

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**2010 QUADRENNIAL REGULATORY REVIEW –
REVIEW OF THE COMMISSION’S BROADCAST
OWNERSHIP RULES AND OTHER RULES ADOPTED
PURSUANT TO SECTION 202 OF THE
TELECOMMUNICATIONS ACT OF 1996**

MB Docket No. 09-182

**PROMOTING DIVERSIFICATION OF OWNERSHIP
IN THE BROADCASTING SERVICES**

MB Docket No. 07-294

COMMENTS OF DIRECTV, LLC

DIRECTV, LLC (“DIRECTV”) submits these comments in response to the Commission’s review of its rules related to ownership and attribution of broadcast stations.¹ These comments focus on a single aspect of that review: agreements that allow a third party to exercise control over a station’s retransmission consent rights. As the *NPRM* recognizes, such agreements can take many forms and are called by a variety of different names, from Joint Sales Agreements (“JSAs”) to Shared Services Agreements (“SSAs”) to network affiliation agreements. Whatever the arrangement may be called, however, if it effectively transfers a station’s retransmission consent rights to another station in the same market or affords a broadcast network operator the right to approve retransmission agreements before they become final, it permits a third party to exert significant influence over core licensee functions.

¹ See *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*, 26 FCC Rcd. 17489 (2011) (“*NPRM*”).

Accordingly, the Commission should recognize that any such agreement creates a cognizable interest under the Commission's broadcast attribution rules.

I. BROADCASTERS VIEW RETRANSMISSION CONSENT REVENUE AS AN INCREASINGLY IMPORTANT COMPONENT OF BROADCAST STATION FINANCES

As noted in the *NPRM*, the Commission's broadcast attribution rules "seek to identify those interests in licensees that confer on their holders a degree of 'influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.'"² These rules, which classify as "cognizable" interests as remote as a five percent equity investment, also "seek to identify financial interests in licensees that convey the potential and incentive to exert significant influence over core licensee functions, and thus should be counted under the multiple ownership rules."³ One such core licensee function, well recognized in Commission precedent, is control over a station's finances.⁴

Retransmission consent fees have become an increasingly important component of such finances. According to SNL Kagan, retransmission fees increased by nearly 50 percent in just the last two years.⁵ Moreover, based on an analysis of public companies, SNL Kagan estimates

² *NPRM*, ¶ 194 (quoting *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd. 12559, ¶ 1 (1999), *recon. granted in part*, 16 FCC Rcd. 1097 (2001), *stayed*, 16 FCC Rcd. 22310 (2010)).

³ *2006 Quadrennial Regulatory Review*, 24 FCC Rcd. 5896, ¶ 17 (2009). It would be anomalous for the Commission to deem a five percent indirect equity interest to constitute a "cognizable interest" but not to deem veto control over retransmission consent agreements to constitute such an interest.

⁴ *See, e.g., Stereo Broadcasters*, 87 F.C.C. 2d 87, ¶ 29 (1981) (describing the ability to control finances, personnel and programming as "the major concerns of station operation and decision making"); *News International PLLC*, 97 FCC 2d 349, ¶ 20 (1984) (describing finances, personnel, and programming as "the three most important factors in determining control"); 47 C.F.R. § 73.3555 notes 2(j) and (k) (specifying that time brokerage and joint sales agreements, respectively, must leave stations with ultimate control over "facilities including, specifically, control over station finances, personnel and programming").

⁵ *See* Press Release, *Broadcast TV monthly per subscriber retransmission fees up by 47% according to latest SNL Kagan Study* (Feb. 15, 2012) (available at www.snl.com/InTheMedia.aspx).

that retransmission consent accounted for 52 percent of television station cash flow on average in 2010, and as much as 76 percent in some cases.⁶

Broadcasters themselves are quick to emphasize the extent to which station finances are increasingly dependent upon this revenue stream. In the Commission's retransmission consent proceeding, for example, a group of broadcast associations claimed that "[l]ocal broadcasters are increasingly relying on revenue from retransmission consent to expand and improve their local news programming, especially in the face of declining advertising revenue."⁷ One station owner went so far as to claim that "[t]he future of free, over-the-air broadcast programming" depends upon securing sufficient retransmission consent compensation from MVPDs.⁸ This revenue stream is by now well established. Indeed, one large station group expects to generate "hundreds and hundreds of millions of dollars" each year through retransmission consent alone.⁹

