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

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review	)	
	)	
Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182

American Cable Association

COMMENTS

I. INTRODUCTION.

As the Commission begins its comprehensive assessment of the efficacy of its media ownership rules to achieve the core policy goals of competition, diversity and localism, it must take into account the impact of retransmission consent negotiations on local markets. The right to negotiate retransmission consent for local station signal carriage is not only a fundamental incident of local broadcast station ownership, but a rapidly increasing revenue source for station owners, particularly the top 4 stations in a market, which are typically local affiliates of the four national broadcast ("Big 4") networks. Local broadcast station signals compete amongst themselves based on the quality and quantity of their programming to attract viewers, which in turn allows the stations to secure higher retransmission consent fees from multichannel video programming distributors ("MVPDs"). As such, any reduction in the level of competition in a local retransmission consent market through combined ownership or control of multiple broadcast stations would be harmful to the overall policy objectives of the Commission's local television ownership rules.

Increasingly, either through the acquisition of a second television station in a local market, or other arrangements, broadcasters are jointly negotiating retransmission consent on behalf of other stations in the same market. These arrangements are often contained in sharing agreements, such as Shared Services Agreements ("SSAs") and Local Marketing Agreements ("LMAs"). The level of local competition is particularly affected when these acquisitions and arrangements to jointly negotiate involve the top 4 stations in a market because these stations typically elect retransmission consent rather than must carry.

Available evidence further suggests that when one broadcast station negotiates retransmission consent on behalf of another station in the same market, the amount of leverage that local broadcast television stations exercise in carriage talks with cable operators and other multichannel video programming distributors increases, leading to higher fees for signal carriage. These retransmission consent fee hikes are passed along to consumers in the form of higher cable rates, which affects the affordability of accessing this programming for some consumers.

The Commission must evaluate the effects of local station consolidation on negotiations for retransmission consent when considering whether to retain, modify or eliminate its local television station ownership limits. ACA urges the Commission to refrain from further relaxation of its local television station ownership limits, particularly among the top four rated stations in markets with at least eight independently owned and operating stations, and to consider tightening the showing required to grant a waiver of these rules. Most importantly, the Commission should consider prohibiting the transfer of retransmission consent rights through sharing arrangements and other means so as to preclude joint negotiation of retransmission consent rights.

American Cable Association. ACA represents nearly 900 independent cable companies that serve more than 7.6 million video subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in nearly every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA's members serve fewer than 2,000 subscribers.

II. THE "PUBLIC INTEREST" REQUIRES THE COMMISSION TO CONSIDER RETRANSMISSION CONSENT AS PART OF ITS BROADCAST OWNERSHIP REGULATIONS.

Congress charged the Commission with the task of comprehensively reviewing its media ownership every four years to determine whether they "are necessary in the public interest as a result of competition."[1] The Commission is further obligated to

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("*1996 Act*"); Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) ("*Appropriations Act*"), *amending* Sections 202(c) and 202(h) of the *1996 Act*.

"repeal or modify any regulation it determines is no longer in the public interest."[2] The fundamental question before the Commission in its quadrennial review is whether it is in the public interest to retain, tighten, loosen or eliminate its media ownership limits. These comments focus solely on the Commission's local television ownership rule, and whether as currently constituted and implemented it continues to be necessary in the public interest. ACA anticipates that broadcasters will once again seek relaxation of the limits.[3]

Retransmission consent is among the bundle of fundamental rights conferred by ownership of a local broadcast television station.[4] In the four years since the Commission's last comprehensive analysis of its media ownership rules, retransmission consent compensation has grown in importance to many station owners.[5] Where

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[2] 47 U.S.C. 303, note.

[3] *See, e.g.*, *In the Matter of 2006 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*, Report and Order and Order on Reconsideration, MB Docket No. 06-121, et al., 23 FCC Rcd 2010, 2063 ¶ 95 (2008) ("*2006 Quadrennial Review Order*").

[4] 47 U.S.C. § 325. The retransmission consent framework put into place by the 1992 Cable Act allows broadcasters to negotiate compensation from multichannel video programming providers in return for providing them with permission to carry their signals. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *See also* 47 C.F.R. § 76.64. The original act applies only to cable system operators. Subsequent amendments extended the framework to direct broadcast satellite operators. *See, e.g.,* Satellite Home Viewer Extension Reauthorization Act ("*SHVERA*"), Pub. L. No. 108-447, 118 Stat. 2809 (2004).

[5] *See, e.g.,* Linda Moss, "Nexstar Tallies $6.2 Million In Q3 Retrans Fees," MULTICHANNEL NEWS (Nov. 11, 2008), *available at* http://www.multichannel.com/article/84306-Nexstar_Tallies_6_2_Million_In_Q3_Retrans_Fees.php (last visited July 12, 2010) ("'Revenue growth was driven by strong year-over-year increases in political, retransmission consent and eMedia revenues, which offset the softness of traditional television advertising spending in our markets,' Nexstar chairman and

broadcasters had previously relied primarily on advertising revenues to fund their operations, today top 4 broadcasters are increasingly relying on a dual revenue model that includes carriage fees from cable and satellite operators secured in exchange for the right to retransmit their local broadcast station signals to pay television customers.[6]

The Commission's charge from Congress in its periodic quadrennial media ownership review is to broadly consider the relationship between its broadcast regulations and the public interest.[7] As such, it is appropriate for the Commission to take this new development into account in its analysis of whether its current ownership rules ensure adequate competition in local markets between broadcasters.

III. JOINT NEGOTIATING OF RETRANSMISSION CONSENT AMONG BROADCASTERS HAS REDUCED COMPETITION IN THE BROADCAST MARKETPLACE.

Initially, retransmission consent negotiations occurred on a station-by-station basis, consistent with the Commission's media ownership rules that prohibited common

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CEO Perry Sook said in a statement."); Mike Farrell, "CBS: We're in the (Retrans) Money!", MULTICHANNEL NEWS, (Jun. 21, 2010), *available at* http://www.multichannel.com/article/453990-CBS_We_re_In_The_Retrans_Money_.php (last visited July 12, 2010) ("Total retrans fees are expected to rise 44% to $1.1 billion this year, with cable operators carrying the biggest load ($573 million). By 2016, total retrans fees will reach $2.6 billion, with cable operators accounting for more than half ($1.5 billion) of that amount.").

[6] *See id.*

[7] *See In the Matter of 2010 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*, Notice of Inquiry, MB Docket No. 09-182 (rel. May 25, 2010), ¶¶ 17-27, 80 ("*2010 Quadrennial Regulatory Review NOI*") ("We ask commenters also to raise any additional pertinent issues with respect to each of [the five media ownership] rules beyond those on which we specifically invite comment.").

ownership of two television stations with overlapping contours.[8] Relaxation of the duopoly rule in 1999 was permitted in larger markets only to the extent that the duopoly combine no more than one of the top four stations in terms of audience share with an independently owned and operated ("O&O") broadcast television station not affiliated with a major network in a designated market area ("DMA"),[9] consistent with its policy goal of preserving viewpoint diversity and competition.[10] The 4 top-rated ("top 4") stations in a market, which cannot be combined under joint ownership under the Commission's local television rules, are typically local affiliates of the Big 4 national broadcast networks in a market. These top 4 stations are treated differently for media ownership purposes based on the recognition that these broadcasters do not need the "increased efficiencies that multiple ownership affords" in order to provide local programming.[11]

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[8] *See, e.g., In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, Comments of Cequel Communications, LLC d/b/a Suddenlink Communications at 7 (filed Oct. 23, 2006).

[9] 47 C.F.R. § 73.3555(b). *See In the Matter of Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, 12930-31, at ¶¶ 58-59 (1999). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004) (upholding retention of the top-four restriction).

[10] *2006 Quadrennial Review Order*, at ¶ 87 (the "8 voices" rule).

[11] *In the Matter of 2006 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*, Further Notice of Proposed Rule Making, MB Docket Nos. 06-121, 21 FCC Rcd 8834, 8834, ¶ 12 (2006).

