

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

In the Matter of)	
)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations)	MM Docket No. 00-168
)	
Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398))	MM Docket No: 00-44
)	

COMMENTS



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I. INTRODUCTION AND BACKGROUND

The American Cable Association (“ACA”) files these comments in response to the Further Notice of Proposed Rulemaking in the above-referenced docket.¹ In the FNPRM, the Commission seeks comment on whether it should require broadcasters to place sharing agreements among separately-owned television broadcast licensees in the broadcaster’s online public file. The agreements at issue include those governing shared services, station joint operations, local news sharing, local marketing, and other operations sharing agreements (collectively “sharing agreements”). ACA submits that requiring disclosure of any agreement, regardless of name or purported effect on “efficiencies” between separately-owned same-market broadcasters, particularly those that facilitate the coordination of their retransmission consent negotiations, would serve the public interest by enabling regulatory and antitrust authorities to both monitor the competitive effects of such agreements, and detect violations of the Commission’s regulations and federal antitrust statutes.

Coordinated retransmission consent negotiations among separately-owned same-market broadcasters lessen competition in local markets among broadcasters and implicate the media ownership rules, the retransmission consent rules, and the antitrust statutes. Specifically, this practice replaces competition among local broadcasters with collusion, the result of which is to drive up the prices consumers pay to access free over-the-air television through their pay television service. The practice is both widespread and demonstrably harmful to local broadcast competition, pay television providers and the viewing public.

Adopting the reasonable measures advocated by ACA in these Comments will assist the Commission and the U.S. Department of Justice (“DOJ”) in monitoring these agreements and advances the federal interest of protecting and promoting competition. Specifically, disclosure of any

¹ *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398)*, Order on Reconsideration and Further Notice of Proposed Rulemaking MM Docket No. 00-168, MM Docket No. 00-44, ¶ 35 (rel. Oct. 27, 2011) (“FNPRM”).

agreement that facilitates the coordination of retransmission consent negotiations among separately-owned same-market broadcasters will assist federal regulators in three key areas: media ownership, retransmission consent, and antitrust enforcement. The Commission's ability to perform a data-driven analysis in its policymaking and its ability to monitor broadcast station compliance with a range of public interest obligations will be greatly enhanced by ready access to these agreements. To capture the full range of potentially harmful agreements, it is important that the Commission amend the FNPRM's definition of sharing agreements that must be placed in the online inspection file to include *any agreement, regardless of name or purported effect on "efficiencies" between separately-owned same-market broadcasters, particularly those that facilitate the coordination of their retransmission consent negotiations.*

The Commission and the antitrust authorities have already recognized the benefits of placing joint sales agreements and time brokerage agreements among same-market broadcasters in the stations' public inspection files. The same concerns about adverse impacts on local broadcast competition and the circumvention of Commission rules that gave rise to these disclosure requirements warrant inclusion of agreements that facilitate coordinated negotiation of retransmission consent in the online public inspection file as well. Disclosure will further serve the public interest by informing the viewing public about how their local television broadcasters are serving their communities and discharging their obligations as managers of the public's airwaves. The Commission should act quickly to require disclosure in the online public inspection file of any agreement that facilitates coordinated negotiation of retransmission consent, regardless of name, or purported efficiencies without delay.

II. THE PRACTICE OF SEPARATELY-OWNED SAME-MARKET BROADCASTERS COORDINATING THEIR RETRANSMISSION CONSENT NEGOTIATIONS RAISES SIGNIFICANT PUBLIC INTEREST CONCERNS

A. Coordinated Negotiation of Retransmission Consent Among Separately-Owned Same-Market Broadcasters Lessens Competition In Local Markets Among Broadcasters and Implicates the Media Ownership Rules, the Retransmission Consent Rules, and the Antitrust Statutes.

Separately-owned same-market broadcast television stations are lessening competition in local television markets by coordinating their retransmission consent negotiations. In numerous filings with the Commission, ACA has identified specific instances where top four-rated (“Big 4”) broadcast stations (ABC, CBS, NBC and Fox) operating under sharing agreements² and have engaged in coordinated retransmission consent negotiations.³ In these filings, ACA has also

² The FNPRM states that “sharing agreements are contracts between licensees where one licensee provides certain station-related services to another station, including administrative, sales, and/or programming support, in order to obtain certain efficiencies.” FNPRM ¶ 35. Depending on their terms, the FNPRM recognizes, some sharing agreements can affect the Commission’s attribution rules, which define what interests are counted for purposes of applying the Commission’s broadcast ownership rules. FNPRM ¶ 35 n.105. See generally 47 C.F.R. § 73.3555. As discussed below, ACA urges the Commission to more carefully delineate the sharing agreements subject to the enhanced public inspection file rule adopted in this rulemaking. For ease of reference, “sharing agreements” as used herein refers to any agreement, regardless of name or purported effect on “efficiencies” between separately-owned same-market broadcasters, particularly those that facilitate the coordination of their retransmission consent negotiations.

