Attribution of Joint Sales Agreements | ) | |
| In Local Television Markets | ) | |
| | ) | |

To: Chief, Media Bureau

# COMMENTS OF MINDEN TELEVISION CORPORATION

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## SUMMARY

The FCC should not enact a rule attributing TV JSAs to brokers with cognizable TV interests in the same market where brokers exceed a predetermined advertising sales benchmark. That proposed benchmark would equate to a percentage of the advertising hours sold.

First, any such rule would be premature. Local TV ownership rules have not been finalized, and a rule of general applicability could dissuade parties from entering into JSAs, impair existing arrangements, and may well conflict with the new TV ownership rules.

Second, there is no credible evidence to suggest that same-market JSAs have resulted in abuses, such as brokers assuming control over brokered stations' programming or core operations. On the contrary, JSAs under which brokers sell all advertising spots, have helped brokered stations become more competitive and successful.

Minden Television Corporation ("Minden") demonstrates in these Comments that its combined joint sales and services agreement ("JSSA") and time brokerage agreement ("TBA") with a local TV station, have enabled its newly-acquired Shreveport market station (KPXJ (TV), Channel 21, Minden, LA) to increase revenues and offer locally-produced programming. As a brand new small station licensee, Minden could not have been in a position to produce local news and sports programs absent the economic and operational benefits it (and its broker) have gained by virtue of the combined agreements.

Aware of the economic realities of TV competition, Minden submits that the industry would be well served by the FCC continuing to apply its current attribution policy -- attributing same-market JSAs to broker-licensees if and only if, the record shows that the broker exercised or may potentially exercise undue influence and control.

If, however, the FCC enacts a JSA attribution rule, it should extend liberal grandfather rights to existing advertising agreements, thereby avoiding adversely impacting JSA parties and the public.

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In response to the Commission's August 2, 2004 released *Notice of Proposed Rule Making* ("NPRM"),[1] Minden Television Corporation ("Minden") files its comments in opposition to a proposed rule under which certain same-market TV joint sales agreements ("JSAs") would be attributed to brokers having cognizable interests in local television stations. Minden believes that the proposal would not serve the public interest.

## I. IDENTITY AND INTEREST.

Earlier this year, Minden acquired Station KPXJ (TV), Channel 21, Minden, Louisiana ("KPXJ").[2] *See* Letter of Barbara A. Kreisman, Chief of the Media Bureau's Video Division (File No. BALCT-20031008ACZ) ("*Kreisman Letter*"). KTBS, Inc. ("KTBS"), licensee of Shreveport Station KTBS (TV), brokers KPXJ under a "Joint

[1] FCC 04-173. The NPRM was published in the Federal Register. 69 Fed. Reg. 52464 (Aug. 26, 2004). The time for commenting on the NPRM was extended to the date hereof.

[2] Minden, LA, is part of the Shreveport DMA, ranked 81$^{st}$ by Nielsen.

Sales and Services Agreement" ("JSSA") [3] and a non-attributable time brokerage agreement ("TBA").

In approving the acquisition, the FCC found that the then-proposed KTBS-Minden JSSA and TBA prohibited the broker from exercising control over KPXJ's programming or core operations. The Commission declared that

> Under the TBA, the broker shall pay Minden [a fixed sum] per month. Under the [JSSA], Minden and KTBS will split station revenues 50-50. Specific targets for the combined payments by KTBS to Minden, including sales revenues and the TBA fee, are set for each year during the life of the agreement [5 years]. If those targets are missed by more than 10% during a given year, then Minden may terminate the agreement with six months notice. [4]

The Commission went on to find that "[t]he terms of the [JSSA] and the TBA specify that ultimate control over programming, finances and personnel will remain with Minden and the payment terms of those agreements indicate an arms-length transaction between the parties."[5]

Minden respectfully urges the Commission to defer action in this proceeding until it issues final rules governing local TV ownership. If, however, the Commission elects to act before it issues those rules, it should *not* modify its current policies regarding TV JSAs. TV JSAs can assist local independent and network television stations to achieve and maintain economic stability and viability. Further, based on available facts, it appears that any perceived injury to the public from keeping the current policies in place

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[3] The JJSA enables Minden to share studio and office space with KTBS, and KTBS provides technical, production, and, of course, sales assistance to KPXJ. *See infra* Sec. III A.

