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 Broadcast Services	)	MB Docket No. 07-294

JOINT COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION AND CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS

Seth A. Davidson
EDWARDS WILDMAN PALMER LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Their Attorneys

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SUMMARY

Joint Commenters, who are two of the leading cable operators focused on serving smaller cities and who have been in the forefront of bringing to the Commission's attention the adverse impact that local broadcast ownership concentration is having on retransmission consent negotiations, agree with the Commission that the existing local broadcast television multiple ownership rules should not be repealed or weakened. Rather, the Commission needs to take aggressive, affirmative steps to strengthen those rules by, *inter alia*, closing certain gaps in the rules that are being exploited by broadcasters in order to engage in coordinated and collusive retransmission consent negotiations to the detriment of the public interest.

The analytical framework adopted by the Commission in reviewing the local multiple ownership rules was narrower than it could and should have been. In particular, the NPRM states that "because broadcast content is available for free to end users…the Commission cannot examine changes in price to assess the impact of different levels of ownership concentration." This simply is not true. While broadcast television signals may be "free" for the few viewers that can and do choose to receive them over-the-air, the broadcaster themselves have elected to seek payment for their signals from most members of the public through the vehicle of retransmission consent.

The Commission has the statutory duty and authority to ensure that broadcast licensees – who have been granted the privilege of using the public airwaves – act in a manner that serves the needs and interests of the communities they are licensed to serve. As the Commission has recognized, retransmission consent disputes between broadcasters and MVPDs are harmful to consumers. Those disputes are becoming more common, as evidenced by the fact over the past fourteen months, subscribers in over 45 DMAs have been impacted by one or more

retransmission consent-related service disruptions (and subscribers in dozens of other markets have been adversely impacted by threatened shutdowns that were averted at the last minute).

The uptick in retransmission consent disputes is attributable to the broadcasters' escalating and unreasonable demands for retransmission consent compensation. And, of particular relevance to this proceeding is the fact that these skyrocketing demands are being fueled in significant part by the growing level of concentration in the local broadcast market, especially among Big Four affiliates. As the Justice Department has concluded, and as expert economic analyses have confirmed, where multiple stations in a market coordinate their retransmission consent decisions or cede control over those decisions to a single entity, the stations are able to "extract ...more favorable terms from cable companies" than would otherwise be the case, thereby harming consumers.

The broadcasters, of course, deny that there is any need for the Commission to consider the impact of local ownership concentration on multiple ownership in this proceeding. For example, the broadcasters claim that the increased use of LMAs, JSAs, SSAs and other arrangements are beneficial to the public because they produce cost savings for individual stations. However, the evidence is at best inconclusive as to whether these cost savings are reflected in the development of diverse, competitive local content and there is no indication that consolidating control over retransmission consent-related decisions produces public benefits that outweigh the higher fees that have been shown to result when two or more stations negotiate as one.

There also is no merit to the broadcasters' claim that shared retransmission consent negotiating authority is necessary to counteract the alleged market power of MVPDs. While horizontal ownership at the national level has increased among MVPDs, the cable industry long

ago lost any vestige of local monopoly power. Increased concentration at the national level cannot and does not help the Joint Commenters (or any other cable company) secure better retransmission consent terms. What is relevant in measuring retransmission consent bargaining power is simple: how much damage can the parties to the negotiations inflict on each other if there is an interruption of service. The "balance of terror" that once protected consumers from overreaching in retransmission consent negotiations has disappeared. Today, a highly competitive MVPD marketplace puts broadcasters in the driver's seat in retransmission consent negotiations – and it is a simple matter of common sense that a station's ability to inflict harm on an MVPD by threatening to deny retransmission consent is significantly enhanced where two or more broadcasters directly or indirectly coordinate their retransmission consent negotiations.

The aggregation of market power by local television stations through actual or virtual control of multiple stations (particularly Big Four affiliates) can and does encourage and enable those stations to make unreasonable retransmission consent demands and use coercive negotiating tactics. The Commission has proposed in its retransmission consent reform proceeding to prohibit joint retransmission consent negotiations by stations that are not commonly-owned and the Joint Commenters support the adoption of that proposal. However, the Commission can and should adopt additional measures in the context of its ownership rules to protect consumers from broadcasters' market power abuses.

First, because decisions relating to the exercise of retransmission consent affect a station's "core operating function" (*i.e.,* the uninterrupted availability of the station to members of the community it is licensed to serve), the Commission should make clear that any arrangement that allows one station to decide whether and how another station's retransmission consent rights will be exercised will be deemed to create an attributable ownership interest

between the stations. In order to avoid such attribution, retransmission consent-related actions must be taken individually and independently and may not involve the use of a common agent or the sharing of any relevant information between stations in a market.