Yet as the value of the retransmission consent revenue stream has increased, so too have the ways in which the underlying right has been made subject to decisions by other parties. In some cases, as part of a JSA or SSA, one station owner may authorize another station owner in its market to negotiate retransmission consent on its behalf. In other cases, a broadcast network may reserve the right to approve any retransmission agreement negotiated by its affiliates. As discussed below, in either case the station owner has placed an important component of the

⁶ See Georg Szalai, *Broadcasters to Boost Retrans Fees to \$3.6 Billion by 2017*, THE HOLLYWOOD REPORTER (May 25, 2011) (discussing SNL Kagan report) (available at <http://www.hollywoodreporter.com/news/broadcasters-boost-retrans-fees-36-192349>).

⁷ Opposition of the Broadcaster Associations, MB Docket No. 10-71, at 51 (filed May 18, 2010).

⁸ See *Facts About Fox's Negotiations with DISH* (formerly available at <http://getwhatipaidfor.com/home/story/view/182>).

⁹ See Steve Donohue, "Comcast's NBCUniversal eyes 'hundreds of millions' in retransmission fees," FIERCECABLE (Sep. 15, 2011) (quoting NBC Universal CEO Steve Burke) (available at <http://www.fiercecable.com/story/comcasts-nbcuniversal-eyes-hundreds-millions-retransmission-fees/2011-09-15>).

station's finances in the hands of another party who should be deemed to acquire an attributable interest as a result.

II. A STATION SHOULD BE DEEMED TO HAVE AN ATTRIBUTABLE INTEREST IN ANY OTHER STATION IN ITS MARKET ON WHOSE BEHALF IT NEGOTIATES RETRANSMISSION CONSENT

Whether denominated as a JSA, SSA, or something else entirely, any agreement that delegates a station's retransmission consent negotiating rights to another station in the same market should be deemed to create a cognizable interest under the Commission's attribution rules. Such delegation empowers the owner of another in-market station to determine whether and when retransmission consent agreements will be reached and resulting revenues will flow to the delegating station, thereby giving the negotiating station control over a significant aspect of the delegating station's finances.

Although such agreements are based on the assumption that the negotiating station will act on the delegating station's behalf, such arrangements also allow the negotiating station to act against the delegating station's interest. For example, if the negotiating station also owns stations in other markets, it may be willing to withhold retransmission consent for all stations for which it bargains (including that of the delegating station) if unsatisfied with the compensation offered in one of the other markets. Alternatively, the negotiating station may have the willingness and financial wherewithal to withstand a lengthy period without retransmission income while the delegating station does not. In such cases, the delegating station's loss of control over this revenue stream could significantly constrain its ability to operate as it otherwise would, which might coincidentally reduce its ability to compete with the negotiating station in its home market. This level of influence should be deemed to give the negotiating station an attributable interest in the delegating station.

Where a station possesses this ability, it has secured an interest that “convey[s] the potential and incentive to exert significant influence over core licensee functions, and thus should be counted under the multiple ownership rules.”¹⁰ Indeed, such arrangements give the negotiating station far more than the “potential and incentive” to exert such influence over core licensee functions. They convey the unfettered ability to exert such influence. Accordingly, such clauses should be deemed to create a cognizable interest for the negotiating station in the delegating station.

Broadcasters contend that arrangements under which stations in a market share resources serve a valid purpose as they can capture economies of scale and other efficiencies that enable the stations to better fulfill their public interest function.¹¹ To be clear, DIRECTV has no objection to these arrangements as they relate to operating efficiencies and other benefits from cooperative activity, such as improved news and informational programming. There are many such areas of station operation that have nothing to do with retransmission consent. However, to the extent an arrangement includes one station handing over its retransmission consent rights to another station in its market, it should be deemed to create a cognizable interest. Thus, attributing the delegation of this outward-facing function would maintain the integrity of core licensee functions without precluding stations from pursuing a variety of strategies for capturing internal efficiencies that might be available.