In its *2006 Quadrennial Review Order*, the Commission decided to retain the rule in recognition of the fact that local television station ownership limits promote competition for viewers and advertisers within local markets, that viewers are best served when numerous rivals compete for viewing audience by increasing the quality of their program offerings, and that the local community benefits from competition among broadcasters by receiving enhanced quality programming provided to viewers. Additionally, the Commission found that local broadcaster incentives to respond to conditions in local markets may be diminished by mergers between stations that reduce competition to anticompetitive levels, and that competition among local stations is also necessary to preserve competition for local advertising by local businesses seeking television advertising time.[12]

Competition among local stations for retransmission consent fees based on the quality of their programming to attract viewers is also a form of local broadcast competition. And not surprisingly, competition amongst broadcasters in a market for retransmission consent fees is typically most intense amongst top 4 stations. Combined ownership or control of top 4 local affiliates decreases this form of competition because it permits broadcasters to secure higher retransmission consent fees not through increasing programming quality but simply through increased bargaining leverage in

[12] *2006 Quadrennial Review Order*, at ¶ 97.

retransmission consent negotiations, thus adversely affecting the level of local competition.

Increasingly, through the acquisition of a second station in the same market, or other arrangements,[13] broadcasters are negotiating retransmission consent on behalf of more than one station in the same market. These arrangements are often contained in sharing agreements, such as SSAs and LMAs.

The transfer of one top 4 station's fundamental right to negotiate retransmission consent to another in the same local market harms competition among broadcasters. Because the practical effect of the transfer of retransmission consent rights of a top 4 station under a sharing agreement in a local market is no different than the formation of a duopoly by license transfer, it should similarly be prohibited by the Commission's local television station ownership rules.

ACA has examined publicly available documents and records to compile as thorough a list as possible of all instances in which multiple Big 4 broadcast affiliates

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[13] *See, e.g.,* "Granite, Barrington announce joint sales, shared services agreement," BROADCAST ENGINEERING (Mar. 2. 2009), *available at* http://broadcastengineering.com/news/granite-barrington-announce-joint-sales-shared-services-0302/ (last visited July 12, 2010); "LIN Media and ACME Communications Announce Shared Services Arrangement in the Albuquerque-Santa Fe, Dayton and Green Bay-Appleton Markets," Press Release, BusinessWire (June 4, 2010), *available at* http://www.marketwatch.com/story/lin-media-and-acme-communications-announce-shared-services-arrangement-in-the-albuquerque-santa-fe-dayton-and-green-bay-appleton-markets-2010-06-04?reflink=MW_news_stmp (last visited July 12, 2010).

from the same DMA are under joint control or ownership.[14] ACA has identified at least 93 instances of these sharing agreements or duopolies in 78 television markets – affecting more than 37% of the 210 DMAs – with the heaviest concentration in smaller markets.[15] In *Table 1* of Appendix A,[16] there are 36 identified instances of two Big 4 affiliates in the same DMA operating under common ownership.[17] In *Table 2* of Appendix A,[18] ACA has identified 57 instances where multiple Big 4 affiliates in the same DMA operate under some sort of sharing agreement – which typically means the stations operate under joint control for purposes of negotiating retransmission consent agreements.[19] Based on reports from ACA members and other MVPDs, ACA can confirm that in many of the 57 instances where multiple Big 4 affiliates in the same DMA operate under some sort of sharing agreement, there was a single negotiator for both

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[14] While ACA's research focused on joint negotiations involving Big 4 broadcast stations operating in the same market, we believe that in most cases the Big 4 broadcast stations would also be the 4 highest ranked stations in the market.

[15] *See Appendix A*, *36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market* ("*Table 1*") and *57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market* ("*Table 2*").

[16] *Appendix A*, *Table 1*.

[17] With respect to negotiating retransmission consent, ACA makes no distinction between a broadcaster that owns two stations – whether full or low power – in the same market that is affiliated with different Big 4 networks (*i.e.*, a duopoly), and a station owner that broadcasts one Big 4 network on its primary video stream and another Big 4 network on its multicast stream (*i.e.*, a multicast duopoly).

[18] *Appendix A*, *Table 2*.

[19] While broadcasters appear to generally make known when sharing agreements exist between stations, they rarely publicly disclose the terms of these arrangements. Thus, it is difficult to determine from publicly available documents whether or not a sharing agreement includes the assignment of

stations, and reaching carriage terms for one station was contingent upon reaching terms for the other.

There are likely additional instances of sharing arrangements and duopolies involving multiple Big 4 affiliates in the same market than is reported in *Table 1* and *Table 2*. ACA will update the record as more of these instances are discovered. Furthermore, there may be instances in which broadcasters agree to jointly negotiate retransmission consent but otherwise operate separately. If such stations do not consider themselves as operating under a sharing agreement, then they would not appear in *Table 2* even though they do in fact negotiate retransmission consent prices together.

ACA urges the Commission to evaluate the effects on competition in the local broadcast market as a result of broadcasters who no longer compete against one another for transmission consent fees, but negotiate together.[20] The Commission should refrain from further relaxation of its local television station ownership limits,

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retransmission consent negotiation rights.

[20] Separately, in response to the Media Bureau's Public Notice seeking suggestions for additional studies in this proceeding, ACA suggested that the Commission confirm the ACA's observations and analysis by assessing (i) the extent to which the level of competition in a broadcast television market is reduced when one local station jointly negotiates retransmission consent on behalf of another station in the same market; (ii) the impact of this reduced competition on both the quality and quantity of local programming produced in the market; and (iii) the fees charged to cable and satellite TV operators to retransmit broadcast signals to consumers. *See Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, Public Notice, DA 10-1084, MB Docket No. 09-182 (rel. Jun. 16, 2010), Comments of the American Cable

particularly among the top four rated stations in markets with at least eight independently owned and operating stations,[21] and should consider tightening the showing required to grant a waiver of these rules. Most importantly, the Commission should consider prohibiting the transfer of retransmission consent rights through shared services and local marketing agreements so as to preclude joint negotiation of retransmission consent rights.

IV. JOINT NEGOTIATIONS HAS VASTLY INCREASED BROADCASTER NEGOTIATING FOR RETRANSMISSION CONSENT LEADING TO HIGHER COSTS FOR CONSUMERS.

Joint negotiation of top 4 television stations in a local market also has deleterious effects on the prices cable consumers pay to receive the programming. To adequately discharge its statutory obligation, a comprehensive assessment of whether the local television ownership rule continues to serve the public interest must include consideration of the vastly increased leverage that combined local station ownership or management gives to local broadcasters negotiating retransmission consent fees smaller cable operators.[22]

Available evidence strongly suggests that joint control of multiple Big 4 affiliates

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Association at 4 (filed July 7, 2010).

[21] 47 C.F.R. § 73.3555.

[22] *See 2010 Quadrennial Regulatory Review NOI* , at 80, ¶¶ 17-27 ("We ask commenters also to raise any additional pertinent issues with respect to each of [the five media ownership] rules beyond those on which we specifically invite comment.")

in a single DMA results in significantly higher retransmission consent fees. Consumers, particularly in smaller markets, ultimately foot the bill in the form of higher cable rates. The Commission's media ownership rules permit joint operations of local stations in limited circumstances. However, the Commission must examine the manner in which these joint operating arrangements give rise to adverse consumer consequences by enhancing the bargaining leverage of the top-ranked local broadcast stations in retransmission consent negotiations.[23] For this reason, the Commission's media ownership review must consider the manner in which its ownership rules affect the retransmission consent process through both actual and virtual broadcast duopolies.[24]

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[23] Kim McAvoy, "Virtual Duopolies Coming Under Fire," TVNewsCheck, June 9, 2010, *available at* http://www.tvnewscheck.com/articles/2010/06/09/daily.2/ (last visited July 12, 2010) ("virtual duopolies" permit stations to enjoy the efficiencies of running multiple stations in a market, even where FCC rules limit broadcasters to owning just one; broadcasters likely to urge FCC to relax its duopoly rule so that they can own multiple stations in small markets and convert virtual duopolies into real duopolies).

