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

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

TO: Office of the Secretary
ATTN: The Commission

COMMENTS OF KTBS, INC.

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Executive Summary

The Commission's proposal to impose attribution requirements on television Joint Sales Agreements ("JSAs") is unwarranted and ill-advised. It is based on the presumption that radio and television markets are so similar that they should be regulated in the same way. But this leap of logic fails to account for the clear differences in both the marketplace and regulatory structure in which television operates.

First, multiple ownership limits in television are in flux due to the Court of Appeals ruling in *Prometheus Radio Project v. F.C.C.* The Commission should not regulate now until it is clear what the parameters of multiple ownership will be. This cannot occur until the Commission finishes its court-ordered review of the rules and has an acceptable rubric in place. The JSA question should only be confronted as part of a comprehensive, rather than scattershot regulatory approach. A bar on JSAs in the absence of a multiple ownership rule that reflects current market conditions would cause harm to the public interest in competition and diversity by damaging the economic standing of many lower rated television stations in small and medium sized markets.

Next, the Commission's presumption that radio and TV are alike ignores the well documented fact that radio stations operate in a much less competitive environment. No parallel exists in the radio market to the multichannel explosion that pits a handful of broadcast television stations in the average market against dozens of non-broadcast TV channels now that cable, DBS and other multichannel video programming distributors are in nearly nine out of ten American homes.

Despite the higher level of competition in the television market, FCC multiple ownership rules are more restrictive in television than in radio. While multiple ownership is possible in every defined radio market in the country, it is only possible in 34 percent of television's 210 markets. This means that, under a JSA attribution requirement, stations in two-thirds of the television markets in the country will not be able to gain the competitive boost that advertising-based JSAs provide by improving revenue and freeing resources for programming and community service. Those excluded are precisely the lower-rated small markets stations that require the assistance of JSAs the most.

Without JSAs, many small and medium market stations – especially those with lower ratings – will become even less competitive and the diversity they provide will be concomitantly diminished. Imposition of a radio-like JSA attribution requirement in television will not serve the public interest; it will, in fact, harm the competitive position of lower-rated free over-the-air broadcast television stations to the detriment of competition and diversity.

The Commission cites a single example of a TV JSA that ceded too much editorial and business control to another licensee. But in that case, *Shareholders of Ackerley Group, Inc.*, the JSA was structured to function as a control mechanism rather than a revenue enhancer. The Commission took action to curtail that practice as it violated existing rules. But this situation says nothing about JSAs that do not illegitimately cede control of a station to another licensee. This case does not prove the need for JSA attribution rules.

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KTBS, Inc. ("KTBS"), through counsel, hereby submits comments in the above-referenced rulemaking in response to the notice of proposed rule making issued on Aug 2, 2004 (the "JSA NPRM").

I. Introduction

KTBS is the locally-based owner of a single television station, KTBS-TV, Shreveport, Louisiana operating in a competitive, medium sized market – the Nielsen Shreveport, Louisiana DMA. The principals of KTBS are Shreveport residents.

KTBS sells the advertising time of KPXJ(TV), Minden, Louisiana, which is also in the Shreveport DMA, under terms of a joint sales and services agreement ("JSSA") with KPXJ's licensee, Minden Television Corporation. The two licensees are also parties to a non-attributable time brokerage agreement.[1]

In these comments, KTBS demonstrates that the Commission's proposal to universally attribute Joint Sales Agreements (JSAs) as ownership interests is unwarranted and ill-advised.

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1 Minden Television Corporation has provided details about the JSSA in comments that it is separately filing in this proceeding.

It is ill-advised, first, because the Commission's ownership rules are in flux due to the Court of Appeals review now underway in the Third Circuit.[2] The proposal is also ill-advised because it does not take account of market and regulatory forces unique to television. The Commission wrongly assumes that these forces are the same in television and in radio. Having made this faulty assumption, the Commission then takes a leap in logic by asserting ,that because JSAs are attributable in radio, they should also be attributable in television. The facts do not support this conclusion.

Analysis based on an examination of the realities of television demonstrates that attribution of television JSAs, as contemplated in the JSA NPRM, will harm diversity and competition in free over-the-air television. The harm will arise because JSAs help lower-rated broadcast television stations compete in a multichannel marketplace where non-broadcast offerings distributed exclusively via such services as cable and DBS vastly outnumber broadcast channels.

