

**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
)	

REPLY COMMENTS



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I. INTRODUCTION

The American Cable Association (“ACA”) files these reply comments in response to comments filed by the broadcast industry in the above-referenced docket.¹ In its initial comments, ACA urged the Commission to require broadcasters to place in the broadcaster’s online public file any agreement that facilitates coordinated negotiation of retransmission consent by separately-owned television broadcast licensees in the same market. ACA demonstrated that requiring disclosure in licensees’ online public files 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, is consistent with the Commission’s goal of enhancing the utility of the online public files and 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.

Broadcasters have advanced two principal reasons for opposing enhanced public file disclosure of agreements between separately-owned same-market stations that are not already required to be included in its public file: (1) requiring disclosure would be premature because the Commission is still investigating the impact of agreements, like these, on its local television ownership rules in an ongoing proceeding; and (2) these agreements contain confidential and proprietary information that should not be revealed to the public. Each argument lacks merit and should be rejected by the Commission.

The disclosure requirement is timely and appropriate and will permit the public, the Commission and the antitrust authorities to monitor compliance with the Communications Act, *existing* Commission rules and policies as well as the antitrust statutes. For this reason, the Commission should not be persuaded by broadcaster arguments that adoption of the proposed

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, 26 FCC Rcd 15788, (rel. Oct. 27, 2011) (“FNPRM”).

public file disclosure rule is premature. Whether the Commission ultimately adopts rule changes concerning agreements that facilitate coordinated negotiation of retransmission consent by separately-owned same-market broadcasters in its ongoing media ownership review or in its retransmission consent reform rulemaking, the obligation of broadcast licensees today is to comply with existing rules, regulations and laws, and disclosure of these agreements in the online public file will enhance the ability of the Commission and the antitrust authorities to monitor compliance. Moreover, disclosure of these agreements in online public inspection files, with appropriate confidentiality protections in place, will impose only a minimal burden on licensees, while providing the public and regulators with correspondingly great benefits in terms of transparency. In short, no compelling argument has been advanced against placement of these agreements in broadcasters' enhanced online public files, and the Commission should expeditiously act to ensure their disclosure.

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

ACA has submitted extensive evidence in multiple proceedings demonstrating how 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.² Specifically, this

² 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) ("Retransmission Consent NPRM"); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association at 2-41 (filed May 27, 2011) ("ACA Retransmission Consent 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*, MB Docket No. 10-71, Reply Comments of the American Cable Association at 2-41 (filed June 27, 2011) ("ACA Retransmission Consent 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*, MB Docket No. 09-182, Comments of the American Cable Association at 3-11 (filed July 12, 2010) ("ACA Media Ownership NOI Comments") (urging the Commission to examine how the reduction in local broadcast competition achieved through the combined ownership or

practice replaces competition among local broadcasters with collusion, which diminishes the level of competition between separately-owned broadcasters to produce quality programming that attracts viewers. It also drives up the rates consumers pay to access over-the-air television through their pay television provider.³ The practice is both widespread and demonstrably harmful to local broadcast competition, pay television providers and the public.⁴ In fact, the Commission has proposed rules to prohibit the coordinated negotiation of retransmission consent by separately-owned same-market broadcasters.⁵

The Commission and the antitrust authorities have already recognized the benefits of placing several forms of sharing agreements – joint sales and time brokerage agreements, also referred to

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 Retransmission Consent Petition Comments”); *Id.* at Appendix B, William P. Rogerson, 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 *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, MB Docket No. 09-182, American Cable Association Suggestions for Additional Studies in Media Ownership Proceeding at 2-5 (filed Jul. 7, 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).

³ ACA Retransmission Consent Comments at 5-25; ACA Retransmission Consent Reply Comments at 2-39; ACA Retransmission Consent Petition Comments at 14-16; ACA Media Ownership NOI Comments at 5-12.

⁴ ACA Retransmission Consent Comments at 5-25; ACA Retransmission Consent Reply Comments at 33-41; ACA Retransmission Consent Petition Comments at 9-16; ACA Media Ownership NOI Comments at 5-19.