Second, the harms that the multiple ownership rules are intended to address, including harms arising from the aggregation of market power in retransmission consent negotiations, also can and do occur when a single entity garners control over multiple Big Four affiliates in a DMA through "affiliate swaps" or the use of multicast capacity. The Commission should close the gaps in its current rules that allow duopolies to be created through such swaps and multicasting.

Third, any new rules that the Commission adopts to address local multiple broadcast ownership concentration should be applied to existing arrangements. For example, broadcasters who have entered into LMAs, JSAs, SSAs, and other arrangements giving a single entity control over retransmission consent-related decisions of multiple stations should be required to reform or terminate such arrangements prior to the expiration of any existing retransmission consent agreements involving the stations. Duopolies created by an affiliate swap should be dissolved within one year unless the station owner agrees to limit its election of retransmission consent to no more than one Big Four station in a market. "Virtual" multicast duopolies should also be subject to divestiture absent an agreement by the station to stagger the expiration dates of its Big Four affiliate retransmission consent agreements so that there is at least six months separation between them.

Finally, the Commission should apply the old adage that "sunlight is the best disinfectant" and adopt new rules requiring expanded public disclosure of agreements between stations serving the same market. These new disclosure requirements should be in addition to the mandatory disclosure of the terms of retransmission consent agreements themselves.

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Mediacom Communications Corporation ("Mediacom") and Cequel Communications LLC d/b/a Suddenlink Communications ("Suddenlink") (collectively "Joint Commenters") hereby submit these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceedings.[1] Mediacom, which operates cable television systems serving approximately 1.1 million subscribers in 22 states and Suddenlink, which operates cable systems serving approximately 1.37 million subscribers in 18 states, are among the leading cable operators focused on serving smaller cities in the United States. They also are two of the cable operators that first sought to bring to the Commission's attention evidence showing that increased local broadcast television ownership concentration is contributing to

[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; Promoting Diversification of Ownership in the Broadcast Services*, Notice of Proposed Rulemaking, MB Docket Nos. 09-182 and 07-294, FCC No. 11-186 (rel. Dec. 22, 2011) ("*NPRM*").

hyperinflationary increases in the price of retransmission consent and to actual and threatened disruptions of consumer access to broadcast television service.[2]

INTRODUCTION

The Commission is required by Section 202 of the Telecommunications Act of 1996, as amended, to conduct quadrennial reviews of its media ownership rules including, *inter alia*, its "local television multiple ownership" rules.[3] In fulfillment of that mandate, the NPRM specifically solicits comment on the Commission's tentative conclusion that the local television multiple ownership rules, including the restriction on ownership of more than one Big Four station in a market, continue to be necessary to promote competition, localism and diversity and thus should be retained. The NPRM also requests that commenters address whether certain changes should be made in the local television multiple ownership rules to address the creation by broadcasters of "virtual duopolies" through multicasting or contractual relationships not previously deemed to be attributable.

As discussed below, the Joint Commenters are pleased that the Commission has resisted the broadcast industry's entreaties that the local television multiple ownership rules be eliminated or watered down; however, we are disappointed that the Commission has largely ignored the relationship between gaps in the current local television ownership rules and the rapid increase in the price of retransmission consent in recent years (and the concomitant

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[2] *See, e.g.,* Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications and Insight Communications, MB Docket No. 10-71 (filed May 27, 2011) at 18-22 ("*Comments of Joint Commenters in MB Docket No. 10-71*"); Joint Reply Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications and Insight Communications, MB Docket No. 10-71 (filed June 27, 2011) at 6-7 ("*Reply Comments of Joint Commenters in MB Docket No. 10-71*").

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112 (1996); Consolidated Appropriations Act, 2004, Pub. L. 108-199, , § 629, 118 Stat. 3, 99-100 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act). The local television multiple ownership rules can be found at 47 C.F.R. § 73.3555(b).

increase in the number of instances in which retransmission consent negotiations result in the threatened or actual denial of access of local broadcast television stations to MVPDs and their customers). The ownership rules are not ends in and of themselves, but rather are tools intended to guarantee that those upon whom the Commission has conferred the privilege of using the public airwaves meet the needs of the viewers in their communities. In order to ensure that broadcasters are fulfilling their obligation to operate in the public interest, the Commission needs to go beyond merely tweaking the current rules and must take aggressive, affirmative steps to close the gaps in those rules that are being exploited by broadcasters in retransmission consent negotiations.