³ See, e.g., *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) (“NPRM”); *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Comments of the American Cable Association, MB Docket No. 10-71, at 2-41 (filed May 27, 2011) (“ACA Comments”); *id.* at Appendix A, William P. Rogerson, Professor of Economics, Northwestern University, “Coordinated Negotiation of Retransmission Consent Agreements by Separately-Owned Broadcasters in the Same Market” (“Rogerson II”); *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Reply Comments of the American Cable Association, MB Docket No. 10-71 at 2-41 (filed June 27, 2011) (“ACA Reply Comments”); *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, 25 FCC Rcd 6086 (2010); *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*, Comments of the American Cable Association, MB Docket No. 09-182, at 3-11 (filed June 22, 2010) (“ACA Media Ownership NOI Comments”) (urging the Commission to examine how the reduction in local broadcast competition achieved through the combined ownership or control of multiple stations via actual or “virtual” duopolies by a single entity would be harmful to the overall policy objectives of its local television ownership rules and recommending that the Commission consider prohibiting the transfer of retransmission consent rights through sharing agreements to preclude coordinated negotiations); *In the Matter of Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association at 9-14 (filed May 18, 2010) (“ACA Petition Comments”); William P. Rogerson,

demonstrated how coordinated negotiations permit separately-owned entities to drive up prices beyond levels achievable if each station were to negotiate retransmission consent separately.⁴ Not only are retransmission consent fees artificially raised through such collusive negotiations, but competition among broadcasters in the local television market is generally harmed as a result of broadcasters who use coordinated arrangements to avoid competing against one another for retransmission consent fees.⁵ The adverse impact on competition among broadcasters of such coordinated retransmission consent negotiations is no different than that possible through equity ownership relationships, which are not countenanced for top four-rated television stations in a market under the Commission's local television station ownership limits.

Specifically, ACA and others have presented extensive evidence in the record of the Commission's quadrennial media ownership review and retransmission consent reform rulemaking of the prevalence of separately-owned broadcasters in the same market coordinating their retransmission consent negotiations, either through formal agreements, like local marketing agreements ("LMAs") and shared services agreements ("SSAs"), or informal arrangements.⁶ As described in more detail below, such coordination enables multiple competing broadcast stations in a single designated market area ("DMA") to collude, rather than compete, in the negotiation of

Professor of Economics, Northwestern University, "Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees," May 18, 2010, at 7-8 ("Rogerson I"). See also American Cable Association, Suggestions for Additional Studies in Media Ownership Proceeding at 2-5, MB Docket No. 09-182, (filed Jul. 7, 2010), in response to *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, 25 FCC Rcd 7514 (2010) (recommending that the Commission include in its comprehensive assessment of the efficacy of its media ownership rules to achieve core goals of competition, diversity and localism, the effect of the reduction in competition in local broadcast markets when separately-owned broadcast stations in a local market coordinate their negotiation of retransmission consent on the quality and quantity of local programming and the fees charged to cable and satellite television for retransmit broadcast signals to consumers).

⁴ See ACA Media Ownership NOI Comments at 5-10; ACA Petition Comments at 11-14.

⁵ See ACA Media Ownership NOI Comments at 5-10, 19-20.

⁶ ACA Media Ownership NOI Comments at 5-11; ACA Comments at 6-8; ACA Reply Comments at 28-41; Time Warner Cable Retransmission Consent Comments at 28-30; Ex Parte Letter by Matthew Brill, Counsel to Time Warner Cable, MB Docket No. 09-182; MB Docket No. 10-71 (Nov. 18, 2011).

retransmission consent. These collusive agreements and arrangements suppress competition in local television markets and vastly increase broadcaster negotiating leverage for retransmission consent. They permit stations to secure fees in excess of those obtainable individually.

An initial economic analysis done by ACA's economic expert, Professor William P. Rogerson, applied basic economic theory to show why common ownership or control of multiple Big 4 broadcasters in the same DMA will result in higher retransmission consent fees.⁷ Available empirical evidence submitted by ACA also suggests that common control or ownership of multiple Big 4 affiliates in a single market results in significantly higher retransmission consent fees, ranging from 21.6% to 161% higher than for separately-owned or controlled broadcast affiliates.⁸ Consumers, particularly in smaller markets, ultimately foot the bill in the form of higher cable rates.

The Commission and the DOJ have recognized that coordinated retransmission consent negotiations among separately-owned broadcast stations in the same market can trigger significant public interest and competitive concerns under federal policy, regulations and laws.⁹ The specific impact of this practice in the areas of media ownership, retransmission consent, and antitrust enforcement, are set forth in greater detail below:

Media Ownership. Competition in local markets between broadcasters is diminished by the coordinated negotiations of retransmission consent between separately-owned stations in the same market, and this directly implicates the local television station ownership limits.

In the *2006 Quadrennial Review Order*, the Commission retained its local television duopoly rule in recognition of the fact that local television station ownership limits promote competition for viewers and advertisers within a local market, and that our communities are best served when numerous rivals compete for local advertising and audience share by increasing the quality of their

⁷ ACA Petition Comments at 9-14; Rogerson I at 7-8; ACA Comments at 9.

⁸ ACA Comments at 10-11.

⁹ Retransmission Consent NPRM ¶ 23; 47 U.S.C. §§ 309 & 325; see also 47 C.F.R. §73.3555; 47 C.F.R. § 76.65.

program offerings.¹⁰ In its most recent Quadrennial Review NPRM, the Commission has once again tentatively concluded that retention of the local television ownership rule, including the prohibition against mergers among the top-four-rated stations is in the public interest.¹¹

Since the FCC's last comprehensive analysis of its media ownership rules, retransmission consent compensation has grown in importance. Where broadcasters had previously relied primarily on advertising revenues to fund their operations, today Big 4 broadcasters are increasingly relying on a dual revenue model that includes carriage fees.¹² As such, the FCC must take this new development into account in its analysis of whether there is adequate competition in local markets between broadcasters under the ownership rules.

