



December 2, 2011

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Notice of Ex Parte Communication in MB Docket Nos. 09-182 and 10-71

Dear Ms. Dortch:

On November 30, 2011, Jane E. Mago, Jerianne Timmerman and the undersigned of the National Association of Broadcasters (NAB), met with Josh Cinelli of the Office of Commissioner Michael Copps.

During the meeting, we discussed the public interest benefits of shared services agreements (SSAs). We stated that some stations are dependent upon SSAs in order to achieve efficiencies that allow them to provide more and better services to the public – services the stations could not otherwise offer. The agreements allow broadcast licensees to benefit from some economies of scale and scope while maintaining separate ownership and control of their respective stations. The agreements often facilitate sharing of capital-intensive costs associated with stations' day-to-day operations, such as the cost of helicopters and electronic news-gathering trucks equipped with microwave or satellite transmission capability.

Although NAB does not currently have data that isolates SSAs from other types of joint operations or common ownership, NAB has presented evidence that stations that are commonly owned or operated through a joint agreement such as a local marketing agreement or SSA are more likely to offer local news, public affairs or current affairs programming.<sup>1</sup> A more recent study on economies of scale and scope and the

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<sup>1</sup> See, e.g. Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated, "Effect of Common Ownership or Operation on Television News Carriage: An Update" (Attachment A, NAB Reply Comments, MB Docket No. 06-121, at 6-7 (Nov. 1, 2007)) (finding that a station in a same-market combination is 6.2 percent more likely to carry local news and public affairs programming than a station that is not in such a local combination). The FCC also has acknowledged the public interest benefits of common ownership of television stations in the

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television broadcast industry found that joint arrangements including SSAs allow broadcasters, especially in small markets, to reduce their fixed costs and continue to operate where it would otherwise be uneconomic to do so.<sup>2</sup> Depriving stations, especially smaller ones, of the ability to engage in joint agreements could have a significant impact on both the production of local news and on the stations' ultimate financial viability.<sup>3</sup>

We noted that government intervention into the nature of joint arrangements between broadcasters poses a risk of intruding too far into the details of stations' day-to-day operations and how stations go about gathering and presenting news, raising potential First Amendment issues. We also noted that the Commission typically does not evaluate both ownership and attribution within the scope of the same proceeding because the analysis required to develop each set of rules is very different. An ownership rulemaking considers what structural rules will best promote competition, diversity and localism, while establishing attribution rules requires the Commission to consider what interests confer a degree "of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."<sup>4</sup> We stated that, given the complexity of the issues involved under each analysis, addressing attribution rules in a proceeding separate from the statutorily-mandated 2010 quadrennial ownership review (and associated court remands) would be advisable.

NAB representatives stated that the FCC should be particularly wary of the efforts of multichannel video programming distributors (MVPDs) to import retransmission

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same market. A study conducted in connection with the FCC's last review of media ownership rules found that co-ownership of television stations in the same market "has a large, positive, statistically significant impact on the quantity of news programming"—specifically, a 15% increase in the amount of news minutes aired per day. See FCC, Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming* (July 24, 2007).

<sup>2</sup> See *Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves* (June 27, 2011) at ¶¶ 18-27, filed in MB Docket No. 10-71 as Appendix A of NAB's Reply Comments ("Eisenach Reply Declaration"); Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (June 2011), filed in MB Docket No. 10-71 as Attachment A of Eisenach Reply Declaration. This economic analysis also found another benefit from joint arrangements between television stations: these stations are less likely to be involved in impasses with pay TV companies when negotiating retransmission consent agreements. *Id.* at ¶¶ 24-25.

<sup>3</sup> *Id.*

<sup>4</sup> See *Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, 14 FCC Rcd 12559, 12560 ¶ 1 (1999).

consent issues into this quadrennial review of the ownership rules.<sup>5</sup> The Commission already has a pending proceeding in which it is considering a wide range of retransmission consent issues. That proceeding is a more appropriate vehicle for the disposition of MVPDs' contentions regarding retransmission consent. Moreover, we noted that recent filings by representatives of the MVPD industry were blatant attempts to use ownership rules to skew retransmission consent negotiations in their favor. We urged the Commission to reject these suggestions to further complicate the already complex analysis of broadcast ownership rules, particularly since there are no similarly limiting rules imposed on the MVPD industry.