A properly configured JSA will not lead to editorial or business control by the station providing advertising sales or other non-programming services, as the FCC asserts in the JSA NPRM. To the contrary, a universal JSA attribution requirement will instead harm the important public interest in diversity and competition by making it more difficult for lower-rated TV stations to compete more effectively against the increasingly-popular channels available only on cable, DBS, and similar video services.

An objective assessment of the facts demonstrates that television ownership attribution by virtue of a JSA will serve no discernible public interest – and harm the important public interest in competition and diversity in free over-the-air television. As a

2 *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004).

result, the Commission should not attribute television station ownership interests solely because a station is operating under a JSA.

II. Discussion

A. JSA attribution should only be considered once the Commission has completed efforts to comply with the Court's mandate in *Prometheus Radio Project v. FCC.*

In 2003, the Commission modified its television multiple ownership rules to allow multiple ownership in smaller markets, in part, because the "record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty . . . ."[3] The Commission, thus, found it in the public interest to allow "a cognizable interest in more than one full-power commercial television broadcast station in the same DMA,"[4] as long as both of the attributably co-owned stations were not among the DMA's top four rated stations.

The Third Circuit Court of Appeals agreed "with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets,"[5] potentially justifying changes in the multiple ownership rules. But the court also found the Commission's record lacked sufficient evidence to support the actual regulatory rubric that it chose and remanded "the numerical limits to the Commission for further justification."[6]

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3 *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, 18 FCC Rcd 13620, 13698 (1993) at ¶201.

4 *See* 47 C.F.R. § 73.3555(b) (2003), enforcement of which is currently stayed by order of the United States Court of Appeals for the Third Circuit.

5 *Prometheus Radio Project v. F.C.C.,* 373 F.3d at 414.

6 *Id.* at 430.

This court action effectively reinstated the older, more restrictive rules – rules that prohibit attributable multiple ownership in any market with fewer than nine full power television stations. These older rules are in effect today.

Given the clear factual and public interest findings that the FCC made in 2003, it should not impose new JSA attribution requirements in isolation from its overall court-mandated effort to create supportable regulations to govern television multiple ownership. A JSA limitation, which might not cause harm in television if a single attributable owner could own more stations in a market, will harm weaker stations as long as the Commission continues the current limitations on the number of stations attributed to a single owner in a single market. Thus, a JSA attribution rule imposed in isolation from a broader set of revised multiple ownership rules would disrupt existing JSAs that have promoted competition and diversity by eliminating an important means for lower-rated stations to raise the revenue necessary to improve programming and community service.

The Commission should take no action that will harm weaker broadcast television competitors now, when the rules are in flux. The court's mandate demonstrates the need for systematic analysis, rather than wholly reactive regulation; imposition of a television JSA attribution requirement, without benefit of the facts and analysis required by the Court, will neither meet the Court's mandate, nor serve the core public interest goal, which is the promotion of diversity and competition.

Moreover, given the dramatic changes that have occurred in the television marketplace over the past decade (which will be discussed more fully, below), and the effects that they are having on the competitive position of lower rated broadcast television stations and their concomitant ability to serve as a strong diverse voice among free over-the-air stations, the Commission would likely be forced to revisit and likely repeal or reconfigure any TV JSA attribution rule in the next quadrennial review, as required by Section 202(h) of the Communication Act.

B. The television marketplace is different than the radio marketplace; the Commission must not assume that one size fits all.

The Commission made a logical leap by stating in the JSA NPRM: "We have no reason to believe that the terms and conditions of TV JSAs differ substantively from those of radio JSAs, and, in this *Notice*, we tentatively conclude that JSAs have the same effect in local TV markets that they have in local radio markets and should be treated similarly."[7]

In announcing its "tentative conclusion," the Commission offered no evidence or analysis. The Commission may have "no reason to believe" that JSA contractual terms and conditions differ in radio and television, but the Commission's belief is not a substitute for actual knowledge. Mere belief does not reasonably lead to the conclusion that JSAs "have the same effect in local TV markets that they have in local radio markets," as the FCC asserts. Such a conclusion could only be valid if a reasoned comparison were made between the market forces and regulatory structures in radio and television – and how those forces and structures interact with JSAs. The Commission appears to have skipped this step in reaching its tentative and, apparently, foregone conclusion.