[24] ACA, together with Public Knowledge, DirecTV, Inc., DISH Network LLC, Charter Communications, Inc., New America Foundation, OPATSCO, Time Warner Cable, Inc., Verizon, Cablevision Systems Corp. Mediacom Communications Corp., Bright House Networks, LLC, Insight Communications Company, Inc. and Suddenlink Communications ("Petitioners") has also filed a *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed Mar. 9, 2010) ("*Retransmission Consent Petition*"), challenging the use of joint broadcast station negotiations for retransmission consent, either through common ownership or contractual arrangement. *See also Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, DA 10-474, MB Docket No. 10-71 (rel. Mar. 19, 2010), Comments of the American Cable Association (filed May 18, 2010) ("*ACA Retransmission Consent Comments*") (Broadcasters increasingly use sharing agreements or duopolies to jointly negotiate retransmission consent for multiple Big 4 affiliates in the same market, and all available evidence suggests that joint control or ownership of multiple Big 4 affiliates in a single DMA results in significantly higher retransmission consent fees, resulting in higher costs for consumers and hindering broadband deployment.).

V. ECONOMIC THEORY SHOWS HOW BROADCASTERS' USE OF JOINT NEGOTIATING INCREASES RETRANSMISSION CONSET FEES.

In the attached paper, Professor William Rogerson applies basic economic theory to show how broadcasters' joint negotiation of retransmission consent involving multiple Big 4 affiliates in the same market can result in higher retransmission consent fees.[25] Professor Rogerson, applying a standard modeling approach, explains:

> When a programmer and MVPD negotiate the fee that the MVPD will pay the programmer, they are essentially deciding how to split the joint economic gains created from having the MVPD carry the programming. This sort of bilateral bargaining situation has been extensively modeled in the economics literature. Application of the standard modeling approach used in the economics literature immediately demonstrates that a programmer selling two different programs will be able to charge more by bundling the programs together so long as the programs are substitutes in the sense that the marginal value of either of the programs to the MVPD is lower conditional on already carrying the other program.[26]

VI. EMPIRICAL EVIDENCE DEMONSTRATES THAT JOINT NEGOTIATING SIGNIFICANTLY INCREASES RETRANSMISSION CONSENT FEES.

The evidence available suggests that when broadcasters jointly negotiate retransmission consent for multiple Big 4 affiliates in a single market, the result is significantly higher retransmission consent fees.

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[25] In connection with its Retransmission Consent Comments, ACA commissioned Professor William P. Rogerson to prepare a paper addressing rising retransmission consent costs due to sharing agreements and duopolies ("*2010 Rogerson Joint Control or Ownership Report*"). Professor Rogerson is a Professor of Economics at Northwestern University, and served as the Commission's Chief Economist from 1998-99. Professor Rogerson's Joint Control or Ownership Report is attached to these Comments as *Appendix B*.

[26] *2010 Rogerson Joint Control or Ownership Report* at 7-8. (citations omitted). Professor Rogerson also

In a recent filing with the Commission, Suddenlink Communications ("Suddenlink") reported the results of an internal analysis it conducted showing the effect ownership status of broadcast stations has on the magnitude of retransmission consent fees. Suddenlink reported:

> Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one "Big 4" station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4" stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other "Big 4" stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two "Big 4" stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations.[27]

Professor Rogerson observes, "[the Suddenlink analysis] should raise the Commission's concern, especially in light of the fact that such an outcome is completely consistent with the predictions of standard economic theory under plausible circumstances."[28]

Similarly, in the Commission's pending retransmission consent proceeding,[29] three cable operators – Cable America, USA Companies, and Pioneer Telephone

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provides a simple example of this theory in his report. *Id.* at 8-9.

[27] *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Retransmission Consent Complaint, CSR-8233-C, CSR-8234-M, *Ex Parte* Comments of Suddenlink Communications at 5 (filed Dec. 14, 2009).

[28] *2010 Rogerson Joint Control or Ownership Report* at 12.

[29] *See In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010).

Cooperative – reported the variance in prices between negotiations involving one Big 4 station and those involving joint negotiations of two Big 4 stations. The operators reported that retransmission consent fees are 161%, 133%, and 30% higher, respectively, for Big 4 stations in the same DMA that are subject to joint control or ownership, than for separately owned or controlled broadcast affiliates.[30] To gauge the relevance of such increases, the ACA notes that the federal antitrust agencies generally consider that a proposed merger results in significant competitive harm when there is more than a 5% increase in price.[31]

Moreover, a recent Congressional Research Service report on retransmission consent made the following observation while discussing programmer-distributor conflicts:

> In the earlier section presenting specific examples of programmer-distributor conflicts, it was striking how often the broadcaster involved in a dispute owned or controlled more than one broadcast station in a small or medium sized market. It appears that where a broadcaster owns or controls two stations that are affiliated with major networks, that potentially

[30] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71, *Ex Parte* of Cable America (filed May 28, 2010); *Ex-Parte* of USA Companies (filed May 28, 2010); and *Ex Parte* of Pioneer Telephone Cooperative (filed June 4, 2010). *See also* Kim McAvoy, "Virtual Duopolies Coming Under Fire," TVNewsCheck, (June 9, 2010), *available at* http://www.tvnewscheck.com/articles/2010/06/09/daily.2/ (last visited July 12, 2010) (Commission's quadrennial media ownership proceeding may also examine allegations of small MVPDs that various forms of broadcaster negotiating alliances among two local broadcast television stations - "virtual duopolies" - are driving up the costs of retransmission consent),.

[31] *See Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, Rev. Apr. 8, 1997, at 7, *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited July 12, 2010).

> gives that broadcaster control over two sets of must-have programming and places a distributor, especially a relatively small cable operator, in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.[32]

The evidence available suggests that sharing agreements and duopolies ***do*** increase retransmission consent fees, and the higher costs have no economic rationale or public policy basis. Professor Rogerson summarizes the problem as follows:

> While there may be a good public policy rationale to require all MVPDs to make payments in support of the programming efforts of local broadcasters, it is hard to imagine a sound rationale for allowing broadcasters in some markets to extract higher payments than broadcasters in other markets, based on whether they are able to enter into agreements with one another that essentially reduce the extent to which they compete with one another.[33]

The United States Department of Justice (DOJ) initiated at least one antitrust action against broadcasters based on the combined control of multiple broadcast stations in the same market. The DOJ alleged that three broadcast stations in the Corpus Christi DMA illegally conspired to raise retransmission consent fees by jointly negotiating retransmission consent.[34] The matter was settled when the three stations

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[32] Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at CRS-70 (July 9, 2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf (last visited July 12, 2010) (emphasis added).

[33] *2010 Rogerson Joint Control or Ownership Report* at 4.

[34] *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Complaint, (Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/f0700/0745.pdf (last visited July 12, 2010). *See also U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Competitive Impact Statement, *available at* http://www.justice.gov/atr/cases/f0700/0746.pdf (last visited

agreed to terminate the practice and refrain from engaging in such practices in the future.

VII. BROADCASTERS' USE OF JOINT NEGOTIATING RESULTS IN HIGHER RETRANSMISSION CONSENT FEES THAT RAISE COSTS FOR CONSUMERS AND IMPEDES BROADBAND DEPLOYMENT.

The use of joint negotiations for retransmission consent by broadcast stations adversely affects consumers by increasing their MVPD subscription fees and hindering MVPDs' ability to deploy broadband. As reported by Professor Rogerson, available evidence shows smaller MVPDs pay more than twice as much as larger operators for the same Big 4 local broadcasts signals. Evidence further suggests that when broadcasters jointly negotiate retransmission consent for multiple Big 4 affiliates in a single market, the result is higher retransmission consent fees than could be obtained through separate negotiations. Increased retransmission consent fees result in higher basic cable rates for consumers and impedes broadband deployment, threatening important public interests the Commission must protect.

The Commission has previously concluded what recent cable rate studies show and ACA members report: Retransmission consent fee hikes are passed along to consumers in the form of higher cable rates.