⁵ Retransmission Consent NPRM, ¶ 23; *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 Promoting Diversification of Ownership In the Broadcasting Service*, Notice of Proposed Rulemaking, MB Docket No. 09-182; MB Docket No. 07-294, ¶¶ 194, 204 (2010) (“Quadrennial Media Ownership NPRM”) (seeking comment on: (i) whether LNS and SSAs are substantively equivalent to agreements that are already subject to our attribution rules, and are therefore attributable today or should be attributable; and (ii) the impact of agreements such as LNS agreements and SSAs on the Commission’s competition, localism and diversity goals).

as local marketing agreements – among same-market broadcasters in the stations’ public inspection files.⁶ ACA reiterates that the same concerns about adverse impacts on local broadcast competition and the circumvention of Commission rules that gave rise to these public file disclosure requirements warrant inclusion of any agreement that facilitates coordinated negotiation of retransmission consent between separately-owned same-market broadcasters in the online public inspection file as well.

The Commission should act now in this proceeding to ensure that broadcasters disclose these agreements so that regulators and market participants, including MVPDs and customers can properly assess their impact on the competitive marketplace.

III. BROADCASTERS HAVE FAILED TO DEMONSTRATE ANY COMPELLING REASON WHY AGREEMENTS THAT FACILITATE COORDINATION BY SEPARATELY-OWNED SAME-MARKET STATIONS IN RETRANSMISSION CONSENT NEGOTIATIONS SHOULD NOT BE INCLUDED IN THE ENHANCED ONLINE PUBLIC FILE

Broadcasters have advanced two primary reasons for opposing public file disclosure of agreements between separately-owned same-market stations other than JSAs and time brokerage agreements: (1) requiring disclosure would be premature because the issue of whether these other agreements implicate the Commission’s local television ownership limits is currently under consideration by the Commission in a separate proceeding; and (2) agreements between separately-owned broadcast stations in the same market contain confidential and proprietary information that should not be revealed to the public. As demonstrated below, neither argument is sufficient to

⁶ LMAs fall under the “ownership reports and related materials” category of materials broadcasters must keep in their public files. Commercial and noncommercial educational television stations must maintain in their public files copies of the contracts they submit with their Ownership Reports, or an up-to-date list of those contracts. 47 C.F.R. §§ 73.3526(e)(5), 73.3527(e)(4); see *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*, Report and Order, 14 FCC Rcd 12559, ¶¶ 83, 174 (1999) (“1999 Attribution Order”). Commission rules identify LMAs as contracts that broadcast stations must submit with their Ownership Reports. 47 C.F.R. § 73.3615(a)(4)(i) (requiring a commercial television station licensee to include in its Ownership Report the contracts specified in § 76.3613). Time Brokerage Agreements and Joint Sales Agreements are two other forms of sharing agreements explicitly required to be placed in the public inspection files. 47 C.F.R. § 73.3613(d). In the 1999 Attribution Order, the Commission determined that television LMAs would be considered *per se* attributable for a station under certain circumstances, and noted the Commission’s intention to modify the Ownership Report form to reflect the attribution changes adopted in the 1999 Attribution Order. 1999 Attribution Order, ¶¶ 83, 174.

overcome the public interest need for immediate disclosure of these agreements in the enhanced online public file.

A. Enhanced Online Public File Disclosure Of Agreements Between Separately-Owned Same-Market Broadcasters Is Not Premature.