The Administrative Procedure Act requires that an agency, in a formal rulemaking proceeding such as this, "examine the relevant data and articulate a satisfactory

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7 JSA NPRM at ¶2.

explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (*citing Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

The relevant data here demonstrate that JSAs do not have the same effect in local television and local radio markets. In television, JSAs serve to support the public interest in diversity and competition in free over-the-air broadcasting because the relatively small number of over-the-air television stations is dwarfed by nearly ubiquitous competition for viewers with channels available only through such multichannel video programming distributors ("MVPDs") as cable and DBS. These MVPD-only channels are increasingly popular with audiences, so that more viewers are now watching them than are watching free over-the-air broadcast channels.

Nielson Media Research rating and share data for July for each of the past five years illustrate the erosion in free over-the-air broadcast television's audiences:[8]

Year	Basic Cable	Broadcast
2000	23.9 rating/44 share	24.7 rating/46.1 share
2001	26.2 rating/49 share	22.1 rating/41.5 share
2002	28.3 rating/53 share	19.8 rating/36.6 share
2003	29.3 rating/55 share	19.3 rating/36.4 share
2004	31.6 rating/58.9 share	18.4 rating/34.3 share

8 Source: Lifetime Television analysis of Nielsen Media Research data, published in R. Thomas Umstead, *Another Solid Quarter for Cable*, Multichannel News, Oct. 4, 2004 at 3.

While July may be a slow period in broadcast television due to the prevalence of reruns during prime time, increased cable competition is not just a summertime phenomenon. Last year "was the first regular season, September to May, when cable actually drew more viewers than broadcast."[9]

Increasingly, these MVPD-only program options include not only national channels that appeal both to mass and niche audiences, such as CNN, Fox News Channel, CNBC, ESPN, HBO, the Food Channel, Discovery and Nickelodeon, but, also, MVPD-only channels directed toward local audiences including regional sports networks and local news offerings (*e.g.* NewsChannel 8 in metro Washington, DC or the New England News Channel).[10]

"Viewers don't distinguish between cable and broadcast; they are going to find the shows they like," noted Jim Paratore, executive vice president of Warner Bros. Domestic Television Distribution and president of Telepictures Productions, expressing the current thinking among program-providers that cable and broadcast are equally good places to sell their productions.[11] FCC Chairman Michael Powell[12] as well as

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9 Linda Moss, *Hot Net Nun*, Multichannel News, Sept. 6, 2004 at 1.

10 See Exhibit A, attached hereto, listing regional cable services. Source: *Industry Overview*, National Cable & Telecommunications Association, at <www.ncta.com/industry_overview/programList.cfm> (visited Oct. 17, 2004).

11 Paige Albiniak, *Syndication's Feel-Good Fall*, Broadcasting and Cable, Aug. 16, 2004 at 14.

12 "My child has no idea what a broadcast channel is – no idea what the difference is between channel five and channel 105," the Chairman said. *Developments in the news industry for July 12-19,* The Associated Press, Jul. 19, 2004

Commissioners Kevin J. Martin[13] and Michael J. Copps[14] have similarly noted that today's viewers do not distinguish.

Local advertisers, which at one time were limited to placing commercial spots on broadcast stations, can now place local spots on virtually any cablecast program, even purely national ones, through local availabilities inserted by MVPDs. Viewer choices and, therefore, advertiser choices, are enormous.

By comparison, radio stations, do not face the same kind of competitive pressures. Satellite radio, the closest equivalent to cable and DBS in the radio market, has a market penetration that is but a small fraction of MVPD penetration. While more than 220 million people each week listen to free over-the-air broadcast radio,[15] the larger of the two satellite radio providers, XM, "finished the third quarter 2004 with more than 2,500,000 subscribers."[16] XM's smaller competitor, Sirius, has announced only 600,000

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[13] "[C]able and broadcast programming compete aggressively for the same viewers and advertisements." The Broadcast Decency Enforcement Act of 2004: hearing on H.R. 3717, Before the Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, Feb. 11, 2004.

[14] "Most people don't recognize the difference as they flip channels between a broadcast station and a cable channel." *Id.*

[15] "Radio reaches more than 94 percent of the U.S. 12+ population each week." *Arbitron, Radio Today: How America Listens to Radio* (2004) at <http://www.arbitron.com/downloads/radiotoday04.pdf>. The most recent census data measures the United States population above the age of 14 as 221,168,531. 2000 Census Bureau, U.S. Dept. of Commerce, *Profiles of General Demographic Characteristics* at 1.