We emphasized that broadcast ownership rules are not designed to protect MVPD interests but to promote diversity, competition and localism *for viewers*. We stressed the critical importance of ensuring that any evaluation of the impact of market structure on retransmission consent take an equally hard look at the MVPD market, which is highly concentrated at the local, regional and national levels.<sup>6</sup> With no limitations on either horizontal or vertical ownership,<sup>7</sup> MVPDs have an unfettered incentive and

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<sup>5</sup> See, e.g., Letter from Mike Chappell, American Television Alliance, to Marlene H. Dortch, MB Docket Nos. 09-182 and 10-71 (Nov. 18, 2011).

<sup>6</sup> At the national level, concentration in the MVPD market is considerably higher than it was a decade ago. For example, in 2002, the four largest MVPDs controlled 51.5% of the market (as measured by their share of MVPD subscribers). By the fourth quarter of 2010, the top four MVPDs controlled 68.5% of the market. During that same period, the market share of the top ten MVPDs rose from 67.4% to 89.9%. See NAB Comments in MB Docket No. 10-71 at 30 (filed May 27, 2011). Concentration also is increasing at the regional level through cable system "clustering." The number of clustered cable systems (cable systems under the same ownership serving the same local market area or region) serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers. *Id.* at 30 (citing SNL Kagan, *Broadband Cable Financial Databook* (2009)). As a result, broadcasters are often faced with the possibility that a failed negotiation with a particular cable company will cause the broadcaster to lose MVPD access to a large percentage of households in a given market. *Id.* at 28-29.

<sup>7</sup> Congress directed the Commission to adopt cable horizontal and vertical ownership limits within one year of the enactment of the Cable Television Consumer Protection and Competition Act of 1992. 47 U.S.C. § 533(f). However, because of court reversals, vacatur, and remands, the limits have been invalid for a longer period of time than they have actually been in effect. In 2001, the D.C. Circuit Court of Appeals reversed and remanded the horizontal and vertical cable ownership limits. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). Nearly seven years later, the FCC again adopted limits on cable horizontal ownership, but deferred adoption of new vertical ownership limits. See *Cable Horizontal and Vertical Ownership Limits*, 23 FCC Rcd 2134 (2008). The horizontal limit was vacated by the same court in 2009. See *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). The FCC has not yet initiated a further proceeding to address the vacatur of its cable horizontal cap, and a proceeding concerning the vertical cap, remanded more than ten years ago, remains pending.

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ability to achieve high market shares and exercise virtual gateway control over their distribution platforms.

We also discussed the status of the FCC's efforts to gather data to support rules that would promote diversity in broadcast ownership. During that discussion, we referenced NAB's support for certain incubator and other incentive proposals,<sup>8</sup> as well as the initiation of a proceeding to evaluate possible bidding credits for auction participants that have overcome substantial disadvantages.<sup>9</sup>

Finally, we discussed the impact of the digital transition on the contour-based triggers for various ownership rules. We stated that NAB continues to analyze potential approaches,<sup>10</sup> including the DMA-based approach that is being considered by the Commission.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Erin L. Dozier  
Senior Vice President and Deputy General Counsel  
Legal and Regulatory Affairs

cc: Josh Cinelli

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<sup>8</sup> See, e.g., NAB Reply Comments in MB Docket No. 09-182 at 23-24 (Jul. 26, 2010) (supporting proposals that the Commission: (i) adopt a system of waivers/exceptions to its ownership rules for broadcasters taking actions that enhance ownership opportunities for socially disadvantaged businesses; (ii) allow sellers of broadcast properties to hold a reversionary interest in properties for certain sales; and (iii) permit the sale of broadcast subchannels to socially disadvantaged businesses).

<sup>9</sup> See Comments of NAB in GN Docket No. 10-244 (Feb. 7, 2011).

<sup>10</sup> See NAB Comments in MB Docket No. 09-182 at 93-95 (July 12, 2010).