Broadcasters' primary objection to the placement of these agreements in the online public file is that the Commission has not yet concluded its examination of the impact of sharing agreements, other than JSAs and time brokerage agreements, between separately-owned same-market broadcasters in a rulemaking proceeding. Joint Broadcasters argue that the Commission has yet to review these other agreements in any depth, particularly in its 2010 Quadrennial Review, and that absent the conclusion of such review, it is improper for the Commission to adopt any new substantive disclosure requirements under the guise of making the public file more accessible.⁷ Rather than address the straightforward matter raised by the Commission in this proceeding concerning inclusion of these agreements in the enhanced public file, Joint Broadcasters recommend that the Commission first determine "the legal status and regulatory disclosures requirements regarding such operational agreements, which do not implicate ownership or control."⁸ NAB similarly argues that the current proceeding, which they assert is aimed at moving current paper public inspection files online, is not the proper venue for determining the need for additional disclosure to the Commission of other agreements, and proposes a separate or stand-alone proceeding in which the Commission can examine all of the public policy implications.⁹

⁷ *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)*, MM Docket No. 00-168, MM Docket No. 00-44, Comments of the Joint Broadcasters at 20-21 (filed Dec. 22, 2011) ("Joint Broadcasters Comments").

⁸ Joint Broadcasters Comments at 20.

⁹ *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)*, MM Docket No. 00-168, MM Docket No. 00-44, Comments of the National Association of Broadcasters at 28-29 (filed Dec. 22, 2011) ("NAB Comments").

The Commission should decline to entertain broadcasters' requests for delay and promptly adopt in this proceeding new disclosure rules that would expose to the sunlight agreements through which separately-owned broadcasters in the same market skirt local television station ownership limits and eliminate competition through coordinated negotiation of retransmission consent, thereby driving up the prices subscription television providers pay to deliver over-the-air television programming to their customers.

As discussed in more detail below, the Commission's interest in monitoring compliance with existing media ownership and retransmission consent good faith rules fully justifies inclusion of agreements between separately-owned same-market broadcasters that facilitate coordinated negotiation of retransmission consent in the broadcasters' enhanced online public files.

Media Ownership Rules. It is not premature to require broadcasters who enter into agreements with other separately-owned stations in the same designated market area to facilitate the coordination of retransmission consent negotiations to include these agreements in their enhanced online public file in advance of the Commission deciding the separate question whether agreements, like these, should be deemed attributable as part of the pending media ownership review.¹⁰ Regardless of the outcome of that proceeding, it is important for regulators and the public to have access to these agreements in the online public file under existing media ownership rules.

Agreements that facilitate the coordinated negotiation of retransmission consent have an impact on local broadcast competition, and under current rules, the Commission is required to take into account agreements that impact local broadcast competition. Specifically, these agreements are relevant: (i) in evaluating whether a station's license renewal would be consistent with the public interest; (ii) when evaluating whether granting an individual license application, transfer or assignment would be consistent with the public interest; and (iii) in determining whether an

¹⁰ See Quadrennial Media Ownership NPRM, ¶¶194-208.

unauthorized transfer of control in violation of its rules has occurred.¹¹ In addition, disclosure of these agreements assists the Commission in conducting its periodic media ownership reviews.

The Media Bureau, acting on delegated authority, recently acknowledged this key point in a decision involving an arrangement between two top-four rated stations in a local market, whereby one local broadcaster delegated significant portions of its station's operations to another. The Bureau stated that: (i) agreements that have an impact on competition may be relevant in determining whether a license renewal for a station would be consistent with the public interest; and (ii) in determining whether an unauthorized transfer of control has occurred, the Commission will look to any acts or agreements vesting in a "new" entity the right to determine basic policies concerning the operation of the station, and is to be made on a case-by-case basis.¹²

In the absence of an application or a rule violation, we will not evaluate the impact of the instant agreements on competition and diversity in the Honolulu market. However, consideration of the impact such agreements have on competition and diversity may be relevant in determining whether license renewal for one or either of the stations that are the subject of the