Like competition for advertising dollars, 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 among broadcasters in a market for retransmission consent fees is typically most intense among the top four-rated stations. Coordination of retransmission consent among same-market Big 4 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 retransmission consent negotiations, thus adversely affecting the level of local competition. In lieu of acquiring a second station in the same market, which is prohibited between two top four-rated broadcast stations in a

¹⁰ 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 ¶¶ 95-97 (2008) ("2006 Quadrennial Review Order").

¹¹ *In the Matter of 2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 09-182, MB Docket No. 07-294 (rel. Dec. 22, 2011) ¶¶ 8, 32-44 ("2010 Quadrennial Review NPRM").

¹² See, e.g., Staff, TVNewsCheck, *Retrans Revenue To Top \$3.6B Through 2017*, available at <http://www.tvnewscheck.com/article/2011/05/25/51472/retrans-revenue-to-top-36b-through-2017> (last visited Dec. 22, 2011) (reporting that SNL Kagan has projected that total industry retrans fees could increase from \$1.14 billion in 2010 to \$3.61 billion by 2017, with average per-sub fees for cable MSOs potentially more than doubling over time from their levels through 2017).

market, broadcasters are simply coordinating their carriage negotiations, a practice which achieves the same end. This diminishes competition among same-market broadcasters.¹³ The practical effect of the coordination of retransmission consent negotiations between Big 4 stations under a formal, legally binding, agreement or informal understanding or arrangement is no different than the formation of an actual duopoly by license transfer.

Retransmission Consent. Coordinated negotiation of retransmission among separately - owned same-market broadcasters directly also implicates the Commission's good faith negotiation rules, as the Commission itself has recognized. First, Section 325 (b)(3)(C)(ii) of the Communications Act dictates that the terms and conditions of a broadcaster's retransmission consent agreements must be "based on competitive marketplace considerations." Allowing separately-owned suppliers to enter into price-fixing agreements or arrangements frustrates, not furthers, the operation of competitive markets.¹⁴ Consistent with this premise, the Commission has previously determined as a general matter that "[p]roposals that result from agreements not to compete or fix prices" are presumed inconsistent with competitive marketplace conditions."¹⁵

Second, it is significant that the Commission appears to have accepted the economic underpinning of ACA's coordinated negotiation analysis in its retransmission consent rulemaking by proposing to adopt a rule targeting legally binding agreements through which one local broadcaster gives another the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.¹⁶ As the Commission explained, "[s]uch consent might

¹³ See ACA Media Ownership NOI Comments at 6-11.

¹⁴ ACA Comments at 25.

¹⁵ *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues; Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, ¶ 58 (2000) ("SHVIA Implementation Order") ("Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute.").

¹⁶ Retransmission Consent NPRM ¶ 23 n. 75 (citing comments filed by ACA observing "that while Section

be reflected in local marketing agreements (“LMAs”), Joint Sales Agreements (“JSAs”), shared services agreements, or other similar agreements.”¹⁷ Specifically, the Commission has proposed to prohibit as a *per se* violation of a broadcaster’s duty to negotiate in good faith agreements under which one station grants “another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.”¹⁸ The Commission has reasoned that adding this *per se* prohibition against legally binding agreements to coordinate retransmission consent to its good faith rules will improve the negotiating process and help protect consumers from service disruptions.¹⁹

73.3555(b) of the Commission’s rules generally prohibits common ownership of multiple Big 4 stations in a single DMA, ‘broadcasters circumvent this general prohibition through the Commission’s waiver process, or via contractual agreements that offer one Big 4 station control of another in the same market.’); NPRM Appendix B, Proposed Rule Changes, § 76.65(b)(1)(ix) (making a *per se* violation of good faith negotiation standard, “Agreement by a broadcast television station Negotiating Entity to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned”).

¹⁷ Retransmission Consent NPRM ¶ 23. An LMA or time brokerage agreement refers to ‘the sale by a licensee of discrete blocks of time to a ‘broker’ that supplies the programming to fill that time and sells the commercial spot announcements in it. See 47 C.F.R. § 73.3555, Note 2(j). A JSA is “an agreement with a licensee of a ‘brokered station’ that authorizes a ‘broker’ to sell advertising time for the ‘brokered station.’” See 73.3555, Note 2(k). A shared services agreement is an agreement between broadcasters to share services such a technical support, back-office support or production of newscasts. *Id.* at n. 74. Regardless of the name or form of the actual agreement, the adverse competitive impacts will be the same: decreased competition and higher prices for goods sold by the broadcaster participants.

¹⁸ Retransmission Consent NPRM ¶ 23, Appendix B.

¹⁹ Retransmission Consent NPRM ¶ 23. In a subsequent study, ACA’s economic expert, Professor Rogerson, examined how the Commission’s proposed *per se* standard, targeting only legally binding sharing-type agreements, could miss harmful coordination of retransmission consent done non-legally binding or informal agreement between same-market broadcasters. See ACA November 3, 2011 Ex Parte at 2; ACA Comments, Appendix A, Coordinated Negotiation of Retransmission Consent Agreements by Separately-Owned Broadcasters in the Same Market, May 27, 2011 (“Rogerson II). Professor Rogerson further explained how adequate relief could be provided to MVPDs if the Commission amended its proposed prohibition on coordinated negotiations to specify that the four coordinated negotiating practices identified in ACA’s filings in this docket would constitute *per se* violations of the duty to negotiate in good faith, thus better ensuring that retransmission consent negotiations are conducted consistent with competitive marketplace considerations, which do not include price fixing. The four practices to be prohibited under the good faith rules are: (i) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately-owned broadcaster in the same DMA; (ii) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately-owned broadcasters in the same DMA to a common third party; (iii) any informal or formal agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether another separately-

Antitrust Enforcement. Coordinated retransmission consent negotiations among broadcasters in the same market can also violate antitrust laws, and have been of specific concern to antitrust authorities.