[4] *Kreisman Letter,* at 3.

[5] *Id.,* at 4.

is more hypothetical than real. As such, there are no compelling reasons for making TV JSAs attributable. Finally, if the Commission adopts an attribution test, it should accord all existing JSAs very liberal grandfather rights so as to minimize adverse impact on brokered *and* brokering same-market stations.

## II. THE COMMISSION SHOULD DEFER ACTION IN THIS MATTER UNTIL IT COMPLETES THE REMAND PROCEEDING ORDERED BY THE THIRD CIRCUIT IN *PROMETHEUS v. FCC.*

In *Prometheus v. FCC,* [6] the Third Circuit Court upheld the FCC's decision to attribute radio JSAs, based on a "reasoned decision-making" analysis, and rejected a constitutional challenge under the Fifth Amendment's Takings Clause. It also upheld in part the FCC's ruling permitting TV duopolies and triopolies that could satisfy a two-pronged test. While the Court affirmed the first prong of the test (a top-four restriction),[7] it remanded to the FCC for further consideration the numerical caps.

On remand, the Commission will have to rework its local TV ownership rule. The final rule could be a variant of the market share approach, along with the Court-sanctioned prohibition on top-four-ranked station combinations.[8] On the other hand, the Commission may adopt an entirely different methodology. If, however, the Commission

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[6] *Prometheus Radio Project v. F.C.C.,* 373 F.3d 372, 2004 WL 1405975 (3d Cir. 2004) ("*Prometheus*"). That case affirmed in part and remanded in part the FCC's new media ownership rules adopted *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) ("*Report and Order*").

[7] The top four restriction of local TV ownership rule adopted in the *Report and Order* prohibits one entity from controlling two of the top-four-rated television stations in a single market.

[8] The Commission could well find that JSAs between a top-ranked station in a market and a station ranked below the top-four outlets are presumptively non-attributable, but devise a bright-line test standard (*e.g.*, 15% or 25%) for other JSAs.

decides to attribute TV JSAs, before it completes its remand deliberations, TV licensees that broker more than 15% of the advertising time on another same-market TV station would be barred from continuing such an arrangement because it conflicts with the *currently-effective* ownership rule in place adopted prior to the *Report and Order*. Paradoxically, the same arrangement could turn out to be perfectly consistent with the final rule governing local TV ownership. Consequently, in order to preclude disruption and destabilization of existing arrangements, Minden urges the FCC to defer action in this proceeding until it completes the deliberations ordered by the Third Circuit in *Prometheus*.

## IIII. THE COMMISSION SHOULD NOT ENACT A RULE OF GENERAL APPLICATION FOR THE ATTRIBUTION OF TV JSAs.

### A. There is no Need to Attribute TV JSAs.

The FCC should continue to review disputed and questionable TV JSAs on a case-by-case basis applying the "substantively equivalent" test enunciated in the *Ackerely* case;[9] *i.e.*, TV JSAs will be attributed to brokers only if their likely degree of influence is substantively equivalent to a local marketing agreement ("LMA") for more than 15% of the brokered station's hours. The test is straightforward and can be applied to all same-market TV JSAs, whether or not they are paired with programming agreements. Moreover, the test strikes a balance between laissez-faire purism and the recognition that properly administered TV JSAs are perfectly legitimate commercial arrangements that contribute to the stability of smaller television outlets such as Minden's KPXJ.

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[9] *See Shareholders of Ackerley Group, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Transfer of Control of the Ackerley Group, Inc., and Certain Subsidiaries*, 17 FCC Rcd 10828 (2002)("*Ackerley*").

There is scant evidence to justify an inference that same-market TV JSAs have subverted competition and should be regulated in the manner proposed in the NPRM. Although the Third Circuit's affirmance of the radio JSA attribution rule may be defensible under appellate review standards, Minden believes that FCC's "threat" rationale, *see Report and Order,* ¶ 321, lacks a factual underpinning for that industry. Similarly, with regard to TV JSAs, the NPRM does not refer to any other persuasive reasons that would justify the FCC's departure from its current policy of attributing same-market TV JSAs where there is a "realistic potential"[10] that the broker has influenced programming or other core operating decisions, or may potentially exert influence in those areas. Thus, while the FCC's concern may be legitimate in the abstract, it is neither supported by empirical data nor based on reliable anecdotal evidence. In fact, with the exception of *Ackerley*, cases involving JSAs that have been vetted by the Commission suggest that TV JSAs have helped not hindered, competition.