¹¹ See 47 U.S.C. §§ 309(a)(k) (stating the Commission shall grant an application for a license where an examination of the application and other matters before it show "the public interest, convenience, and necessity would be served by the granting thereof"; and shall grant a license renewal where "the station has served the public interest, convenience, and necessity" and has not committed serious violations of the Commission's rules or regulations); see 47 U.S.C. § 310(d) (stating disposition of a station license requires a Commission finding that "the public interest, convenience, and necessity will be served" by granting the transfer); see e.g., *In the Matter of Meridian Communications of Idaho, Inc.; Application for Construction Permit for New Television Station on Channel 20 Idaho Falls, Idaho*, Memorandum Opinion and Order, 26 FCC Rcd 678 (2011) ("Meridian Communications Order") (determining that the Commission's grant of a construction permit for a station was consistent with the public interest); see *In the Matter of KHNL(TV) and KGMB(TV), Honolulu, Hawaii And HITV License Subsidiary, LLC 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) ("Raycom-HITV Order") (considering the public interest, convenience and necessity when evaluating whether an unauthorized transfer of control occurred); see *In re Applications of Guy Gannett Communications For Consent to the Assignment of License of Television Stations*, Memorandum Opinion and Order, 14 FCC Rcd 6204 (1999) ("Gannett Communications Order") (considering "the public interest, convenience, and necessity" in reviewing applications for consent to assign station licenses and related waiver request); see *In re Applications of Shareholders of Pulitzer Publishing Company and Hearst-Argyle Television, Inc.; For Consent to Transfer of Control of Pulitzer Broadcasting Company*, Memorandum Opinion and Order, 13 FCC Rcd 22875 (1998) ("Hearst Argyle Television Order") (considering "the public interest, convenience, and necessity" in reviewing applications for consent to assign station licenses and related waiver request); see ACA Media Ownership NOI Comments at 3-5.

¹² Raycom-HITV Order, ¶ 16.

transaction would be consistent with the public interest, a finding required under Section 309(k)(1)(A) of the Act.

. . . .In determining whether an unauthorized transfer of control has occurred, the Commission looks to any acts or agreements vesting in a “new” entity the right to determine basic policies concerning the operation of the station. . . . The Commission’s analysis “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented,” and must be determined on a case-by-case basis. . . . However, the focus of any Commission inquiry with respect to the locus of control of a station’s operations focuses on programming, personnel, and finances.¹³

It is therefore evident that the Commission and staff perform the equivalent of a “totality of the circumstances” analysis on a case-by-case basis in evaluating whether its broadcast licensees are in compliance with existing broadcast statutes, rules and policies, and that agreements between broadcasters that impact competition are relevant to this analysis.¹⁴ The fact that the media

¹³ Raycom-HITV Order, ¶¶ 15-16 (citations omitted); See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff’d sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, cert. denied, 403 U.S. 923 (1971); *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8514, (1995); *Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 87 (1981).

¹⁴ Section 309 of the Act requires the Commission to “determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, *upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.* 47 U.S.C. 309(a) (emphasis added). Similarly, Section 310 of the Act restricts disposition of a station license except upon application to the Commission “and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310. Consistent with this statutory charge, the Commission’s rules specify that it will grant an instrument of authorization without a hearing “if it finds (on the basis of the application, the pleadings filed or other matters which it may officially notice) that the application presents no substantial and material question of fact” and meets certain other requirements. 47 C.F.R. § 73.3591(a)(1). The Commission’s local broadcast ownership rules explain that it will entertain requests for waivers of its duopoly rule on a case-by-case basis. 47 C.F.R. § 73.3555 n. 7. Several orders on petitions relating to applications for license or consent to transfer licenses include requests for waiver of the duopoly rule and the Commission has used a totality of the circumstances analysis to make its case-by-case determination. See, e.g., Meridian Communications Order, ¶ 9 (“In interpreting the *Spousal Attribution Order*, the Commission has made clear that the existence or non-existence of one, or many, of the factors listed above is not necessarily dispositive, and that, *in such cases the Commission looks at the totality of the circumstances, weighing all the evidence before it to determine whether or not the family members’ media interests will be independent and not subject to common influence or control.*”) (emphasis added); Gannett Communications Order, ¶ 37 (“Given the totality of the circumstances presented here, we believe that a nine-month temporary waiver of the duopoly rule to permit common ownership of two UHF stations located in separate DMA’s would serve the public interest, convenience, and necessity.”); Hearst Argyle Television Order, ¶¶ 28-33 (1998) (after reviewing the elements of the waiver requirements and current circumstances, the FCC concluded that a continuation of the permanent waiver of the duopoly ownership rule served the public interest, convenience and necessity).

ownership rules are currently under review by the Commission and may be amended in the future should not stand in the way of removing barriers to determining whether broadcasters *today* are harming the public interest by violating regulatory requirements and the antitrust laws. By requiring broadcasters to disclose agreements that impact competition in their enhanced online public files, the Commission can better fulfill its ongoing responsibility to ensure compliance with its existing broadcast ownership limits.