[16] Press Release, XM Satellite Radio, XM Satellite Radio Exceeds 2,500,000 Subscribers In Third Quarter, (Oct. 1, 2004), at 3. Available at <http://www.xmradio.com/newsroom/screen/pr_2004_10_01.html>.

subscribers.[17] Unlike MVPDs, satellite radio services are barred from providing discrete local programming, including advertising, that is not nationally distributed.[18] Thus, while broadcast radio stations, at most, must compete with satellite radio offering only nationally-distributed programming and advertising to less than 1.5 percent of the potential audience, broadcast television stations must compete with a large number of MVPD-only channels that provide a mix of local, regional and national information, entertainment and advertising to 88.29 percent of U.S households.[19]

In radio, then, local broadcast stations so dominate the market that audiences and advertisers have nowhere else to turn. Broadcast local radio is, therefore, nearly

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17 Press Release, Sirius Satellite Radio Surpasses 600,000 Subscribers (Sep. 6, 2004), *at* <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=PresReleAsset&cid=1094570181801>.

18 *See Sirius Satellite Radio, Inc.*, 16 FCC Rcd 16773, 16777 at ¶ 11 (2001) (restricting use of terrestrial repeaters that complement satellite digital radio service to "simultaneous retransmission of programming" from national service); *XM Radio Inc.*, 16 FCC Rcd 16781, 16784-85 at ¶ 11 (2001) (same).

19 "The total number of subscribers to both cable and non-cable MVPDs has increased significantly over the last ten years and continues to increase incrementally each year. A total of 60.3 million households subscribed to multichannel video programming services as of year-end 1993, where as of June 2003, 94.1 million households subscribed to MVPDs, an increase of more than 56% over the last ten years. Five years ago, 76.6 million households subscribed to MVPDs, an increase of more than 27% over 1993. This subscriber growth over the last five and ten years accompanied 14.2 and 21.26 percentage point increases respectively in MVPDs' penetration of television households to 88.29% as of June 2003." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1609-1610 (2004) at ¶7.

monolithic in its marketplace.[20] Television, by comparison, operates in a multi-faceted marketplace both for audiences and advertisers because, as demonstrated, MVPD-only channels are a viable and vibrant alternative to reach local audiences. Advertisers can find audiences on whatever channels their target audiences are watching. Therefore, local broadcast television is not a must-buy for advertisers interested in television – although local broadcast radio is a must-buy for advertisers interested in radio, as they have no other choices for purely local coverage.

Thus, in radio's monolithic marketplace, the FCC may have found a "rational connection between the facts found and the choice made"[21] when it imposed JSA attribution requirements as an antidote to harmful collusion and control that hinder the public interest goals of competition and diversity. This is evident by the Commission's statement that it based its decision on "the need for our attribution rules to reflect accurately competitive conditions of <u>today's</u> radio market."[22]

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[20] As the Commission has noted, radio and television tend not to compete with each other in the sale of advertising. "The essential nature of each medium determines, in large measure, the type of programming each will broadcast. For example, a car dealership or furniture warehouse wishing to quickly create strong brand recognition will likely place greater value on television ads where potential customers see the products, as opposed to using radio ads. Radio listeners are seldom completely engaged to listening because simultaneously they are perhaps, driving, working, cleaning, dining, or shopping. Thus, some advertisers may prefer, while others avoid, the radio listener as a significant audience to target." *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, 18 FCC Rcd 13620, 13771-2 (1993) at ¶380. This finding underscores the unique nature of each local medium.

[21] *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Automobile Ins. Co.*, supra.

[22] *2002 Biennial Review,* 18 FCC Rcd at 13745, ¶ 321 (emphasis added).