The DOJ has initiated at least one antitrust action against broadcasters based on the combined control of the retransmission consent negotiations of multiple same-market broadcast stations through “agreements, understandings and concerted actions among the Defendants to increase the price of retransmission consent rights to cable companies.”²⁰ The DOJ alleged that three broadcast stations in the Corpus Christi DMA illegally conspired to raise retransmission consent fees by jointly negotiating retransmission consent and promising each other that they would not formally sign with and release their signals to a cable operator until the other two local broadcasters came to terms with that cable firm. This behavior was alleged, *inter alia*, to have the effect of “restraining, suppressing and eliminating competition for cable services;” “increasing the cost of retransmission rights to the cable companies;” and “depriving cable companies and consumers of the benefits of free and open competition.”²¹ DOJ explained in the Competitive Impact Statement that the “broadcasters’ collusion succeeded in extracting more favorable terms from the cable companies than they would have otherwise obtained. . . .”

owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and (iv) any discussions or exchanges of information between separately-owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements. See ACA Comments at 23-24; ACA Reply Comments at 40. See also Ex Parte Letter of the American Television Alliance, MB Docket Nos. 09-182 and 10-71 (filed Nov. 18, 2011), attachment 1 at 2. The Commission could provide similar relief through changes to its local broadcast television ownership rules. See ACA Media Ownership Comments at 3-10. Consistent with this approach, ACA recommends that the Commission require disclosure in a broadcaster’s online public inspection file any legally binding agreement accomplishing the first three forms of coordination its has identified here.

²⁰ 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 Dec. 22, 2011) (“Corpus Christi Complaint”). 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 Dec. 22, 2011) (“Corpus Christi Competitive CIS”).

²¹ Corpus Christi Complaint, Section V, Effects, ¶ 20.

Although the 1992 Cable Act gave broadcasters the right to seek compensation from retransmission of their television signals, the antitrust laws require that such rights be exercised individually and independently by broadcasters. When competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals, as did these Defendants, their conduct violates the Sherman Act.²²

The matter was settled when the three stations agreed to terminate the collusive practice and refrain from engaging in such practices in the future.

Separately-owned, same-market broadcasters coordinating their retransmission consent negotiations with MVPDs clearly implicate the core antitrust prohibition against competitors colluding in their sales negotiations with third parties for the purpose of driving prices up beyond what each broadcaster could achieve acting on its own.

B. The Practice of Coordinating Retransmission Consent Negotiations Between Separately-Owned Stations in the Same Market is Widespread.

Despite the fact that the coordination of retransmission consent negotiations among separately-owned broadcast stations in the same market implicates significant public interest and competitive concerns, the practice is prevalent.

ACA has provided the Commission evidence in multiple filings that strongly suggests that the coordinated sale of retransmission consent among separately-owned Big 4 stations in a single DMA is widespread.²³ Based on reports from ACA members and other MVPDs, ACA confirmed and detailed 36 pairs of Big 4 broadcasters in 33 markets coordinating their retransmission consent negotiations, in which there was a single negotiator for both stations, and reaching carriage terms for

²² Corpus Christi CIS at 8 (emphasis supplied).

²³ ACA Media Ownership NOI Comments at 9, Appendix A, *Table 2*. The table referenced in its comments showed 57 instances of multiple Big 4 affiliates operating under some sort of sharing agreement. ACA subsequently determined that one of the listed instances (Ft. Smith-Fayetteville-Springdale-Rogers, AR) was erroneously placed in this table and is actually a case of common ownership. Removal of this market leaves 56 instances of sharing agreements. See ACA Comments at 7 n.6, Appendix B; see also ACA Petition Comments, Appendix C.

one station was contingent upon reaching terms for the other.²⁴ In every instance, the broadcasters coordinating their retransmission consent negotiations were operating under some sort of sharing agreement.

III. THE COMMISSION SHOULD REQUIRE EACH BROADCAST TELEVISION LICENSEE TO DISCLOSE ANY AGREEMENTS WITH A SEPARATELY-OWNED BROADCAST TELEVISION LICENSEE IN THE SAME MARKET, PARTICULARLY THOSE THAT FACILITATE THE COORDINATED NEGOTIATION OF RETRANSMISSION CONSENT IN THE ONLINE PUBLIC INSPECTION FILE

In multiple proceedings, as stated above, ACA has recommended that the Commission deem coordinated retransmission consent negotiations involving separately-owned same-market Big 4 stations to be in violation of the local television ownership limits and of the broadcasters' obligation to negotiate retransmission consent in good faith.²⁵ Such coordinated retransmission consent negotiations reduce competition in local television markets and also result in higher costs to customers of pay television providers.

Irrespective of whether the Commission deems coordinated negotiations a *per se* violation of the media ownership limits and the retransmission consent rules, to facilitate effective monitoring of this practice, ACA urges the Commission to impose disclosure requirements for any agreement, regardless of name or purported effect on "efficiencies, between separately-owned stations in the same market, particularly those that facilitate the coordination of retransmission consent negotiations. At the very least, disclosure in the broadcaster's public inspection is necessary because today the information needed to evaluate whether broadcasters are in compliance with current media ownership, retransmission consent, and antitrust rules is not otherwise readily available.²⁶

²⁴ ACA Media Ownership NOI Comments at 9, Appendix A; ACA Comments at 7.