In the Commission's evaluation of the News Corporation acquisition of DIRECTV,

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July 12, 2010).

the Commission found that increased retransmission consent fees lead to higher costs for consumers and these higher costs can harm consumers.[35] Buttressing this conclusion, Professor Rogerson highlights a recent study on cable prices that found, in general, that around 50 percent of programming cost increases are passed along to customers in the form of higher subscription rates.[36] Moreover, as we reported to the Commission last year, 88% of ACA members surveyed had already or planned to raise basic cable rates because of retransmission consent fee increases that incurred between 2008 and 2009.[37]

In speaking about retransmission consent recently, Chairman Genachowski expressed concern about "the *potential* for rising cable rates" and how that could impact consumers, whom the Chairman described as "third parties who aren't at the table" in

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[35] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 568, ¶ 209 (2004) ("If News Corp. can…charge higher fees…these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.") ("News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals…could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

[36] *2010 Rogerson Joint Control or Ownership Report* at 10.

[37] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd. 4401 (2009), Comments of the American Cable Association, MB Docket No. 07-269, *Appendix 1*, Clarus Research Group, *Impact of Retransmission Consent Costs on Members of the American Cable Association*, at 2, 7 (filed July 29, 2009).

retransmission consent negotiations.[38] For consumers served by smaller MVPDs, that "potential" has already become a reality, and consumers are paying the price for permitting local broadcast stations to engage in joint retransmission consent negotiations.

Beyond increasing the cost of cable, broadcasters' use of sharing agreements and duopolies also threaten broadband Internet deployment in rural markets. As discussed, while about 50 percent of retransmission consent cost increases are passed along to consumers, the remainder depletes capital that could be used to deploy other advanced services, including broadband Internet infrastructure and services.[39]

VIII. CONCLUSION.

The Commission cannot discharge its periodic obligation to re-evaluate the

[38] Remarks of Chairman Julius Genachowski, National Association of Broadcasters Show at 8 (Apr. 13, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297469A1.pdf (last visited July 12, 2010).

[39] In markets served by smaller MVPDs, the current retransmission consent regime also threatens the Commission's top policy priority – increasing broadband Internet deployment and adoption. The calculus is straightforward – for businesses with limited resources, broadcasters' escalating demands require diverting funds from network expansion and upgrades. The extreme bargaining imbalance between duopoly and virtual duopoly broadcast stations and smaller cable operators, leaves smaller MVPDs and rural markets are most vulnerable to paying supra-competitive rates to receive local broadcast station signals. ACA and others have been reporting this dynamic to the Commission for several years. See *2007 Program Access NPRM*, Comments of the American Cable Association, MB Docket No. 07-198, at 20 (filed Jan. 3, 2008) ("The ever-escalating pressure on cost and bandwidth from programmers and broadcasters can delay and even prevent very small systems from upgrading to provide broadband.; *2007 Program Access NPRM*, Comments of the National Telecommunications Cooperative Association, MB Docket No. 07-198, at 2 (filed Jan. 4, 2008)); *2007 Program Access NPRM*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al.*, MB Docket No. 07-198, at 19 (filed Jan. 4, 2008).

efficacy of its media ownership limits to achieve the core policy goals of competition, diversity and localism without including an assessment of retransmission consent negotiations. Retransmission consent is both a fundamental incident of broadcast station ownership and an increasingly important source of revenue for station owners, particularly top 4 stations.

The Commission has recognized that local television station ownership limits promote competition for viewers and advertisers within local markets, that viewers are best served when numerous rivals compete for viewing audience by increasing the quality of their program offerings, and that the local community benefits from competition among broadcasters by receiving enhanced quality programming provided to viewers. Today, competition among local stations for retransmission consent fees based on the quality of their programming to attract viewers is another form of local broadcast competition.

Combined ownership or control of multiple top 4 affiliates, whether by actual or virtual duopoly by means of sharing agreements, reduces the amount of competition among broadcasters, particularly when such arrangements allow one broadcaster to negotiate retransmission consent on behalf of another station in the same market. Such arrangements are harmful to the overall policy objectives of the Commission's local television ownership rules, and also leads to higher carriage fees. These retransmission consent fee hikes are passed along to consumers in the form of higher rates.

The Commission must evaluate the effects of local station consolidation on negotiations for retransmission consent when considering whether to retain, modify or eliminate its local television ownership limits. The Commission should not permit its local television ownership rules to be exploited in a manner that simultaneously decreases competition on quantity and quality of programming for viewers while increasing the market power of station owners in negotiations for retransmission consent with cable operators and other MVPDs.

ACA accordingly urges the Commission to refrain from further relaxation of its local television station ownership limits. In considering waivers of its local television station ownership limits, the Commission should consider the harmful impact that actual and virtual local broadcast station consolidation has local broadcast television competition, and, in turn, on the price MVPDs and their subscribers must pay for retransmission consent. Finally, to preserve competition among local broadcasters, the Commission should also consider limiting the right of the four top-rated local broadcast stations from transferring their right of retransmission consent through shared services and local marketing agreements with other top-four rated stations.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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Appendix A

36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market

57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market

36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market

			Station or Signal #1		Station or Signal #2	
DMA	DMA Rank	Station(s) Owner	Call Letters	Affil.	Call Letters	Affil.
Raleigh-Durham (Fayetteville), NC[#]	26	Capital Broadcasting	WRAL	CBS	WRAZ	FOX
Grand Rapids-Kalamazoo-Battle Creek, MI[#]	41	LIN Media	WOOD	NBC	WOTV	ABC
Norfolk-Portsmouth-Newport News, VA[#]	43	LIN Media	WAVY	NBC	WVBT	FOX
Albuquerque-Santa Fe, NM[#]	44	LIN Media	KASA	FOX	KRQE	CBS
Jacksonville, FL[#]	47	Gannett Co.	WJXX	ABC	WTLV	NBC
Youngstown, OH[*@]	110	New Vision Television	WKBN 27.1	CBS	WKBN 27.2 (WYFX-LP)	FOX
Santa Barbara-Santa Maria-San Luis Obispo, CA[#]	120	Cowles Media	KKFX	Fox	KCOY	CBS
Topeka, KS[*+]	136	New Vision Television	KSNT 27.1	NBC	KSNT 27.2 (KTMJ-CA)	FOX
Beaumont-Port Arthur, TX[*]	141	London Broadcasting Co.	KBMT 12.1	ABC	KBMT 12.2	NBC
Palm Springs, CA[*+]	142	News-Press & Gazette Co.	KESQ 42.1	ABC	KESQ 33.2 (KDFX-CA)	FOX
Salisbury, MD[*]	144	Draper Holdings Business Trust	WBOC 16.1	CBS	WBOC 21.2	FOX
Bluefield-Beckley-Oak Hill, WV[*]	156	West Virginia Media Holdings	WVNS 59.1	CBS	WVNS 59.2	FOX
Binghamton, NY[#]	157	Newport Television LLC	WIVT	ABC	WBGH-CA	NBC
Wheeling, WV-Steubenville, OH[*]	159	West Virginia Media Holdings	WTRF 7.1	CBS	WTRF 7.2 & 7.3	FOX & ABC
Sherman, TX-Ada, OK[*]	161	Gray Television	KXII 12.1	CBS	KXII 12.3	FOX
Sherman, TX-Ada, OK[*]	161	Lockwood Broadcasting Group	KTEN 10.1	NBC	KETN 10.3	ABC
Yuma, AZ-El Centro, CA[*]	164	News-Press & Gazette Co.	KECY 9.1	FOX	KECY 9.2	ABC
Clarksburg-Weston, WV[#]	168	Withers Broadcasting Co.	WDTV	CBS	WVFX	FOX
Clarksburg-Weston, WV[*]	168	West Virginia Media Holdings	WBOY 12.1	NBC	WBOY 12.2	ABC
Quincy, IL-Hannibal, MO-Keokuk, IA[*]	171	Barrington Broadcasting Group	KHQA 7.1	CBS	KHQA 7.2	ABC
Quincy, IL-Hannibal, MO-Keokuk, IA[*]	171	Quincy Newspapers	WGEM 10.1	NBC	WGEM 10.3	FOX
Harrisonburg, VA[*]	178	Gray Television	WHSV 3.1	ABC	WHSV 3.2	FOX
Alexandria, LA[*]	179	Hoak Media Corp.	KALB 5.1	NBC	KALB 5.2	CBS
Marquette, MI[*]	180	Barrington Broadcasting	KLUC 6.1	NBC	KLUC 6.2	FOX
Bowling Green, KY[*]	182	Gray Television	WBKO 13.1	ABC	WBKO 13.2	FOX
Bowling Green, KY[*]	182	Max Media	WNKY-DT 40.1	NBC	WNKY-DT 40.2	CBS
Charlottesville, VA[*@]	183	Gray Television	WCAV 19.1	CBS	WCAV 19.3 (WAHU-LP)	FOX
Charlottesville, VA[*@]	183	Gray Television	WVAW-LD 16.1	ABC	WVAW-LD 16.2 (WCAV 19.1)	CBS