Today's radio market, as noted, is vastly less competitive than is today's television market. An average of 29.4 AM and FM stations[23] operate in each of the Arbitron-defined geographic markets that the FCC relies upon to regulate through its multiple ownership rules. But in television's multi-faceted marketplace, the average market's handful of broadcast television stations is vastly outnumbered by the recently reported "more than 339 national non-broadcast programming" channels available only on MVPDs.[24] "Today, cable operators are choosing to provide, on average, 70 analog video channels and approximately 120 digital video channels"[25] including some of these 339 MVPD-only channels plus local broadcast stations. Among DBS providers, DirecTV offers a retail minimum of 125 MVPD-only channels,[26] while Echostar's Dish Network offers a retail minimum of 60 MVPD-only channels,[27] that compete with the average DMA's total of only 5.9 over-the-air broadcast television stations.[28]

In this setting, it may have made sense for the FCC to depart from it previous finding that radio "JSAs may actually help promote diversity by enabling smaller stations

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23 Source: BIA. KTBS, Inc. commissioned BIA to perform studies. These studies support the factual statements cited to BIA. These studies will be provided to the Commission upon request.

24 *Annual Assessment of the Status of Competition*, 19 FCC Rcd at 1617, ¶17. The data was reflects the number of such channels available as of June, 2003.

25 *Id.* at 1625, ¶25.

26 See DirecTV web site at < http://www.directv.com/DTVAPP/learn/Packages_withoutLocalChannels.dsp> (visited October 26, 2004).

27 See Dish Network web site at <http://www.dishnetwork.com/content/programming/packages/at_50/index.asp?viewby=1&packid=10049&sortby=1> (visited October 26, 2004).

28 Source: BIA. *See* n.23, *supra.*

to stay on the air,"[29] because of conditions specific to radio's current monolithic market. Such conditions, the Commission held, had given licensees of stations subject to radio JSAs "less incentive to maintain or attain significant competitive standing in the market."[30]

By contrast, in television's multi-faceted marketplace, the earlier finding that "JSAs may actually help promote diversity by enabling smaller stations to stay on the air,"[31] applies with even greater force today – in television – than it did when first issued by the Commission in 1999. Given the rise of and continuing increase in competition from MVPD-only channels, weaker free over-the-air stations may not be able to survive without the advertising sales assistance that JSAs provide – especially in small or medium-sized markets, such as KTBS's Shreveport.

As demonstrated, television has become more competitive amid a multichannel explosion – regardless of what has occurred in the radio marketplace. If the Commission is to pay more than lip service to the idea of competition and diversity in free over-the-air television in such markets as KTBS's Shreveport, it must not make weaker broadcast television stations even less competitive with their MVPD-only competitors. A competitor that is too weak to do battle in the rough and tumble television marketplace of today, will neither effectively compete nor provide a diverse voice in the market. Just as

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29 *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests,* ("1999 Attribution Order") 14 FCC Rcd 12559, 12612 (1999) at ¶122.

30 *2002 Biennial Review,* 18 FCC Rcd at 13745, ¶320.

31 *1999 Attribution Order*, 14 FCC Rcd at 12612, ¶122.

the Commission responded to the "competitive conditions of today's radio market,"[32] when it imposed JSA attribution in radio, it actions here must respond to today's television market. And, in today's television market, JSAs support greater diversity and competition in local free over-the-air television in the face of growing competition from MVPDs.

JSAs are a tonic that helps broadcast television stations leverage their competitive advantages against MVPD-only competitors. These advantages typically include local programming (such as sports and news), network fare and syndicated programs that have not migrated to MVPD-only channels. Involvement in community activities – charitable fund-raisers, school activities, community fairs, etc. – also helps develop and cement relationships between viewers and a local broadcast channel. But such efforts require resources. JSAs aid in the quest for the necessary resources, especially for many lower-rated stations, to provide the kinds of programming and community service activities that draw viewers. JSAs free up resources for programming and community service through efficiency; if the ads are sold elsewhere, but revenue arrives (and, possibly, arrives in larger amounts than would be produced without a JSA), the broadcaster has more resources to devote to its core programming and community service missions. Rather than curtail editorial independence, as the Commission suggests in the JSA NPRM, the broadcaster who has outsourced commercial sales through a JSA is actually better able to focus on its editorial content and other audience-building activities in its community and, thus, take actions that will strengthen its draw in the

32 *2002 Biennial Review,* 18 FCC Rcd at 13745, ¶ 321.

marketplace. A lower-rated station that must divert resources to ad sales has, perforce, fewer resources available for these activities.