²⁵ See ACA Media Ownership NOI Comments at 11 ("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"); ACA Comments at 22-25; see *supra* note 19.

²⁶ The Commission appears to have recognized this by seeking comment in the retransmission consent reform rulemaking "on the prevalence of agreements that grant one station or station group the right to negotiate or approve the retransmission consent agreement of a station that is not commonly owned. . . ."

The fact is, that despite recognition by the Commission and DOJ of the harms of collusive agreements by separately-owned same-market broadcast stations, neither the government, the industry, nor the public have ready access to legally binding agreements through which broadcasters might coordinate their retransmission consent negotiations. As the Public Interest Public Airwaves Coalition (“PIPAC”) has stated, “[u]nless such agreements are available online, it is exceedingly difficult for members of the public, or the Commission, to learn about joint sales agreements (JSAs), local news sharing (LNS), shared services agreements (SSAs) or other contracts affecting control of the station and production of local news and other programming.”²⁷

Indeed, at the same time the National Association of Broadcasters (“NAB”) argues that stations operating through joint agreements such as local marketing agreements or SSAs are able to achieve efficiencies permitting them to offer more and better services to the public, NAB acknowledges that it “does not currently have data that isolates SSAs from other types of joint operations or common ownership.”²⁸ To provide the Commission with a sense of the widespread nature of the problem of coordinated negotiations, ACA was forced to spend significant time and resources in order to simply compile a list of the 56 instances in which two Big 4 television stations in the same DMA were operating under some form of sharing agreement. This list that was submitted for the Commission’s review in both the retransmission consent and quadrennial media ownership proceedings and put together solely through press reports and other publicly available information.²⁹

Retransmission Consent NPRM ¶ 23.

²⁷ Ex Parte Letter from Angela Campbell and Andrew Schwartzman, counsel for Public Interest, Public Airwaves Coalition (“PIPAC”), to Julius Genachowski, Chairman, Federal Communications Commission, MB Docket Nos. 00-168, 00-44 at 5 (filed Aug. 4, 2011).

²⁸ Ex Parte Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, MB Docket Nos. 09-182, 10-71 at 1 (filed Dec. 5, 2011).

²⁹ See Table 2 of Appendix A, ACA Media Ownership Comments; ACA Comments at 17 n.22.

Moreover, although broadcasters might generally make known when sharing agreements exist between stations, they rarely publicly disclose the terms of these agreements.³⁰ This makes it especially difficult to determine from publicly available information whether or not a sharing agreement facilitates the coordination of retransmission consent, and to what degree.³¹ Because the contents aren't known, information that is critical for determining whether broadcasters are in compliance with both the Commission's rules and the antitrust statutes is unavailable for routine monitoring.³² The Commission and the antitrust authorities will be far better able to evaluate the merits of arguments made concerning the competitive harms of such arrangements in particular, and in general, broadcasters' discharge of their public interest obligations and compliance with Commission broadcast rules if all such agreements are placed in each station's online public inspection file.

A. The Commission Must Require Disclosure in the Online Public Inspection File of All Sharing Agreements, Regardless of Name, that Facilitate Coordinated Retransmission Consent Negotiations.

The Commission must require placement of agreements among separately-owned same-market television stations that permit coordinated negotiation of retransmission consent in the stations' online public inspection file to enable government and public monitoring and assessment of their impact in the areas of media ownership, retransmission consent and antitrust. Care must be

³⁰ It is therefore likely that the data previously provided by ACA on the extent of sharing arrangements has under-estimated the true number of such legally binding sharing arrangements because although stations generally make this information public, not every station will publicly announce or disclose the fact that it has entered into a joint operations or sharing agreement.

³¹ See ACA Media Ownership NOI Comments at 9-10 n. 19.

³² The fact that some parties engaged in litigation over the deleterious effects of sharing agreements on local broadcast station news production were forced to obtain these agreements through a Freedom of Information Act request speaks volumes about the inaccessibility of documents whose contents affect critical operations of the public's broadcast licensees. *In the Matter of KHNL/KGMB License Subsidiary, LLC; Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii And HITV License Subsidiary, Inc.; Licensee of Station KFVE(TV), Honolulu, Hawaii*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 11-1938, (rel. Nov. 25, 2011); see Save the News, Free Press, available at <http://www.savethenews.org/changethechannels/market-detail/471/honolulu-hi> (last visited Dec. 22, 2011).

taken, however, in describing the agreements to be disclosed lest the disclosure obligation fail to reach all forms of agreements by which separately-owned same-market stations coordinate their negotiation of retransmission consent.

The Enhanced Public File FNPRM correctly recognizes the value of ready access online by the public and the Commission to important documents affecting local broadcast station operations and programming decisions.³³ Indeed, the core recommendation of its comprehensive report, *The Information Needs of Communities* (“INOC”) is to “Emphasize Online Disclosure as a Pillar of FCC Media Policy.”³⁴ Because sharing agreements affect many aspects of station operations of interest to the public and the Commission, including compliance with the Commission’s ownership limits and a station’s exercise of retransmission consent, the need for public disclosure of sharing agreements is evident.

The Enhanced Public File FNPRM describes “sharing agreements” as “contracts between licensees where one licensee provides certain station-related services to another station, including administrative, sales and/or programming support, in order to obtain certain efficiencies.”³⁵ It further notes that some sharing agreements implicate the Commission’s attribution rules, which define what interests are counted for purposes of applying the Commission’s broadcast ownership rules.³⁶

ACA submits that the Commission should amend the definition of sharing agreements to ensure that the rule adopted requires placement in the online public inspection file of *any agreement, regardless of name or purported effect on “efficiencies” between separately -owned same-market*

³³ FNPRM ¶¶ 3, 5,11.