¹⁰ 2006 *Quadrennial Regulatory Review*, ¶ 17.

¹¹ See, e.g., 2002 *Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶ 164 (2003) (reviewing evidence that “suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do.”).

III. A BROADCAST NETWORK SHOULD BE DEEMED TO HAVE AN ATTRIBUTABLE INTEREST IN ANY STATION OVER WHICH IT HAS A RIGHT TO APPROVE RETRANSMISSION CONSENT AGREEMENTS

When two stations in a market enter into an arrangement for shared services or joint operations, at least they approach the matter from a fairly comparable position. By contrast, when a network approaches its affiliates with a proposed arrangement that would burden station prerogatives, the disparity in leverage is palpable. For some time, at least one network has imposed a “right-of-approval” condition on its affiliates’ retransmission consent rights. Such network involvement in affiliates’ retransmission consent decisions conveys significant rights that touch on core licensee functions. Indeed, in a prior proceeding, one broadcast network has contended that a station may freely bargain away its retransmission consent rights, ultimately giving a network the power to “*completely ban* a station from granting retransmission consent to an MVPD.”¹² This cannot be what Congress envisioned when it gave broadcast stations the right of retransmission consent. Right-of-approval arrangements give the network control over station finances, and should create cognizable interests under the Commission’s attribution rules.

The effect of such an arrangement would be similar to that of the JSAs and SSAs discussed above: placing the ever increasing retransmission revenue stream outside the station’s control, subject to the different (and potentially adverse) strategic objectives of a third party. If anything, ownership concerns are even more acute with respect to network right-of-approval

¹² See *Ex Parte* Comments of Fox Broadcasting Company in Response to Time Warner Cable’s Comments, CSR Nos. 8233-C and 8234-M, at 7 (filed Dec. 17, 2009) (emphasis in original). The precedent cited by Fox in support of this sweeping assertion are inapposite, as they relate to carriage of a station’s signal *outside* of its home market. See, e.g., *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd. 10339, ¶¶ 20, 31-35 (2005) (discussing negotiation related to requests for “retransmission of the broadcaster’s signal by a distant MVPD”); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd. 1645, ¶ 9 (2009) (“Either party in such retransmission consent negotiations for out-of-market carriage has the right, ‘after evaluating the prospect of distant signal carriage, to reject the proposal and terminate further negotiation.’”).

provisions both because of the extraordinary market power networks possess and because their interests routinely misalign with those of their affiliates.¹³ Given that network operators generally control cable channels in addition to O&O broadcast stations, for example, it is easy to conceive of instances in which the affiliate station's interests would be subordinate to the network operator's concern with a larger (and largely unrelated) suite of programming. The Commission has previously adopted prophylactic rules to prohibit network representation of affiliates when their respective interests could be expected to diverge.¹⁴ Recognizing an attributable interest in this situation would serve a similar purpose by ensuring that station and network interests are more clearly aligned.

This is not a hypothetical concern. The Fox network affiliation agreement, for example, includes a provision calling for the affiliate to "obtain Fox's approval before finalizing an agreement with an MVPD for retransmission consent that includes distribution of Fox's network programming."¹⁵ Because the Commission requires a commercial station to grant consent for carriage of its entire signal within the station's market,¹⁶ this provision applies to virtually all negotiations between MVPDs and Fox affiliates.

¹³ When faced with a concern that networks could pressure affiliates to raise their national spot advertising rates so as to make network ads more attractive to advertisers, and thus increase the network's profits at the expense of the affiliates, the Commission prohibited networks from representing their non-owned affiliates in the sale of non-network advertising time. *See Review of the Commission's Regulations Governing Broadcast Television Advertising*, 10 FCC Rcd. 11853, ¶ 17 (1995) ("The public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reductions of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community.").

¹⁴ *Id.* See also 47 C.F.R. § 73.658(i) (prohibiting network representation of non-owned affiliates in the sale of non-network advertising time).