First, it is evident that virtually all same-market TV JSAs involve brokered stations that are at a competitive disadvantage *vis-à-vis* more powerful local stations, most of which are affiliates of the major networks. Brokered stations can become more economically secure and more efficient competitors Minden's KPXJ is a case in point.

Second, since *Ackerley* was decided, many if not most same-market TV JSAs have been structured so as to insulate brokered stations from potential influence and control. In preparing its comments, Minden attempted without success to identify cases in which the Commission ruled that brokering stations *actually* exercised untoward influence over programming and other core decisions. Minden, however, is aware of the

[10] NPRM, ¶ 3.

Media Bureau's post-*Ackerley* decision in *South Central Communications, Inc.*, another assignment case involving a same-market TV JSA combined with a non-attributable TBA (and a broker's stock option). In finding that those arrangements lacked any "realistic potential" to subvert competition, the FCC referred to explicit pro-competitive safeguards in the parties' contracts.[11] KTBS and Minden were mindful of the rulings in *Ackerley* and *South Central* when they negotiated their agreements.

In sum, the Commission should retain its current TV JSA policies. It should continue to review TV JSAs on a case-by-case basis and decide, on the *particular record before it*, whether or not attribution may be appropriate. Minden is convinced that the NPRM's proposed advertising time benchmark of 15% will end up discouraging same-market TV JSAs, whether they are standalone advertising agreements or are paired with programming agreements that also limit brokers' access to airtime. A regulation of general application may be more easily administered than an *ad hoc* review procedure. Nevertheless, absent any credible proof that widespread abuses have occurred (or are likely to occur), case-by-case adjudication is a more just and reasonable procedure for the Commission to follow.

### B. TV JSAs Promote Diversity: Making Them Attributable Could Have the Opposite Effect.

In its 1999 *Attribution Order*, the FCC found that TV JSAs could promote diversity by "enabling smaller [TV] stations to stay on the air."[12] That determination is

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[11] *Letter from Clay C. Pendarvis, Associate Chief, FCC Video Division, Media Bureau, to South Central Communications Corp.*, regarding the assignment of license for WTVW (TV), Evansville, IN (File No. BALCT-20030404ABS) (December 1, 2003).
[12] *Review of the Commission's Regulations Governing Attribution of Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in*

particularly apposite in today's highly competitive video environment. Here, Minden speaks from direct experience. It welcomes the opportunity to detail how KPXJ and its viewers have benefited from a combined same-market JSSA and TBA.

As background, Minden's broker KTBS, operates a mature VHF-ABC affiliate in the Shreveport market. Station KPXJ started operations on May 8, 2004, under Minden's ownership. Acting as TBA-JSSA broker, KTBS supplies KPXJ with UPN programming and sells 100% of the station's commercial time.[13] Minden assures the Commission that KTBS has never attempted to exert control over its station's programming or interfered with operations. Nor, as the *Kreisman Letter* recognizes, *could* KTBS overreach without facially violating the parties' agreements, both of which were filed with and scrutinized by, the FCC.

The combined agreements have enabled newly-acquired KPXJ to achieve a measure of financial stability in the Shreveport market within a relatively short period of time. Consequently, KPXJ is better able to compete for advertising revenues by being able to carry programs that attract viewers. Additionally, KPXJ is contributing to diversity, having established itself as a truly local outlet in a highly-competitive major market.[14] KTBS's ability to sell unlimited advertising time on KPXJ, and the parties'

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*the Broadcast Industry*, 14 FCC Rcd 12559, 12612 ¶ 123 (1999) (*"1999 Attribution Order"*), *on recon.*, 16 FCC Rcd 1097 (2001).

[13] Each agreement has a five-year term and extensions are subject to the parties' good faith negotiations. Minden believes that at a minimum, a five-year term is reasonable.