³⁴ *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC Staff Report, GN Docket No. 10-24 (rel. June 9, 2011) (“INOC Report”) at 346.

³⁵ FNPRM ¶ 35.

³⁶ *Id.* ¶ 35 n.105; 47 C.F.R. § 73.3555.

*broadcasters, but particularly those that facilitate the coordination of their retransmission consent negotiations.*³⁷

If the enhanced public inspection file rule requires only the disclosure of agreements that purport to achieve operating efficiencies, broadcasters might interpret this to mean that it is unnecessary to disclose agreements that would not provide efficiencies despite the fact that these agreements may implicate the Commission's media ownership limits, retransmission consent rules, or the antitrust statutes. ACA has demonstrated that the operating efficiencies to be gained by separately-owned stations negotiating retransmission consent together are absolutely minimal as compared to sharing resources for advertising sales or local news gathering.³⁸

Accordingly, the Commission must not limit its disclosure requirements solely to agreements that purport to achieve operating efficiencies, but must require disclosure of any agreement, regardless of name or purported effect on "efficiencies" between separately-owned broadcast stations in the same market, particularly those that facilitate the coordination of their retransmission consent negotiations.

B. The Commission and the Antitrust Authorities Have Already Recognized the Benefits of Placing Sharing Agreements Among Same-Market Broadcasters in the Stations' Public Inspection Files.

The Commission and the DOJ have already recognized the benefit of public disclosure of certain sharing agreements among same-market broadcasters, and the rationale supporting these disclosures is fully applicable to all forms of such agreements, regardless of name. The Commission's rules require the placement of Joint Sales and Time Brokerage Agreements (with confidential information redacted) in a broadcaster's public inspection file.³⁹ The Commission's

³⁷ This solution will be administratively less burdensome on both industry and the Commission than the alternative of having to commence a notice and comment rulemaking to amend the Commission's public file rules every time a new form of sharing agreement is devised by broadcasters.

³⁸ ACA Media Ownership NOI Comments at 5-18; ACA Comments at 5-25.

³⁹ See 47 C.F.R. § 73.3526(e)(14)(Time Brokerage Agreements - retain for as long as contract or

decision to require placement of JSAs in public inspection files is particularly instructive. In its 1999 Attribution Order, the Commission reviewed, *inter alia*, whether to consider “attributable” certain JSAs in recognition of the fact that holders of such interests “have a realistic potential to affect the programming decisions of licensees or other core operating functions.”⁴⁰ Specifically, the Commission considered whether, through multiple cooperative arrangements or contractual agreements, broadcasters could so merge their operations as to implicate its diversity and competition interests.⁴¹

In 1997, the DOJ filed an extensive submission in the Commission’s media ownership proceedings, including the attribution rulemaking, recommending that the Commission consider same market JSAs, “which typically involve the transfer of the right to place and sell advertising from one competitor to another as well as coordination of other business and programming operators,” attributable on the basis of their competitive similarity to common equity ownership.⁴² Failure to treat JSAs as attributable, DOJ warned, “could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits of the 1996 Act.”⁴³ In addition, DOJ recommended that “to facilitate effective monitoring of these agreements, the Commission should

agreement is in force); 47 C.F.R. § 73.3526(e)(16) (Joint Sales Agreements - retain for as long as contract or agreement is in force).

⁴⁰ *In the Matter of Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission’s Cross-Interest Policy*, MM Docket Nos. 94-150; 92-51; 97-154, Report and Order, 14 FCC Rcd 12599 (1999) ¶¶ 1, 117-123 (“1991 Attribution Order”).

⁴¹ 1999 Attribution Order ¶ 117.

⁴² Letter to Reed E. Hundt, Chairman, Federal Communications Commission from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, MM Docket Nos. 91-221; 87-7; 94-150; 92-51 and 87-154, May 8, 1997 (“DOJ Letter”) at 2, 7-10. In its comments, DOJ focused on radio station JSAs, but the principles discussed would appear the same for same market broadcasters operating under JSAs and similar sharing agreements.

⁴³ DOJ Letter at 2.

impose notification and filing requirements for all radio JSAs,” and “establish a notification and filing requirement for television LMAs.”⁴⁴

DOJ indicated its understanding that the Commission’s media ownership limits balance a variety of concerns relating to competition, diversity and administrative convenience.⁴⁵ DOJ specified that its recommendations concerning attribution and disclosure were based on the assumption that the numerical limits in the Commission’s broadcast ownership rules address local market competition concerns and “reflect a congressional judgment that such limits are necessary as a safeguard against anticompetitive consolidation.”⁴⁶ DOJ concluded that competitive concerns arising from increased concentration in a market are directly implicated by JSAs after finding that these types of sharing agreements “closely resemble actual ownership” because they give one station control of advertising sales for two competitors in a market. Accordingly, DOJ stated that it would generally treat brokered stations under JSAs as part of the controlling station’s group for purposes of analyzing concentration and the likely competitive effects of mergers under Section 7 of the Clayton Act.