[#]Common Ownership Thru Duopoly w/ Full Power Station

[@]Common Ownership Thru Duopoly w/ Low Power Station

[+]Common Ownership Thru Duopoly w/ Class A Station

*Common Ownership Achieved Thru a Primary Video and Multicast Stream

36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market

			Station or Signal #1		Station or Signal #2	
DMA	DMA Rank	Station(s) Owner	Call Letters	Affil.	Call Letters	Affil.
Meridian, MS[#]	185	Michael Reed (WGBC-TV)	WGBC 30.1	FOX	WMDN	CBS
Meridian, MS[*]	185	Michael Reed (WGBC-TV)	WGBC 30.1	FOX	WGBC 30.2	NBC
Greenwood-Greenville, MS[*]	187	Commonwealth Communications	WAGB 6.1	ABC	WAGB 6.2	FOX
Bend, OR[*@]	189	News-Press & Gazette Co.	KTVZ 21.1	NBC	WTVZ 21.3 (KFXO-LP)	FOX
Parkersburg, WV[*]	194	Gray Television	WTAP 15.1	NBC	WTAP 15.2	FOX
Mankato, MN[*]	199	United Communications Corp.	KEYC 12.1	CBS	KEYC 12.2	FOX
Victoria, TX[*@]	204	Saga Communications	KAVU 25.1	ABC	KAVU 25.2 (KMOL-LP)	FOX
North Platte, NE[+]	209	Hoak Media Corp.	KNOP	NBC	K11TW	FOX

[#]Common Ownership Thru Duopoly w/ Full Power Station

[@]Common Ownership Thru Duopoly w/ Low Power Station

[+]Common Ownership Thru Duopoly w/ Class A Station

*Common Ownership Achieved Thru a Primary Video and Multicast Stream

57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market

		Station #1			Station #2		
DMA	DMA Rank	Owner (**also Controlling Entity**)	Call Letters	Affil.	Owner	Call Letters	Affil.
Columbus, OH	34	Sinclair Broadcast Group	WSYX	ABC	Cunningham Broadacsting Corp.	WTTE	FOX
Jacksonville, FL	47	Newport Television	WAWS	FOX	High Plains Broadcasting	WTEV	CBS
Providence, RI-New Bedford, MA	53	LIN TV Corp	WPRI	CBS	WNAC	WNAC	FOX
Wilkes Barre-Scranton, PA	54	NexStar Broadcasting Group	WBRE	NBC	Mission Broadcasting	WYOU	CBS
Charleston-Huntington, WV	63	Sinclair Broadcast Group	WCHS	ABC	Cunningham Broadacsting Corp.	WVAH	FOX
Ft. Myers-Naples, Fl	64	Waterman Broadcasting Co.	WBBH	NBC	Montclair Communications, Inc.	WZVN	ABC
Dayton, OH	65	Sinclair Broadcast Group	WKEF	ABC	Cunningham Broadacsting Corp.	WRGT	FOX
Honolulu, HI	71	Raycom Media	KHNL	NBC	MCG Capital	KGMB	CBS
Springfield, MO	74	Schurz Communications	KYTV	NBC	Perkin Media	KSPR	ABC
Springfield, MO	74	NexStar Broadcasting Group	KSFX	FOX	Mission Broadcasting	KOLR	CBS
Rochester, NY	80	NexStar Broadcasting Group	WROC	CBS	Sinclair Broadcast Group	WUHF	FOX
Syracuse, NY	83	Barrington Broadcasting	WSTM	NBC	Granite Broadcasting Crop.	WTVH	CBS
Cedar Rapids-Waterloo-Iowa City and Dubuque, IA	88	Sinclair Broadcast Group	KGAN	CBS	Second Generation Iowa	KFXA	FOX
Tri-Cities, TN-VA	93	Bonten Media Group	WCYB	NBC	Esteem Broadcasting of North Carolina	WEMT	FOX
Burlington, VT-Plattsburgh, NY	94	Smith Media	WFFF	FOX	Lambert Broadcasting of Burlington	WVNY	ABC
Baton Rouge, LA	95	Communication Corp of America	WGMB	FOX	White Knight Broadcasting	WVLA	NBC
Savannah, GA	96	New Vision Television	WJCL	ABC	Parkin Broadcasting	WTGS	FOX
El Paso, TX	98	Communication Corp of America	KTSM	NBC	Titan TV	KDBC	CBS
Ft. Smith-Fayetteville-Springdale-Rogers, AR	100	NexStar Broadcasting Group	KNWA	NBC	NexStar Broadcasting Group	KFTA	FOX
Johnstown-Altoona, PA	101	Peak Media	WWCP	FOX	Palm Television	WATM	ABC
Greenville-New Bern-Washington, NC	103	Bonten Media Group	WCTI	ABC	Esteem Broadcasting of North Carolina	WFXI	FOX
Lincoln and Hastings-Kearney, NE	105	Pappas Telecasting	KWNB	ABC	Omaha World-Herald	KFXL	Fox
Fort Wayne, IN	107	Granite Broadcasting Corp.	WISE	NBC	Malara Broadcasting Group	WPTA	ABC
Tyler-Longview(Lufkin and Nacogdoches), TX	109	Communication Corp of America	KETK	NBC	White Knight Broadcasting	KFXK	Fox
Youngstown, OH	110	New Vision Television	WKBN 27.1	CBS	Parkin Broadcasting	WYTV	ABC
Augusta, GA	114	Media General	WJBF	ABC	Schurz Communications	WAGT	NBC
Peoria-Bloomington, IL	116	Granite Broadcasting Crop.	WEEK	NBC	Barrington Broadcasting	WHOI	ABC
Peoria-Bloomington, IL	116	NexStar Broadcasting Group	WMBD	CBS	Sinclair Broadcast Group	WYZZ	FOX