C. The Commission's television multiple ownership regulations impose different, more severe marketplace constraints than do its radio rules; the Commission must not assume that, despite these differences, JSA restrictions must be identical for each medium

The Commission's rules governing multiple ownership in television much more severely limit multiple ownership opportunities than do those in radio, even when radio and television stations operate in the same geographic areas. This is true despite the higher level of competition faced by the average television station, as shown above. Under Section 73.3555(a) of the Commision's rules, every radio station operating in any of the Arbitron-defined geographic markets may be attributably co-owned.[33] In television, by comparison, under Section 73.3555(b), multiple ownership would be possible in, at most, 34 percent of all television DMAs[34] – despite the ever-increasing popularity of MVPD-only channels and the concomitant diminution of audience for free over-the-air television.

The net effect of this ownership rule imbalance between radio and television is that, even though the average broadcast television station faces more competition from more channels, the average television station has fewer opportunities to improve

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33 Source: BIA. *See* n.23, *supra.*

34 Source: BIA. *See* n.23, *supra.* This 34 percent represents those DMAs with nine or more operating full power commercial and noncommercial television stations. If two of the stations in a nine station market are co-owned noncommercial stations, Section 73.3555(b) of the Commission's rules imposes further limitations so that no commercial stations may be commonly owned. This occurs because the current rule also requires "eight independent voices" in a DMA after a commercial station becomes co-owned by, or attributed in ownership to, another commercial station. Therefore, multiple ownership opportunities may be even more restricted than suggested.

efficiency through joint arrangements than do similarly-situated radio stations. A rule attributing ownership to licensees of television stations providing advertising sales services pursuant to JSAs, that mimics the rules in radio, will further limit the competitive standing of free over-the-air broadcast television stations in their marketplace struggle with MVPD-only channels – which in most markets, including KTBS's home city of Shreveport,[35] vastly outnumber over-the-air television channels.[36]

These regulatory facts further undermine the assumption underlying this rulemaking that JSAs "have the same effect in local TV markets that they have in local radio markets." They do not because, even in the smallest market, the rules nearly always allow multiple ownership in radio but forbid it in about 66 percent of television markets[37] – even though local viewers will have access to MVPD-only television channels in amounts more numerous than the number of radio stations serving the same area.

Under current rules, a television licensee may have an attributable interest in a second station only if "at least eight independently owned and operating, full power

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[35] The Shreveport, LA DMA includes just six analog commercial television stations and two DTV stations simulcasting programs of two analog stations. Source: 2004 TV & Cable Factbook.

[36] Time Warner Cable of Shreveport offers a "standard" package that includes 74 channels. *See* <http://www.timewarnercable.com/CustomerService/CLU/TWCCLUs.ashx?CLUID=114&Zip=&Image1.x=21&Image1.y=11> (visited Oct. 18, 2004). Many Shreveport area residents also subscribe to DBS.

[37] BIA reports that 138 DMAs have eight or fewer full power stations. *See* n.23, *supra*. This fact effectively eliminates any multiple ownership opportunity for full power commercial stations in about two-thirds of the nation's television markets.

commercial and non-commercial TV stations would remain."[38] So, at a minimum, at least nine full-powered stations must be operating in a market before the current rules allow any attributable co-ownership in television. By comparison, in any radio market containing 14 or fewer stations, a licensee may attributably own half of the market's radio stations, to a maximum of five.[39] Moreover, a single owner may always control two radio stations, as long as one is AM and the other is FM – even if they are the only two stations in that market.[40] This is true even though, as noted, broadcast radio faces only *de minimus* competition from satellite radio, while free over-the-air television faces vigorous competition from MVPD-only channels. In sum, broadcast TV stations face more competition and stricter multiple ownership limits than do radio stations.

Given this greater level of regulatory constraint on broadcast television stations, imposition of JSA-based ownership attribution will not have the same effects on broadcast television as it has had in radio. With JSA attribution, lesser-rated commercial TV stations in many small and even medium-sized markets will be unable to improve their competitive position versus MVPD-only channels through the proven efficiencies of JSAs – even though several local radio stations could have that opportunity because the Commission's multiple ownership rules tolerate more co-ownership in radio than in television. This is true despite the well-documented fact that many smaller market

38 47 C.F.R. § 73.3555(b)(2)(ii).

39 47 C.F.R. § 73.3555(a)(1)(iv).