On this basis, DOJ made two recommendations to the Commission: (i) given the similarity between common equity ownership of stations and JSAs, it would be appropriate to treat JSAs as attributable interests under the Commission’s rules; and (ii) broadcasters should be required to disclose radio JSAs to the Commission.⁴⁷ According to DOJ, “[s]uch a notice and filing requirement will provide a means for effective monitoring of these arrangements by the Commission and antitrust enforcement authorities.”⁴⁸ The Commission agreed with DOJ’s disclosure recommendation and

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.* at 9-10. DOJ explained that treating JSAs as attributable interests would permit stations to combine their sales operations and to achieve any cost savings that might be associated with the combination, so long as the total number of stations combined (through equity ownership and JSAs, does not exceed the ownership limits imposed by the Act and the Commission’s rules.

⁴⁸ *Id.*

required that broadcasters who have entered into JSAs place such agreements in their public inspection files, with confidential or proprietary information redacted where appropriate.⁴⁹ Consistent with DOJ's recommendation, the Commission observed that "[t]his requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies."⁵⁰

Thus, despite the Commission's earlier failure to find that JSAs amount to attributable ownership interests, it did find it important to include such sharing agreements in the public record to facilitate monitoring by the public, competitors and regulators. Even though the Commission has not yet ruled that coordinated retransmission consent negotiations should be prohibited as *per se* violations of the good faith negotiating obligation, or found that "virtual duopolies" violate its media ownership rules or policies, it would not be inappropriate to conclude at this time that any such agreements should be included in a broadcast station's online public inspection file.

⁴⁹ The Commission ultimately refrained from considering JSAs attributable under its ownership rules based upon the finding that, *on the record before it*, agreements meeting its definition of JSAs failed to "convey the degree of influence or control over station programming or core operations such that they should be attributed." It also refrained from imposing reporting requirements for radio JSAs in the absence of specific evidence of widespread abuse of JSAs by broadcasters at that time. Attribution Order ¶¶ 122-123. The Commission noted that although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, its concerns were not identical, as the Commission also takes into account diversity and reducing administrative burdens in determining attributable interests, and that JSAs "may actually help promote diversity by enabling smaller stations to say on the air." As ACA has made clear in its Retransmission Consent Comments and Reply Comments, it has no objection to local broadcast stations entering into sharing agreements that permit the stations to achieve operational efficiencies that permit the broadcasters to provide more and better programming services to their local communities. ACA objects solely to provisions in sharing agreements that permit one station to conduct or control retransmission consent negotiations on behalf of a separately-owned competing station in the same market and thereby drive retransmission consent fees above levels achievable by each station negotiating separately. See ACA Comments at 8, 26; ACA Reply Comments at 15.

⁵⁰ Attribution Order ¶ 123; 47 C.F.R. § 73.3526(e)(16). Similar requirements were adopted for disclosure of television time brokerage agreements. See Attribution Order ¶ 92 (placement of television time brokerage agreements in public inspection files will permit the Commission to monitor the agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws); 47 C.F.R. § 73.3526(e)(14).

C. The Same Concerns About Adverse Impacts on Local Competition and Circumvention of Commission Rules That Gave Rise to Existing Public Inspection File Disclosures Warrant Inclusion of Sharing Agreements That Facilitate Coordinated Retransmission Consent in the Online Public File.

The very same concerns about circumvention of Commission rules and the adverse impact on local broadcast competition through the coordinated sales actions of local competitors that animated DOJ's JSA recommendations and the Commission's adoption of the rule requiring placement of JSAs in a broadcaster's public inspection file are implicated by the coordinated negotiation of retransmission consent by separately-owned broadcasters pursuant to various forms of sharing agreements.

First, as described above, ACA has presented extensive evidence and analysis demonstrating the public interest and competitive harms arising from separately-owned broadcasters in a local market coordinating their negotiation of retransmission consent through both legally binding and non-legally binding agreements and the fact that such arrangements are widespread.⁵¹ ACA has also shown how these practices harm local broadcast station viewers by decreasing competition among same-market broadcasters and by raising prices viewers pay to access over-the-air broadcast programming through their subscription television service.⁵²

Second, ACA and others have also shown that, in terms of their impact on local television broadcast station competition, JSAs and other sharing agreements through which separately-owned stations coordinate their retransmission consent negotiations should be viewed as essentially interchangeable.⁵³ In early August 2011, NexStar Broadcasting Group, Inc. ("NexStar") filed an antitrust suit against Granite Broadcasting Corporation ("Granite") and Malara Broadcasting

⁵¹ ACA Comments at 17-20; ACA Reply Comments at 33-35 (discussing evidence of coordinated negotiations by 36 pairs of stations in 33 different markets by broadcasters not under common ownership obtained through publicly available information and ACA member survey).

⁵² ACA Media Ownership NOI Comments at 8-10. ACA Comments at 17-20; ACA Reply Comments at 33-35.

(“Malara”) for monopolizing and lessening competition in the local television advertising market by gaining control over three of the “Big Four” affiliates in the local market through a combination of Granite affiliation agreements and via a multi-station advertising representation agreement with Granite’s partner, Malara.⁵⁴

In response to an ex parte filing by NexStar in the retransmission consent reform docket criticizing an ACA press statement concerning NexStar’s lawsuit, ACA demonstrated that the antitrust theory articulated in NexStar’s antitrust action against Granite rests on the same basic economic argument concerning coordinated retransmission consent negotiations in ACA’s filings in the retransmission consent docket.⁵⁵

NexStar’s Complaint avers in essence that when a single station controls three of the top four network affiliates in the same market and two of the independent network affiliates for a total of five out of the six national networks, harm to local advertising purchasers and consumers buying the advertised products results. This is *precisely the same underlying competitive harm* identified by ACA in its retransmission consent reform Comments and Reply Comments: competing sellers in a single market that coordinate their retransmission consent negotiations have the ability to exercise substantial market power over prices, and that this exercise of market power has and will cause retransmission consent prices to rise above competitive levels, to the detriment of MVPDs and their subscribers in the affected local market. . . .