As ACA demonstrated in its comments, collusion among separately-owned sellers of a product in a market aimed at raising prices above levels achievable through independent negotiations implicates significant competitive concerns.¹⁵ Accordingly, because coordinated retransmission consent negotiations reduce local broadcast competition and this reduction in competition is a factor that the Commission must take into account in determining whether broadcasters are in compliance with existing rules, the terms of these arrangements should be disclosed in the station's online public file. This will allow the public, the Commission and antitrust authorities to better monitor licensees' discharge of their obligation to utilize the radio spectrum in the public interest.¹⁶

¹⁵ See *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)*, MM Docket No. 00-168, MM Docket No. 00-44, Comments of the American Cable Association at 19-21 (filed Dec. 22, 2011) ("ACA Comments"). For this reason, NAB's argument against disclosure of sharing agreements on the basis that "[u]nlike time brokerage agreements, not all SSAs involve arrangements that affect content," flounders. NAB Comments at 29. The NAB tries to argue that agreements that do not involve content, which may include some forms of SSAs, do not deserve placement in the public record. This is incorrect for two reasons. The Commission has the authority, as we have discussed, to determine what documents should form part of the public inspection file and it has determined that the public will benefit from access to these agreements. FNPRM, ¶ 10-14,35. Moreover, as discussed above, the Commission has already included one form of sharing agreement, JSAs in the public inspection file, which are not directly associated with content.

¹⁶ ACA reiterates that 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*. See ACA Comments at 14-15.

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. ACA therefore wholeheartedly agrees with the comments of the Public Interest Public Airwaves Coalition (“PIPAC”) that

[V]iewers have a vested interest in the amount, quality and content of programming offered by local broadcasters, as well as ensuring that licensees are not covertly circumventing the FCC ownership rules through sharing arrangements. Agreements between local broadcasters to jointly negotiate cable retransmission consent fees or sell local advertising may implicate similar competitive concerns.¹⁷

Thus, regardless of whether the Commission in its current media ownership review deems sharing agreements that facilitate coordinated retransmission consent negotiations to be attributable for purposes of its local television ownership limits,¹⁸ the arrangements adversely impact local broadcast competition and should be disclosed to the public so that the Commission can better monitor licensees’ discharge of their existing obligations to utilize the radio spectrum in the public interest, and so that the antitrust authorities can ensure that broadcasters are not acting in an anticompetitive manner.

Retransmission Consent Reform. For similar reasons, the Commission’s interest in its licensees’ compliance with current retransmission consent rules justifies inclusion of agreements that facilitate coordinated negotiations in the enhanced public file, regardless of whether the Commission adopts a *per se* prohibition on coordinated negotiations under its good faith rules. Similar to the

¹⁷ See *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)*, MM Docket No. 00-168, MM Docket No. 00-44, Comments of Public Interest Public Airwaves Coalition at 21 (filed Dec. 22, 2011).

¹⁸ Quadrennial Media Ownership NPRM, ¶¶ 204-207. Although the Commission could address the harms of coordinated retransmission consent negotiations under existing broadcast ownership rules, there is also a great value in the Commission declaring that agreements among separately owned same-market broadcasters that facilitate coordinated retransmission consent negotiations should be deemed attributable ownership interests. See ACA Retransmission Consent Comments at 9-13; Rogerson I at 4.