40 *Id.*

television stations have been under siege for a number of years– especially those with lower ratings.[41]

This detailed analysis of the particularities of television regulation further demonstrate that television and radio economics are not the same and imposition of a radio-like JSA attribution requirement in television will not serve the public interest; it will, in fact, harm the economic position of lower-rated free over-the-air broadcast television stations to the detriment of competition and diversity.

D. Should the FCC ignore these differences and universally impose the radio JSA attribution requirement on television licensees, it will threaten the viability of many lower-rated television stations.

If the Commission is serious about protecting the public interests in diversity and competition in free over-the-air broadcast television, it must not make it increasingly difficult for stations to compete by forcing them to divert resources to ad sales that are better expended on programming, community service and other audience-building measures. The net result of JSA attribution in television will be to strengthen the competitive positions of MVPD-only channels at the expense of free-over-the-air broadcasters who will have less to spend on programming and community service because they must allocate scant resources to ad sales.

While a JSA attribution requirement might make sense in radio – given both the greater level of multiple ownership tolerated by the Commission's radio ownership regulations and the lower overall lower level of competition – it does not make sense for

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41 *See, e.g.,* Steve McClellan, *Small Towns, Big Problems,* Broadcasting & Cable, Aug. 6, 2001 at 20; Thomas Buono and Mark Fratick, *Editorial*, Broadcasting & Cable, Sep. 22, 2003 at 32 (noting reality of "television stations, many in medium and small markets whose financial position is deteriorating and whose future may appear bleak.")

television given both the low level of multiple ownership tolerated in television and the more ferocious competition that exists in television. JSA attribution requirements will weaken the already precarious position of many free over-the-air broadcast competitors in the multichannel television marketplace. Such rules will prohibit most JSAs that now work so successfully to bolster free TV stations as they struggle in the vastly more competitive multichannel arena – which, as shown, is much more competitive than the marketplace in which radio licensees operate.

E. Current rules ensure JSAs are not used improperly to transfer decision-making control in violation of the public interest underlying existing ownership restrictions.

The JSA NPRM cites to a single instance in which the Commission found that a television JSA had so intertwined the business affairs and editorial decision-making of two separate licensees in the same market that the station subject to the JSA had become effectively controlled by the licensee that sold commercials on both stations. *Shareholders of Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002) ("*Ackerley*") (holding that particular terms of a local marketing agreement, in combination with a JSA, gave the licensee no incentive to exercise control over programming. These included a flat fee buyout of commercial time so that the licensee was paid no matter how many viewers actually watched.)

But this exception does not prove that JSA attribution is needed in television. It merely shows that the Commission can control harm to competition and diversity through existing mechanisms – just as it did in *Ackerley*.

The particular arrangement in *Ackerley* is not typical of the scores of stand-alone TV JSAs operating today that benefit competition and diversity by improving the weak financial standing of lower-rated broadcast television competitors in the multichannel marketplace. As the Commission itself noted in *Ackerley*, JSAs pose no problem to competition "as long as they deal primarily with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations."[42] The key analysis is whether JSAs are constructed, as in *Ackerley*, to create the functional equivalent of time brokerage agreements (TBAs) or local marketing agreements ("LMAs"), both of which have long been attributable. JSAs that do not cross that threshold, and contain incentives to a licensee of a station subject to a JSA to compete (which the arrangement in *Ackerley* did not), should continue to be permissible because they bolster the market position of lower rated stations.[43]

In *Ackerley*, the Commission identified and eliminated a JSA structured so that it would extend control rather than outsource advertising sales responsibilities. Indeed, the Commission found that, under the arrangement in *Ackerley*, "it does not appear that . . . employees [of the station for which ads are sold] have an affirmative obligation to actively pursue programming options." *Id.* at 10841 at ¶ 32. Nor did they "have an economic incentive to refuse programming suggestions" made by the party selling advertising pursuant to the JSA. *Id.*

These findings say nothing about the effects of a properly constructed television JSA in which the station for which advertising is sold maintains its own incentives to increase audience. A single actionable transaction does not support the imposition of a

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42 *Shareholders of Ackerley Group, Inc.*, 17 FCC Rcd at 10841, ¶33.

43 A good case study is found in the role KTBS plays as advertising representative for Minden Television Corporation ("Minden"). Under this JSA, Minden has financial incentives to compete, and has improved its position in the market. *See* separately filed *Comments of Minden Television Corporation* in this proceeding.

rule that will cause harm to the very public interests that it is designed to serve. Reliance on such a single instance does not provide a rational connection between the facts and the choice proposed and would, therefore, violate the Administrative Procedure Act.