¹⁵ Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71, at 13 (filed May 27, 2011) ("Fox Comments").

¹⁶ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd. 6723, ¶ 102 (1994).

This right-of-approval provision gives Fox the potential for extensive influence over station finances. It permits Fox to escalate a retransmission consent dispute between its O&O stations and an MVPD by refusing to grant or allow its affiliates to grant retransmission consent to that MVPD. It permits Fox to condition its approval on a station's agreement to changes in its personnel (*e.g.*, hiring employees preferred by the network), programming (*e.g.*, purchasing more syndicated programming from an affiliated syndicator), or policy (*e.g.*, participating or not participating in a particular Commission proceeding). Thus, such arrangements give a network tools that can be used to override a licensee's judgment on an issue that both broadcasters and networks suggest is critical to station operations, which can be leveraged to reach additional core licensee functions.

Fox, for its part, has argued that right-of-approval clauses do not give it control over station finances because the affiliated station is free to "grant[] retransmission consent for its entire signal to any MVPD that the licensee chooses"¹⁷ – *i.e.*, breach its contractual obligation to seek approval from the network. That would, of course, place the station's network affiliation at substantial risk. As Fox surely knows, the monetary value of an independent station pales in comparison to the value of a network-affiliated station.¹⁸ And as Fox has demonstrated, it is more than willing to strip a station's affiliation over disagreements related to retransmission

¹⁷ Fox Comments at 13.

¹⁸ See, *e.g.*, Elizabeth A. Rathbun, "*KRON-TV's price of freedom*," BROADCASTING AND CABLE (Apr. 9, 2000) (discussing valuation of station at up to \$915 million with NBC affiliation or as little as \$680 million without it) (*available at* http://www.broadcastingcable.com/article/136203-KRON_TV_s_price_of_freedom.php). Indeed, non-affiliated stations almost always opt for must-carry status and thus forego any retransmission consent revenue. See, *e.g.*, *Comcast Corp., General Electric Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 172 n.446 (2011) ("most independent stations assert must-carry rights, rather than opt for retransmission consent").

consent.¹⁹ Given this level of economic pressure, the right to approve affiliates' retransmission agreements clearly gives a network significant influence (at a minimum) over those affiliates' retransmission consent stream of revenue.

None of this is new. To the contrary, questions have previously been raised specifically related to the implications of network control over retransmission consent rights.²⁰ However, the Commission has never resolved the issue. It is time for the Commission to recognize in its attribution rules the level of influence and control such arrangements cede to the network at the expense of the local station.

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¹⁹ See, e.g., Michael Malone, "Fox, Nexstar Cut Ties in Springfield, Mo. and Ft. Wayne," BROADCASTING AND CABLE (June 20, 2011) ("Fox continues to push its affiliates to share retrans money as part of their affiliation agreements, and has shown it will find a new local partner if stations balk at the terms.") (available at http://www.broadcastingcable.com/article/470015-Fox_Nexstar_Cut_Ties_in_Springfield_Mo_and_Ft_Wayne.php).

²⁰ For example, the Network Affiliated Stations Alliance ("NASA") called into question a wide array of network practices, including a network's use of its affiliates' retransmission consent rights. See Network Affiliated Stations Alliance, Petition for Inquiry Into Network Practices, at 33 n. 95 (filed Mar. 8, 2001) ("One example of network dominance is ABC's refusing its affiliates the right to give retransmission consent to cable and satellite companies within the affiliate's local market."). However, that issue was not ultimately resolved in that proceeding. See *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, 23 FCC Rcd. 13610 (2008). See also *National Broadcasting Co.*, 44 F.C.C. 2218 (1972) (questioning whether NBC's interpretation of its contracts had led it to withhold approval of rebroadcast authority in violation of Section 3.658(b) of the Commission's rules).

For the foregoing reasons, DIRECTV submits that the Commission should deem cognizable under its broadcast attribution rules any arrangement that delegates the right to negotiate retransmission consent to another station in the same market or that compromises a station's retransmission consent rights by subjecting them to a network's right of approval.

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March 5, 2012

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