[14] It should be noted that beneficiaries of the FCC's non-attribution policy for TV JSAs include full network stations as well as independents. As the Commission is aware, many smaller stations must make recurring payments to their networks; *i.e.*, they "receive" *negative compensation*. Minden has been informed that one small-market affiliate's survival depends on the continuation of its JSA with a same-market affiliate of another network. In that case the brokered station compensates its network to retain the

agreement to share those revenues, have fostered rather than diminished competition for audience and revenues and increased diversity. The following comments provide concrete, firsthand information regarding the positive effects the JSSA/TBA combination have had on the public and on parties to those contracts.

• ***Impressive Revenue Growth.*** As a direct result of the JSSA and TBA, KPXJ has enjoyed consistent revenue growth during the past five months, and currently is achieving 80-85% of its monthly revenue goal. If that growth continues at its present rate, by May 2005, KPXJ should meet the first-year revenue target specified in the JSSA. Minden, in turn, will receive 50% of that target amount. This growth record has been particularly gratifying in the face of an eminent TV critic's recent characterization of UPN as a "hardscrabble network."[15]

• ***Lower Operating Costs.*** The NAB's 2002 *Television Financial Report* states that the average UPN affiliate in markets above the top 50 spends $290,000 annually on engineering, including maintenance, repair, and replacement of equipment, technical salaries, and related fixed and recurring costs.[16] In addition to providing for performance-based revenue sharing, the JSSA allows Minden to share KTBS technical personnel. KTBS's technicians assist KPXJ employees in the operation of the master control facility

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affiliation. Moreover, the broker's own network compensation has been slashed. Hence, the broker there receives benefits from revenues it earns under the JSA. These revenues partially offset the reduction in its own network compensation. Absent the JSA, both the brokering station and the brokered station would be financially imperiled.

[15] "The New Season-TV Previews." Review of "Kevin Hill" by Tom Shales. *Washington Post* (Sept. 29, 2004, C-8).

[16] Few radio station's technical budgets approach this figure. The costs involved for television compared to radio underscore the need to differentiate TV JSAs from attribution of radio JSAs.

owned by the broker and shared with KPXJ. KTBS personnel also perform routine monitoring, maintenance, repair, and inspection of KPXJ's equipment.[17] In light of these relationships, Minden projects that its engineering costs for its first year of new operations will approximate $50,000. This amount is far lower than the industry figure, not to mention the budgets of many radio stations and LPTV-CA outlets in comparable markets.

• ***Sharing of Facilities.*** Under the JSSA, KPXJ shares office and studio space with KTBS (TV). Minden estimates that its ability to tap these resources results in a savings of approximately $25,000 a year. Moreover, since key infrastructure is shared with KTBS, Minden did not have to make an upfront investment in the neighborhood of $1 million to build a separate studio.

• ***Programming Acquisition Costs.*** Minden is aware that UPN affiliates spend roughly $575,000 annually on program acquisition. Minden, however, has acquired the rights to show UPN programming on KPXJ for less than a quarter of that sum. The programs are second runs of high caliber shows like *Dr. Phil* and *Judge Judy,* the first runs of which are under contract to KTBS. The availability of favorable second run terms to Minden under the JSSA was motivated in large part by KTBS's ability to sell *all* national, regional and local commercial announcements on KPXJ, and its expectation that the parties' joint efforts would be financially rewarding to both of them.

• ***Newsgathering.*** Few stations affiliated with UPN can afford to carry locally-produced news shows, and many affiliates only broadcast "headline" news. The combined agreements have been instrumental in allowing KPXJ to air 90 minutes of

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[17] Minden pays all costs of installing, repairing, maintaining or replacing KPXJ's equipment.

locally-produced news daily.[18] Not surprisingly, KPXJ already has established a presence in the Shreveport market. For example, KPXJ sponsors a key United Way Campaign in Shreveport. Beginning with the campaign's August 2004 kick-off, KPXJ has covered the drive in its newscasts. Minden understands that its efforts have helped the campaign to succeed. Additionally, on August 27, 2004, Minden's KPXJ began a 13-week run of high school football coverage. Every Friday night, KPXJ televises highlights of local football games, which are of particular interest to its viewership. This unique coverage is attracting more audience and is increasing advertising revenues. Minden assures the Commission that the venture could not have been conceived let alone undertaken, had KTBS's been restricted to a fifteen or even a twenty-five percent advertising time benchmark.