The real lesson in *Ackerley*, is that the Commission can and will police contractual arrangements that undermine rather than enhance competition and diversity. Simply naming something a JSA does not make it a JSA. Parties must not attempt to hide LMA or TBA provisions in a document entitled "JSA." But *Ackerley* provides no evidence that properly constructed television JSAs would similarly undermine the public interest. Indeed, as demonstrated above, the evidence indicates that JSAs support the public interest in diversity and competition. No evidence on any record demonstrates that the contractual particulars found in *Ackerley* are widespread. The antidote to such situations, as found in *Ackerley,* is for the Commission to continue vigorous enforcement of the existing rules that served well to curtail the abuses identified in *Ackerley.* But that does not mean that true JSAs – with advertising and revenue issues at their core – should be virtually eliminated through attribution in all but the largest television markets when the record does not show widespread evidence of *Ackerley*-like harms.

Conclusion

To preserve competition in free over-the-air television, the Commission must not impose attribution requirements for local television JSAs similar to those governing radio JSAs. TV operates in a separate marketplace with its own economic and regulatory dynamics. Discrete analysis, as provided above, demonstrates that local television JSA attribution would harm the public interest without countervailing or attendant benefit.

Respectfully Submitted,

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October 27, 2004

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Channel Lineups

Channel Lineups

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Channel	Channel Name
2	KSHV (WB)
3	QVC
4	KTBS (ABC)
6	Citywide TV
7	KTAL (NBC)
8	KMSS (Fox)
9	TV Guide Channel
10	KPXJ (UPN)
11	KLTS (PBS)
12	WGN
13	KSLA (CBS)

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Basic

Channel Legend

- Basic
- Digital Movie Tier
- Digital Music
- Digital Pay-Per-View Movies & Events
- Digital Pay-Per-View Sports
- Digital Sports Tier
- Digital Tier
- Favorites on Demand
- High Definition TV
- Local on Demand
- Pay-Per-View Movies (Analog)
- Premium Movies (Analog)
- Standard
- Video on Demand

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PROGRAMMING

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View Program Guide Select another lineup Try another ZIP Code

Channel	Channel Name
14	The Men's Channel
15	TBS Superstation
16	The Discovery Channel
17	Turner Network Television - TNT
18	USA Network
19	The Disney Channel
20	ABC Family Channel
21	Lifetime Movie Network
22	Lifetime Television
23	Shop NBC
24	CNN
25	Headline News
26	CNBC
27	Fox News Channel
28	MSNBC

Quick Filter:

Standard

Channel Legend

- Basic
- Digital Movie Tier
- Digital Music
- Digital Pay-Per-View Movies & Events
- Digital Pay-Per-View Sports
- Digital Sports Tier
- Digital Tier
- Favorites on Demand
- High Definition TV
- Local on Demand
- Pay-Per-View Movies (Analog)
- Premium Movies (Analog)
- Standard
- Video on Demand

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29	The Weather Channel
30	TWC-KTBS Cable News
31	**ESPN**
32	ESPN2
33	ESPN Classic Sports
34	Fox Sports Southwest
35	Speed Channel
36	The Golf Channel
37	Outdoor Life Network - OLN
38	Spike TV
39	FX
40	Comedy Central
41	Home & Garden Television - HGTV
42	A&E
43	Court TV
44	Sci-Fi Channel
45	Hallmark Channel
46	Cartoon Network
47	Nickelodeon
48	TV Land
49	Animal Planet
50	Travel Channel
51	The Learning Channel - TLC
52	The History Channel
53	C-SPAN
54	Bravo/C-SPAN II
55	American Movie Classics - AMC
56	Turner Classic Movies - TCM
57	MoviePlex
58	TBN/INSP
59	BET on Jazz
60	BET
61	VH1

62	MTV
63	Country Music Television - CMT
64	E! Entertainment Television
65	WE Women's Entertainment
66	Food Network
67	Oxygen
68	National Geographic Chann
69	SoapNet
70	Discovery Health
71	FIT TV
72	Shop At Home
73	Product Information Network - PIN
74	HSN
75	Celebrity Shopping
96	ACN - Jewelry Television

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