Commission's ability to take account of coordinated retransmission consent negotiations under existing media ownership rules, the Commission could take action under its existing retransmission consent rules in advance of any additional action in its retransmission consent reform proceeding. The current statutory command in Section 325(b) obligates broadcasters to negotiate retransmission consent in good faith, consistent with competitive marketplace considerations.¹⁹ Price fixing agreements among same-market competitors involving the sale of retransmission consent is the antithesis of marketplace competition.

Although the Commission is currently in the process of deciding whether to adopt a *per se* prohibition on coordinated negotiations in its ongoing retransmission consent reform proceeding,²⁰ the Commission today could decide that a broadcaster who coordinates its negotiations with another separately-owned same-market broadcaster has violated its duty to negotiate in good faith under the "totality of the circumstances standard."²¹ This action could be undertaken either on its own motion or in response to the filing of a complaint.²² Readily available access to sharing agreements that facilitate coordinated retransmission consent negotiations in the online public files will aid the public

¹⁹ 47 U.S.C § 325(b)(3)(C)(ii).

²⁰ The Commission's ongoing retransmission consent rulemaking is considering, in part, whether coordinated negotiations should be deemed a *per se* violation of the good faith obligation. Retransmission Consent NPRM, ¶ 23. See ACA Comments at 7-8; ACA Retransmission Consent Comments at 5-25; ACA Retransmission Consent Reply Comments at 2-41; Ex Parte Letter of the American Cable Association, Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Ex Parte Letter by American Cable Association at 1-2 (filed Aug. 3, 2011).

²¹ 47 C.F.R. § 76.65(b)(2).

²² In either case, Commission rules provide for discovery. Although there is no discovery as of right under the good faith complaint procedures, parties may make discovery requests in their pleadings. *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, ¶ 79 (2000) (Good Faith Order). Similarly, Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions or document production. See 47 C.F.R. § 76.7(f). Placing agreements among separately owned same-market broadcasters that facilitate coordinated negotiation of retransmission consent in the broadcasters' enhanced online public files would therefore save significant public and private resources by avoiding the need to obtain such agreements through the resource-intensive discovery process.

and the Commission in evaluating whether, under the “totality of the circumstances” standard, negotiations conducted pursuant to the terms of a sharing agreement violate a broadcaster’s duty to negotiate in good faith. Accordingly it would serve the public interest for the Commission to require disclosure of agreements that facilitate this behavior in the broadcasters’ enhanced online public file to permit monitoring of violations of the good faith negotiation rules at this time.²³

* * *

In summary, it is not premature for the Commission to require placement of sharing agreements between separately-owned same-market broadcasters that facilitate the coordinated negotiation of retransmission consent in the broadcasters’ enhanced online public files in this rulemaking proceeding. The fact that the media ownership and retransmission consent rules are currently under review by the Commission and may be amended in the future to more specifically address the harm of coordinated retransmission consent negotiations should not stand in the way of removing barriers to determining whether broadcasters today are harming the public interest by violating regulatory requirements and the antitrust laws. Rather, it is all the more reason to require disclosure of these agreements. 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.²⁴

²³ Although the Commission could address the harms of coordinated retransmission consent negotiations under existing rules, there is also a great value in the Commission declaring that coordinating negotiations is a per se violation of the obligation to negotiate in good faith. See ACA Retransmission Consent Petition Comments at 9-13; Rogerson I at 4.

²⁴ ACA reiterates that 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.* See ACA Comments at 14-15.

B. Proprietary Information In Sharing Agreements Can Be Protected Through Redaction Allowances.

The Commission's current public inspection file disclosure rules for JSAs and time brokerage agreements permit licensees to redact confidential or proprietary information prior to placement of agreements in the broadcaster's public inspection file.²⁵ The FNPRM appropriately inquires "whether such agreements should be subject to the same redaction allowances that are made available to joint sales and time brokerage agreements."²⁶ Nonetheless, Channel 51 of San Diego, Inc., Prime Time Christian, Inc., Bowling Green State University, and Southern Illinois University ("Four Commercial and NCE Licensees") oppose placement of sharing agreements in a licensee's online public inspection file because "[t]hese documents contain sensitive and proprietary information."²⁷ The Commission should summarily reject this objection.