• ***Programming Autonomy.*** The FCC is rightly concerned that TV JSAs could cause brokered stations to adopt passive positions regarding programming decisions, but that is not the situation with Minden. During the relatively short tenure of the Minden-KTBS combined agreements, KTBS has not made a single unsolicited suggestion regarding programming. On the contrary, as indicated above, Minden *approached KTBS* with news and sports programming proposals. Furthermore, in all JSAs that Minden has seen, brokered stations reserve the right to reject advertising announcements as well as programs. The JSSA and TBA between Minden and KTBS contain those provisions. In fact, Minden has refused to carry commercial announcements furnished by KTBS promoting a local music video. Their JSSA provides that "advertising announcements" must "comply with Minden's reasonable standards regarding broadcast practices and

[18] 7:00 a.m.-8 a.m. & 9:00 p.m.-9:30 p.m.

commercial acceptability, as may be modified by Minden from time to time." That provision goes on to state that "Minden shall have the right to reject *any* material submitted by [KTBS] for broadcast on [KPXJ] that violates the requirements of this Section…" (emphasis added). Minden's determination that a music video ad was unsuitable for broadcast, clearly reduced advertising revenues, but just as clearly underlined the brokered station's autonomy. As the Commission is aware, provisions similar to the one in Minden's JSSA appear in most JSAs and programming agreements.

• ***Digital Transition Fostered.*** In paragraph 17 of the NPRM the FCC asks: "What effect, if any, might attribution of TV JSAs have on the digital transition?" Unlike radio stations that may elect to introduce new technologies such as IBOC, television stations must commence digital operations on their allotted frequency. Some stations have spent many hundreds of thousands of dollars on digital equipment. Since KPXJ did not go on the air until 1999, it was not given a paired digital channel. Nevertheless, the non-attributable Minden-KTBS agreements, and the financial benefits KPXJ expects to realize from those arrangements, have motivated Minden to accelerate its plan for digital conversion. In this regard, in June 2004, KPXJ was awarded a DTV construction permit and expects to begin digital service on its NTSC channel well in advance of an official transition date.

## IV. IF THE FCC DECIDES TO ATTRIBUTE TV JSAs IT SHOULD ADOPT A VERY LIBERAL GRANDFATHERING POLICY.

Minden has shown that the public interest has been well-served by TV JSAs, and that an attribution rule having general application is unnecessary. If the FCC were to adopt an attribution rule, Minden hopes that it will grandfather all existing TV JSAs in the manner suggested below. Grandfathering will avoid harm to the many television broadcasters who, like Minden, have entered into same-market JSAs in good faith and are enjoying the advantages of such arrangements. Grandfathering should apply to all TV JSAs in effect on the date the FCC issues its *Report and Order* in this proceeding. The status quo should be maintained until the later of finality of the quadrennial ownership review, which will commence in 2006, or individual contract expiration dates.[19] At such times, the FCC should apply the same re-evaluation procedures it intends to use with regard to grandfathered TV LMAs and TBAs: It should consider TV JSAs on a case-by-case basis, using the factors discussed in *Ackerley* to decide whether or not particular relationships should be attributable to brokers.[20] Parties to non-compliant same-market TV JSAs should be given the chance to reevaluate their agreements and either terminate them or modify them to conform to pertinent legal standards.

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[19] The next ownership review mandated by Section 202 (h) of the Telecommunications Act of 1996, 47 U.S.C. § 202 (h), will commence in 2006.

[20] The FCC need not scrutinize each and every same-market JSA. Instead, parties to those agreements can be required to certify compliance with pertinent standards, and to re-certify annually. A similar procedure has been adopted with respect to certain telecommunications common carriers who file annual certifications of compliance with the rate averaging and rate integration obligations set out in Title II of the Communications Act. *See* 47 C.F.R. §§ 64.1900 (a) & (b).

## V. CONCLUSION

The Commission should not adopt a TV attribution rule. In any event, it should take no action in this proceeding until it enacts final rules governing local television ownership.

Respectfully submitted,

**MINDEN TELEVISION CORPORATION**

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