ACA also explained that although it had focused its research and analysis on coordinated negotiations involving Big 4 broadcast network affiliates, it was aware of coordinated negotiations occurring with Big 4 affiliates and independent network-affiliated stations negotiating together. Accordingly, ACA believes that Nexstar’s lawsuit is a textbook illustration of how coordinated sales among Big 4 and independent affiliates will drive local television advertising prices upward, which in turn will drive up the prices consumers pay when they purchase the advertised products. The fact that different broadcast “products” are involved in the respective allegations of

⁵⁴ See Press Release, American Cable Association, ACA President & CEO Matthew M. Polka Says Nexstar Lawsuit Underscores Need for the FCC to Curb Formation of Price-Gouging TV Station Duopolies and Triopolies (July 26, 2011), *available at* <http://www.americancable.org/node/3013> (last visited Dec. 22, 2011) (“ACA Press Release”).

⁵⁵ See Letter to Marlene Dortch, Secretary, FCC from Elizabeth Ryker, Vice President & General Counsel, Nexstar Broadcasting Group, Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71, July 27, 2011; Ex Parte Letter of the American Cable Association (“ACA”), Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71 (Aug. 3, 2011) (“ACA August 3 Ex Parte”) at 1-2, attaching ACA Press Release.

ACA and Nexstar is of no significance. The underlying competitive harm is identical: coordinated sales of a broadcast product (for ACA, retransmission consent and for Nexstar, local television advertising) among competitors in a single market driving up prices (respectively, retransmission consent fees and local TV advertising rates). The consequences described by both are also identical: harms to the purchaser of the product (for ACA, MVPDs and for Nexstar, advertisers) and consumers (pay-TV subscribers and advertised product purchasers).⁵⁶

Because the potential adverse competitive effects on two key products in the local television market of sharing agreements – local advertising and retransmission consent fees – are identical, the Commission’s public file disclosure requirements should be identical as well.

III. CONCLUSION

Coordinated negotiations of retransmission consent among separately-owned same-market broadcasters implicate three important public policy concerns: media consolidation, the exercise of retransmission consent and antitrust compliance. In multiple proceedings, ACA has recommended that the Commission deem this practice to be in violation of the local television ownership limits and of the broadcasters’ obligation to negotiate retransmission consent in good faith. Such coordinated retransmission consent negotiations reduce competition in local television markets and also result in higher costs to customers of pay television providers.

ACA is heartened by the Commission’s commitment to investigate the impact of separately-owned, same-market broadcasters who coordinate their action on the retransmission consent market in its ongoing quadrennial media ownership review and its retransmission consent proceeding.

Irrespective of whether the Commission ultimately deems coordinated negotiations a *per se* violation

⁵⁶ ACA Aug. 3 Ex Parte at 3-4 (emphasis supplied); see ACA Comments at 6-7; ACA Comments at 2-3 n.1. As ACA noted in its press release, Nexstar has its own sharing agreements in 13 markets across the country with Mission Broadcasting involving at least two Big 4 affiliates, pursuant to which Nexstar coordinates retransmission consent agreements for the stations: Wilkes Barre-Scranton, Pa. (DMA 54); Springfield, Mo. (74); Amarillo, Tx. (131); Rockford, Il. (134); Monroe, La./El Dorado, Ark. (138); Lubbock, Tx. (143); Erie, Pa. (146); Joplin, Mo./Pittsburg, Kan. (147); Wichita Falls, Tx./Lawton, Ok. (149); Terre Haute, Ind. (152); Abilene-Sweetwater, Tx. (165); Billings, Mont. (169); and San Angelo, Tx.(198). In view of Nexstar’s recognition of how coordination of sales among separately-owned stations in a single market causes harm, ACA suggested, “Nexstar should cease coordinating retransmission consent with Mission in these markets immediately.” ACA Press Release at 2.

of the media ownership limits and the retransmission consent rules, to facilitate effective monitoring of this practice, ACA urges the Commission to impose disclosure requirements for any agreement, regardless of name or purported effect on “efficiencies, between separately-owned stations in the same market, particularly those that facilitate the coordination of retransmission consent negotiations. At the very least, disclosure in the broadcaster’s public inspection is necessary because today the information needed to evaluate whether broadcasters are in compliance with current media ownership, retransmission consent, and antitrust rules is not otherwise readily available.”⁵⁷

The broadcast industry holds a special place in the market for delivery of video programming to the public. As ACA has previously observed, “an over-the-air broadcaster is not just any business, like Sam’s Club or Costco. Broadcasters are entrusted with licenses to use the public’s airwaves to provide their product in exchange for agreeing to operate in the public interest, and therefore stand in a special relationship to the government: federal law provides special support and protections to broadcasters in the public interest, and the government views itself as having a special interest in how its products are distributed priced.”⁵⁸ Disclosure of important operational and shared services agreements in the public inspection file is therefore appropriate and necessary to keep the public informed as to how public spectrum licensees are operating their businesses and discharging their public interest obligations.

⁵⁷ The Commission appears to have recognized this by seeking comment in the retransmission consent reform rulemaking “on the prevalence of agreements that grant one station or station group the right to negotiate or approve the retransmission consent agreement of a station that is not commonly owned. . . .” Retransmission Consent NPRM ¶ 23.

⁵⁸ ACA Comments at iv, 2.

Respectfully submitted,

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