57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market

		Station #1			Station #2		
DMA	DMA Rank	Owner (**also Controlling Entity**)	Call Letters	Affil.	Owner	Call Letters	Affil.
Traverse City-Cadillac, MI	117	Barrington Broadcasting	WPBN	NBC	Tucker Broadcasting of Traverse City	WGTU	ABC
Fargo-Valley City, ND	121	Hoak Media Corp.	KVLY	NBC	Parker Broadcasting	KXJB	CBS
Monterey-Salinas, CA	124	Cowles Publishing	KION	CBS	Seal Rock Broadcasters	KCBA	Fox
Columbus, GA	128	Raycom Media	WTVM	ABC	Southeastern Media Holdings	WXTX	FOX
Corpus Christi, TX	129	Cordillera Communications	KRIS	NBC	Eagle Creek Broadcasting	KZTV	CBS
Amarillo, TX	131	NexStar Broadcasting Group	KAMR	NBC	Mission Broadcasting	KCIT	FOX
Wilmington, NC	132	Raycom Media	WECT	NBC	Southeastern Media Holdings	WSFX	FOX
Rockford, IL	134	NexStar Broadcasting Group	KQRF	FOX	Mission Broadcasting	WTVO	ABC
Monroe, LA-El Dorado, AR	138	Hoak Media Corp.	KNOE	CBS	Parker Broadcasting	KAQY	ABC
Monroe, LA-El Dorado, AR	138	NexStar Broadcasting Group	KARD	FOX	Mission Broadcasting	KTVE	NBC
Duluth, MN-Superior, WI	139	Granite Broadcasting Crop.	KBJR & KRII	NBC	Malara Broadcast Group	KDLH	CBS
Lubbock, TX	143	NexStar Broadcasting Group	KLBK	CBS	Mission Broadcasting	KAMC	ABC
Erie, PA	146	NexStar Broadcasting Group	WJET	ABC	Mission Broadcasting	WFXP	FOX
Erie, PA	146	SJL of Pennyslvania	WICU	NBC	Lilly Broadcasting	WSEE	CBS
Joplin, MO-Pittsburg, KS	147	NexStar Broadcasting Group	KSNF	NBC	Mission Broadcasting	KODE	ABC
Joplin, MO-Pittsburg, KS	147	Saga Communications	KOAM	CBS	Surtsey Media	KFJX	FOX
Sioux City, IA	148	Titan Broadcast Group (TTBG)	KPTH	FOX	Waitt Broadcasting	KMEG	CBS
Wichita Falls, TX-Lawton, OK	149	NexStar Broadcasting Group	KFDX	NBC	Mission Broadcasting	KJTL	FOX
Wichita Falls, TX-Lawton, OK	149	Drewry Broadcast Group	KSWO	ABC	Hoak Media Corp.	KAUZ	CBS
Terre Haute, IN	152	NexStar Broadcasting Group	WTWO	NBC	Mission Broadcasting	WFXW	FOX
Rochester, MN-Mason City, IA-Austin, MN	153	Quincy Newspapers	NBC	KTTC	SagamorHill Broadcasting	KXLT	FOX
Idaho Falls-Pocatello, ID	162	Sunbelt Communications Co.	KPVI-DT	NBC	Compass Communications	KFXP	FOX
Abilene-Sweetwater, TX	165	NexStar Broadcasting Group	KTAB	CBS	Mission Broadcasting	KRBC	NBC
Billings, MT	169	NexStar Broadcasting Group	KSVI	ABC	Mission Broadcasting	KHMT	FOX
Utica, NY	170	NexStar Broadcasting Group	WFXV	FOX	Mission Broadcasting	WUTR	ABC
Grand Junction-Montrose, CO	184	Hoak Media Corp.	KREX	CBS	Parker Broadcasting	KFQX	CBS
San Angelo, TX	198	NexStar Broadcasting Group	KLST	CBS	Mission Broadcasting	KSAN	NBC
Ottumwa, IA-Kirksville, MO	200	Barrington Broadcasting	KTVO	ABC	Ottumwa Media Holdings	KYOU	FOX
Victoria, TX	204	Saga Communications	KAVU	ABC	Surtsey Media	KVCT	FOX

Appendix B

Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees

JOINT CONTROL OR OWNERSHIP OF MULTIPLE BIG 4 BROADCASTERS IN THE SAME MARKET AND ITS EFFECT ON RETRANSMISSION CONSENT FEES*

by

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May 18, 2010

***		Prepared for the American Cable Association**

****		Professor of Economics, Northwestern University. FCC Chief Economist, 1998-99.**

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1. INTRODUCTION AND SUMMARY

The retransmission consent framework put into place by the 1992 Cable Act[1] allows broadcasters to negotiate compensation from MVPDs in return for providing them with permission to carry their signals. In response to a petition for rulemaking,[2] the Commission has asked for comments evaluating the performance of the current retransmission consent regime. The central argument in the petition for rulemaking is that changes in market structure that have occurred since the introduction of the current framework have fundamentally altered the balance of bargaining power in this industry in favor of broadcasters. As a result, the fees that broadcasters are able to charge for retransmission consent are rising to much higher levels than were ever originally contemplated when the rules were first introduced. These fee increases are of course passed through to subscribers in the form of higher subscription prices. A related problem is the increasing occurrence of temporary withdrawals of broadcast signals during negotiations in which broadcasters attempt to exercise their increased bargaining power. The petition for rulemaking suggests that the Commission consider allowing parties to request binding arbitration with mandatory interim carriage of signals to address these problems.

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[1]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *See also* 47 C.F.R. 76.64. This original act applies only to cable system operators. In 1999 Congress enacted the Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 114 Stat. 1501, which allows DBS companies to offer local broadcast channels to their subscribers and allows broadcasters to negotiate compensation for providing them with retransmission consent. *See also*, Satellite Home Viewer Extension Reauthorization Act ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 2809 (2004).

[2] Public Knowledge, DirecTV, Inc., DISH Network LLC, Charter Communications, Inc., American Cable Association, New America Foundation, OPASTCO, Time Warner Cable, Inc., Verizon, Cablevision Systems Corp., Mediacom Communications Corp., Bright House Networks, LLC, Insight Communications Company, Inc., and Suddenlink Communications ("Petitioners"), "Petition for Rulemaking," *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, March 9, 2010.

I agree with the basic economic conclusions of the petitioners as I have described them above, and also agree that the direction of reform suggested by the petitioners is a sensible course of action for the Commission to consider.

The purpose of this paper is to describe a related but additional problem with the retransmission consent process and possible approaches to solving it, that I believe the Commission should also seriously consider as part of its over-all evaluation of whether and how the regulatory framework governing the retransmission consent process could be improved.[3] The problem arises because, in many local television markets, multiple Big 4 stations (i.e., affiliates of NBC, ABC, FOX, and CBS) are able to act as a single entity for purposes of negotiating retransmission consent prices. In some cases, this occurs because the stations are under common ownership. However, in other cases, this occurs because the stations enter into agreements to jointly negotiate retransmission consent prices, even though they are separately owned. This coordinated activity allows broadcast stations to negotiate higher retransmission consent fees than they would otherwise be able to, which are, in turn, passed on to consumers in the form of higher MPVD subscription prices.

In point form, the main arguments I make about this problem and possible approaches to solving it are as follows.

1. Although Commission rules generally prohibit common ownership of multiple Big 4 broadcasters in the same DMA, there are a number of instances where common ownership has been permitted through waivers or exceptions.

2. Separately owned Big 4 stations in the same DMA sometimes agree to jointly negotiate retransmission consent agreements. Such arrangements are often negotiated as part of

[3] I discuss an additional problem with the retransmission consent process in a companion paper also being submitted by the ACA in this proceeding entitled "The Economic Effects of Price Discrimination in Retransmission Consent Agreements."

more comprehensive sharing agreements, that transfer control of all or part of the operations of one station to the management of another station in the same DMA.

3. Standard economic theory suggests that, under plausible assumptions, when an entity jointly negotiates retransmission consent fees for multiple Big 4 stations in the same DMA, the entity will be able to charge higher prices than if the negotiations for each signal were conducted separately.

4. The evidence that is available suggests that joint ownership or control of multiple Big 4 stations in the same DMA does result in significantly higher retransmission consent fees.

5. Increased retransmission consent fees are passed through to MVPD subscribers in the form of higher subscription prices.

6. While there may be a good public policy rationale to require all MVPDs to make payments in support of the programming efforts of local broadcasters, it is hard to imagine a sound rationale for allowing broadcasters in some markets to extract higher payments than in other markets, based on whether they are able to enter into agreements with one another that essentially reduce the extent to which they compete with one another.

7. For separately owned broadcasters, this problem could be addressed by prohibiting them from jointly negotiating retransmission consent agreements, even if some of their operations are jointly controlled through sharing agreements.

8. Allowing parties to retransmission consent negotiations to request binding arbitration with mandatory interim carriage, as suggested by the petitioners in this proceeding, would limit the exercise of monopoly power due to joint ownership or joint control of multiple Big 4 stations in the same market.

9. On a going-forward basis, the Commission should take the harm of higher retransmission consent prices into account when it determines whether to permit exceptions or grant waivers that allow joint ownership of multiple Big 4 stations in the same market.

The remainder of the paper is organized as follows. Section 2 provides some background information on joint control and ownership of multiple Big 4 broadcasters in the same market. Section 3 shows that, under plausible assumptions, standard economic theory suggests that these types of arrangements will lead to higher retransmission consent fees. Section 4 argues that the evidence that is available suggests that these fees increases may be significant. Section 5 discusses possible approaches to solving the problem and section 6 draws a brief conclusion.