The fact that sharing agreements contain sensitive or proprietary information is not a reason to keep the documents from the enhanced online public file; it is simply a basis to extend the same redaction allowances available under Commission rules to JSAs and time brokerage agreements, as the FNPRM has contemplated. Accordingly, in its comments,²⁸ ACA has not objected to the Commission extending the same redaction allowances that are made available to JSAs and time brokerage agreements under its rules to all forms of agreement to be placed in the online public inspection file. Redaction of confidential or proprietary information will adequately balance the public's interest in transparency against the legitimate business concerns of licensees.

²⁵ 47 C.F.R. §§ 73.3526(e)(14),(e)(16).

²⁶ FNPRM, ¶ 35.

²⁷ *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)*, MM Docket No. 00-168, MM Docket No. 00-44, Comments of Channel 51 of San Diego, Inc., Prime Time Christian, Inc., Bowling Green State University, and Southern Illinois University at 5 (filed Dec. 22, 2011).

²⁸ ACA Comments at 15-18.

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 not only that the Commission adopt additional safeguards, but also that the Commission deem this harmful practice to be in violation of *current* local television ownership limits and of the broadcasters' obligation to negotiate retransmission consent in good faith, consistent with competitive marketplace considerations. Such coordinated retransmission consent negotiations reduce competition in local television markets, result in higher costs to customers of pay television providers, and are the antithesis of competitive marketplace considerations.

Consistent with the Commission's earlier decision to place JSAs and time brokerage agreements in the broadcaster's public inspection file, the public and regulatory authorities have an ongoing interest in understanding the terms and conditions of other contractual arrangements among separately-owned same-market broadcast television licensees that impact competition.²⁹ Existing broadcast licensing and ownership rules and regulations were designed to ensure that there is adequate competition in local markets and the Commission's good faith standards found in its retransmission consent rules are designed to ensure that broadcast carriage agreements are negotiated in good faith, consistent with competitive marketplace considerations. Enhanced public

²⁹ ACA Comments at 19-21; See 1999 Attribution Order, ¶¶ 92-94 (Copies of television LMAs or time brokerage agreements to be kept in the licensee's "local public inspection files, with confidential or proprietary information redacted where appropriate and the "station that is the brokering station must file with the Commission, within 30 days of execution of such agreement, a redacted copy of any time brokerage agreements that would result in the arrangement being attributed in determining the brokering licensee's compliance with the multiple ownership rules."); see also *id.*, ¶ 4 n. 8 (referring to LMAs interchangeably as LMAs or time brokerage agreements) and ¶ 66 (Time brokerage agreements and LMAs share the same definition: "An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming."). It is thus evident that the public file disclosure requirement stands apart from the question of whether a particular LMA is attributable. Accordingly, as discussed in more detail below, the Commission need not await the outcome of its current media ownership review to address the desirability of placing sharing agreements in the enhanced online public files.

file disclosure of sharing agreements that facilitate anticompetitive behavior will aid in all of these areas. As the Commission observed when adopting the requirement that all time brokerage agreements, regardless of attribution status, be placed in the public file:

[T]hese requirements would impose only a minimal burden on licensees but would permit it and others to monitor time brokerage agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws.³⁰

The Commission's rationale for requiring placement of LMAs and JSAs in the public inspection file is fully applicable to any agreement between separately-owned same-market broadcast stations that facilitates the coordinated negotiation of retransmission consent. The requirement would impose only a minimal burden on licensees but would permit the Commission and others to monitor these agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, the Commission's rules and policies and the antitrust laws.

Broadcaster objections to placement of such agreements in their online public inspection file because they contain confidential or proprietary information and because the Commission has not yet concluded its media ownership review lack merit and should be rejected by the Commission. The Commission should act quickly to require disclosure in the enhanced online public inspection file of any agreement that facilitates coordinated negotiation of retransmission consent, regardless of name, or purported efficiencies without delay.

³⁰ 1999 Attribution Order, ¶ 92.

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