2. IN SOME LOCAL MARKETS MULTIPLE BIG 4 STATIONS ARE UNDER COMMON OWNERSHIP OR OPERATE UNDER JOINT CONTROL FOR PURPOSES OF NEGOTIATING RETRANSMISSION CONSENT AGREEMENTS

A single entity will negotiate retransmission consent agreements for multiple Big 4 stations in the same DMA if the stations are under common ownership or if the stations are separately owned but agree to operate under joint control for purposes of negotiating retransmission consent agreements.[4] Although Commission rules[5] generally prohibit common ownership of multiple Big 4 broadcasters in the same local market or DMA, there are a number of instances where common ownership has been permitted through waivers or exceptions. Separately owned Big 4 stations in the same DMA sometimes agree to jointly negotiate retransmission consent agreements. Such arrangements are often negotiated as part of more comprehensive sharing agreements that transfer control of all or part of the operations of one station to the management of another station in the same DMA.[6]

The ACA has combed through publicly available documents and records to compile as

[4]In this paper I will always use the term "joint control" to refer the situation where stations are separately owned but agree to operate under joint control for purposes of negotiating retransmission consent agreements. That is, "jointly controlled" should always be interpreted as meaning "separately owned but jointly controlled."

[5] See 47 C.F.R. 73.3555 which prohibits ownership of more than one of the four highest ranked stations in any DMA.

[6]These types of agreements are referred to using a number of different terms besides sharing agreements, including shared services agreements (SSAs), shared management agreements (SMAs) and local marketing agreements (LMAs). In this paper I will use the term sharing agreements as a generic term to refer to any arrangement where one station transfers control of all or part of its operations to the management of another station in the same DMA.

complete a listing as possible of all instances where pairs of Big 4 broadcast stations in the same DMA are under joint ownership or joint control.[7] To the best of my knowledge, this is the first time that such a list has ever been compiled and made publicly available. The data shows that these arrangements are very common. Table 1 in the ACA comments provides a listing of all instances where two Big 4 stations in the same DMA are under common ownership. There are 36 such instances. Table 2 provides a listing of all instances where two Big 4 stations in the same DMA operate under some sort of sharing agreement and thus are very likely to operate under joint control for purposes of negotiating retransmission consent agreements.[8] There are 57 such instances.

Thus, there are a total of 93 instances where multiple Big 4 stations in the same DMA are jointly owned or controlled. The total number of DMAs is equal to 210. Tables 1 and 2 can be used to track how the 93 instances of joint control or ownership are spread across these 210

[7]Ownership or control of more than two Big 4 stations in the same DMA is quite rare. As can be seen from inspecting Tables 1 and 2, the ACA was able to identify 4 instances where three stations in the same DMA were under joint control or ownership. These markets are Youngstown, OH, Charlottesville, VA, Meridian, MS and Victoria, TX. All of the remaining instances of joint control or ownership of multiple stations in the same DMA involve only two stations.

[8]Although stations generally provide publicly available information regarding whether they operate under some sort of sharing agreement, they generally do not describe details of the arrangement in publicly available documents. Thus, it is generally not possible to specifically determine from publicly available documents whether or not the sharing agreement includes joint negotiation of retransmission consent agreements. Based on conversations with ACA members, I believe that in many cases sharing agreements provide for joint negotiation of retransmission consent prices. Furthermore, there may cases where stations agree to negotiate retransmission consent prices jointly but operate separately in all other respects. If such stations do not describe themselves as operating under a sharing agreement, they would not be included in Table 2 even though they do in fact jointly negotiate retransmission consent prices. Thus I believe that the number of stations publicly reporting sharing agreements provides a reasonably good and possibly even conservative estimate of the number of cases where retransmission consent prices are jointly negotiated.

DMAs. In particular, there are 15 DMAs with two instances of joint control or ownership[9] and 63 DMAs with one instance of joint control or ownership. Therefore, of the 210 DMAs, fully 78, or more than one third of them have one or two pairs of jointly owned or controlled Big 4 stations. The fact that these arrangements are so pervasive suggests that it is important that the Commission carefully evaluate their economic effects.

3. STANDARD ECONOMIC THEORY SUGGESTS THAT THESE ARRANGEMENTS RESULT IN HIGHER RETRANSMISSION CONSENT FEES WHICH ARE PASSED THROUGH TO CONSUMERS IN THE FORM OF HIGHER SUBSCRIPTION PRICES

When a programmer and MVPD negotiate the fee that the MVPD will pay the programmer, they are essentially deciding how to split the joint economic gains created from having the MVPD carry the programming. This sort of bilateral bargaining situation has been extensively modeled in the economics literature.[10] Application of the standard modeling approach used in the economics literature immediately demonstrates that a programmer selling two different programs will be able to charge more by bundling the programs together so long as

[9] i.e., four instances of joint control or ownership occur in the same DMA when there are two pairs of Big 4 stations, with each pair being jointly owned or controlled by a different entity. The other 11 markets are Jacksonville, FL, Springfield, MO, Peoria-Bloomington, IL, Monroe, LA-El Dorado, AR, Erie, PA, Joplin, MO-Pittsburg, KS, Wichita Falls, TX-Lawton, OK, Sherman, TX-Ada, OK, Clarksburg-Weston, WV, Quincy, IL-Hannibal MO-Keokuk, IA, Bowling Green, KY.

[10] For general treatments of the bargaining problem see, for example, Harsanyi, John C., "Bargaining," *The New Palgrave Game Theory*, W.W. Norton, 1989; Alvin Roth *Axiomatic Models of Bargaining*, Springer-Verlag, 1979; and Ariel Rubinstein, "Perfect Equilibrium in a Bargaining Model," *Econometrica*, 50, 1982, 97-109. For an extended discussion of how this modeling approach can be interpreted to apply to the case of retransmission consent negotiations, see Katz, Michael L, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, Nov. 12, 2009, provided to the Commission as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

the programs are substitutes in the sense that the marginal value of either of the programs to the MVPD is lower conditional on already carrying the other program.

A simple example will make this point clear. Suppose that an MVPD can carry two programs. Suppose that it would earn a profit of $1.00 per subscriber if it carried just one of the two programs and that is would earn a profit of $1.50 per subscriber if it carried both of the programs. Note that the marginal value of adding a program is $1.00 if the other program is not being carried, but is only equal to $.50 if the other program is already being carried. The programs are thus substitutes in the sense that the marginal value to the MVPD of either program is lower conditional on already carrying the other program. Note, in particular, that the fact that programs are substitutes does NOT mean that the MVPD only wishes to purchase one of the two programs. The MVPD will clearly make more profit if it carries BOTH programs. Nonetheless, the two programs are substitutes in the sense that the marginal value of carrying one of the programs is smaller conditional on the other program already being carried. To the extent that customers appreciate and are willing to pay for increases in variety at a diminishing rate as variety increases, we would expect this condition to hold.

To keep the example as simple as possible, assume that the programmer's cost of providing the program to the MVPD is zero so the joint gain if the MVPD carries the programming is simply equal to the MVPD's profit.[11] Also, assume that the MVPD and programmer have equal bargaining strength in the sense that they choose a price to evenly split

[11]It is easy to see that the example described below continues to yield the same conclusion if we assume that there is a cost of delivering the programming or if the programmer earns additional advertising revenue when the MVPD shows the programming.

the joint profit. [12]

First suppose two different programmers each own one of the two programs. Then, so long as the MVPD carries both networks in equilibrium, when the MVPD negotiates with either of the two programmers, the marginal profit of adding a program will be equal to $.50 per subscriber and the negotiated fee will therefore be equal to half this amount or $.25. Therefore the total fees paid for both programs will be $.50. Now suppose that the same programmer owns both programs. In this case the joint profit of adding both networks is equal to $1.50. Therefore, so long as the programmer sells both networks bundled together as a single item, the negotiated fee for the bundle will be half this amount or $.75.

Thus a single owner will be able to negotiate higher total fees than will two separate owners. The basic economic reason is simply that, when negotiations for each program occur separately, each programmer is only able to extract some share of the joint profit from adding the *last* program. However, when negotiations occur for a bundle of programs, the programmer is able to extract a share of the joint surplus from adding the *entire bundle*. So long as programs within the bundle are substitutes, the joint surplus from adding a bundle of both programs will be greater than twice the surplus from adding the last program.

Standard economic principles suggest that a significant share of any increase in retransmission consent fees will be passed through to subscribers in the form of higher subscription prices. In particular, since retransmission consent fees are levied on a per subscriber basis, they represent a marginal cost of providing service to the MVPD, and we would normally expect a substantial share any increase in marginal costs to be passed on to consumers

[12] It is easy to see that the example described below continues to yield the same conclusion if we assume that the programmer receives a share α of the total surplus where α is between 0 and 1.

in the form of higher prices. For example, one recent study of cable prices found that, in general, about 50 percent of increases in programming costs were passed though to subscribers in the form of higher subscription fees.[13] In its evaluation of the News Corp./ DirecTV merger, the Commission itself concluded that higher programming fees are "passed on to consumers in the form of higher rates."[14] The FTC reached a similar conclusion in its evaluation of the Time Warner/Turner Merger.[15]

4. THE AVAILABLE EVIDENCE SUGGESTS THAT THESE FEE INCREASES MAY BE SIGNIFICANT

Note that the effect on retransmission consent fees described above in Section 3 depends upon the property that the programs are substitutes for one another. To elaborate on this, two programs can be defined to be independent of one another if the value of adding one of the programs does not depend on whether or not the other program is being carried. Similarly, two programs can be defined to be complements for one another if the value of adding one of the programs is greater when the other program is being carried. For example, if the MVPD could earn a profit of $.75 per subscriber by carrying one program and $1.50 per subscriber by carrying

[13]Ford, George S. And John D. Jackson, "Horizontal Concentration and Vertical Integration in the Cable Television Industry," *Review of Industrial Organization*, 12, 1997, 513-14.

[14]FCC, "Memorandum Opinion and Oder," *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation, Transferee, For Authority to Transfer Control,* MB Docket No. 03-124, December 19, 2003 at para. 208.

[15]See *Time Warner, Inc. et. al., Proposed Consent Agreement with Analysis to Aid Public Comment,* 61 Fed. Reg. 50301, 50309 (rel. Sept.25, 1999). "The complaint alleges . . . that substantial increases in wholesale programming costs for both cable systems and alternative providers - including direct broadcast satellite service and other forms of non-cable distribution - would lead to higher service prices."

both programs, the programs would be independent. Similarly, if the MPVD could earn a profit of $.50 per subscriber by carrying one program and $1.50 per subscriber by carrying both programs, the programs would be complements. While the general principle that consumers value variety at a diminishing rate suggests that it may generally be the case that programs are substitutes for one another to some extent, this general principle obviously does not necessarily suggest that this effect will be significant. Furthermore, it is obviously possible to also imagine circumstances in which programs might be complements.[16]

Therefore, while the argument in Section 3 certainly explains why it would not be surprising if we found that joint ownership or control of multiple Big 4 stations in the same DMA caused retransmission consent prices to be significantly higher, it does not prove that we would necessarily expect to find such a result. The theory simply tells us that there will be a significant empirical effect to the extent that the signals of the Big 4 networks are significantly substitutable for one another in the sense that the marginal cost to an MVPD of losing carriage of a Big 4 network would be higher if it had already lost carriage of another Big 4 network. Whether or not this effect is significant is an empirical issue.

The universal use of non-disclosure clauses in retransmission consent agreements severely limits the amount of publicly available evidence on the magnitude of retransmission consent fees and how they vary with market structure. The only publicly available evidence on this question that I am aware of is from a recent filing of the MVPD Suddenlink with the Commission that reports the results of a study that it did on how the magnitude of retransmission

[16]For example, if subscribers were never willing to subscribe to an MVPD unless it carried both programs, then the programs would be complements.

consent fees that it pays for Big 4 stations is affected by the ownership/control status of the stations. It reports finding the following results.

> "Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one 'Big 4' station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4' stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other 'Big 4' stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two 'Big 4' stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations."[17]

While this is only one data point, I think that, at a minimum, it should raise the Commission's concern**,** especially in light of the fact that such an outcome is completely consistent with the predictions of standard economic theory under plausible circumstances. If the Commission decides to further investigate the issue of retransmission consent as part of a rulemaking proceeding, I think that it would very useful to encourage other parties to report the results of conducting their own Suddenlink-like analysis of their fee data.

It is also worth noting that the Department of Justice (DOJ) has brought at least one anti-trust action based on the theory that combined control of multiple Big-4 stations in the same market will result in anti-competitive increases in retransmission consent fees. In particular, on February 6, 1996 the DOJ filed a complaint alleging that three of the Big 4 stations in the Corpus Christi DMA had illegally colluded to raise retransmission consent fees by entering into an agreement to jointly negotiate these fees. In response the three firms entered into a settlement

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[17]Suddenlink Communications, "Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant, v. Sinclair Broadcast Group, inc. Defendant*, CSR No 8233-C, 8234-M at 5.

agreement to halt this practice and refrain from such practices in the future.[18]

Finally, in its recent comprehensive report on retransmission consent, the Congressional Research Service describes a large number of retransmission consent disputes if detail and offers the following qualitative observation.

> "In the earlier section presenting specific examples of programmer-distributor conflicts, it was striking how often the broadcaster involved in a dispute owned or controlled more than one broadcast station in a small or medium sized market. It appears that where a broadcaster owns or controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor, especially a relatively small cable operator, in a very weak negotiating position since it would be extremely risky to lose carriage of both signals."[19]

5. POSSIBLE SOLUTIONS

While there may be a good public policy rationale to require all MVPDs to make payments in support of the programming efforts of local broadcasters, it is hard to imagine a sound rationale for allowing broadcasters in some markets to extract higher payments than broadcasters in other markets, based on whether they are able to enter into agreements with one another that essentially reduce the extent to which they compete with one another.

The problem of separately owned broadcasters that jointly negotiate retransmission consent agreements could be addressed simply by prohibiting them from jointly negotiating retransmission consent agreements, even if some aspects of their operations were jointly controlled through sharing agreements. It would be important that the regulation prohibit both formal and informal agreements to jointly negotiate. In order to make informal agreements less

[18]*United States of America v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,*

[19]*CRS Report, id*, page 70.

likely, the Commission could consider prohibiting broadcasters participating in any sharing agreement from discussing or exchanging information of any sort about retransmission consent agreements.

A somewhat analogous approach for the case of commonly owned Big 4 stations in the same DMA would be to require the common owner to separately negotiate separate stand-alone retransmission consent agreements for each station. However, to the extent that a single owner was still negotiating both agreements and was, by virtue of this, always aware of the status of both sets of negotiations, it is not clear that simply requiring the single owner to ultimately sign two separate agreements and to avoid explicitly linking the results of the two negotiations would necessarily have much effect on negotiations. One way to insure that the negotiations would be more separate would be to require the owner to assign different teams that were not allowed to communicate with one another to each negotiation. If the Commission determined that such an approach would be workable and that it could limit bargaining power arising from common ownership of multiple Big 4 stations in the same market, this would also be worth consideration.

Note also that the recommendation of the petitioners in this proceeding to allow parties the right to request binding arbitration would also likely limit the exercise of monopoly power due to joint ownership or joint control of multiple Big 4 stations. This is because the arbitrator could use prices determined in markets with no joint ownership or control to determine a benchmark price.

Finally, on a going-forward basis, the Commission should consider taking the harm of higher retransmission consent prices into account when it determines whether to permit exceptions or grant waivers that allow joint ownership of multiple Big 4 stations in the same market.

6. CONCLUSION

In some local television markets multiple Big 4 stations are under joint ownership or operate under joint control for purposes of negotiating retransmission consent agreements. These arrangements increase retransmission consent fees which are passed through to consumers in the form of higher MVPD subscription prices. In markets where all of the Big 4 stations are separately owned, this problem could be prevented simply by requiring separately owned stations to separately negotiate retransmission consent agreements, even if some aspects of their operations are jointly controlled through sharing agreements. Also, the policy approach suggested by petitioners in this rulemaking, to allow parties negotiating retransmission consent agreements to request binding arbitration, would likely limit the exercise of market power due to joint ownership or joint control, since fees in markets without joint ownership or control could be used as benchmarks.