DISCUSSION

I. Gaps in the Local Television Multiple Ownership Rules and Lack of Commission Enforcement of Those Rules are Allowing Broadcasters to Exploit Market Power in Retransmission Consent Negotiations to the Detriment of the Public Interest.

A. It is both necessary and appropriate for the Commission to consider the impact that local broadcast television ownership concentration has on the retransmission consent marketplace.

As indicated above, the Commission has tentatively concluded that the current local television ownership rules should be retained with some minor modifications.[4] In reaching this determination, the Commission properly rejected requests by broadcasters that the Commission propose weakening or even eliminating most of the rules that restrict the common ownership or control of local television stations. But Joint Commenters submit that the Commission should go further and adopt additional restrictions on common ownership and control of local broadcast stations so as to better protect the public interest from the abuse of local market power by television stations in retransmission consent negotiations.

[4] *NPRM* at ¶ 26.

In its analysis of the local broadcast television ownership rules, the Commission has focused primarily on the relationship between those rules and the Commission's longstanding goals of fostering competition, localism, and diversity. The Joint Commenters agree that promoting competition, localism and diversity in broadcasting are important policy objectives. However, by focusing on those specific objectives to the virtual exclusion of other issues, the Commission adopted an analytical framework for considering how the rules impact the public interest that is narrower than it could and should have been.

More specifically, as stated in Section 1 of the Communications Act, the Commission's principal mission is "to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges."[5] To this end, the Commission is required to ensure that the licensees who have been granted the privilege of using the public airwaves operate in a manner that serves the needs and interests of the viewing public.[6] Thus, the ultimate goal of the Commission's broadcast television rules, including the local television ownership rules, is not merely to advance competition, localism, and diversity. Rather, fostering competition, localism, and diversity are themselves policies that the Commission has identified as important means of achieving the larger policy objective as defined by Congress.

Unfortunately, by focusing its attention almost entirely on the goals of competition, localism and diversity, the Commission has failed to give appropriate weight to the other ways in

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[5] 47 U.S.C. § 151.

[6] As the Commission's predecessor, the Federal Radio Commission, stated in 1930, a broadcast station "must be operated as if owned by the public....It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest.' The standing of every station is determined by that conception." *Schaefer Radio Co.* (FRC 1930).

which its local television ownership rules promote – or fail to promote – the public interest. In particular, the NPRM states that "because broadcast content is available for free to end users...the Commission cannot examine changes in price to assess the impact of different levels of ownership concentration."[7] This simply is not true. While broadcast television signals may be "free" for the few viewers that can and do choose to receive them via over-the-air reception, the broadcasters themselves have elected to seek payment for their signals from most members of the public through the vehicle of retransmission consent.

Thus, it is incumbent on the Commission to closely consider the relationship that exists between the broadcasters' statutory duty to serve the public interest, retransmission consent prices, and the Commission's ownership policies. The Commission recently acknowledged that retransmission consent disputes between broadcasters and multichannel video programming distributors ("MVPDs") are antithetical to the public interest.[8] Such disputes undeniably are occurring more often than ever before. It also is undeniable that the principal reason that retransmission consent disputes are occurring more frequently is that the price that broadcasters are demanding for retransmission consent is skyrocketing. And one of the factors that is contributing to the rapid increase in retransmission consent fee demands is the growing level of local broadcast television ownership concentration.

First, as the Commission has acknowledged, retransmission consent negotiations have grown more contentious in recent years, leading to "a rise in negotiation impasses that have

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[7] *NPRM* at ¶ 11.

[8] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. March 3, 2011) at ¶ 17 (referencing the "disruptive impact of the loss of broadcast programming" carried by multichannel video programming distributors)("*Retransmission Consent Reform NPRM*").

affected millions of consumers."[9] While the broadcasters never tire of repeating the claim that 99 percent of the time retransmission consent negotiations are resolved "successfully," the fact is that the past year was marked by a substantial number of threatened and actual retransmission consent-related disruptions of service affecting MVPDs and communities of all sizes.[10] For example:

- In March 2011, LIN Broadcasting ordered Dish Network to stop retransmitting over two dozen stations (including affiliates of all four major networks and CW) to subscribers in 16 cities.
- In September, LIN struck again, forcing Mediacom to pull ten stations from systems in eight states for six weeks – a shutdown that had the effect of leaving thousands of customers in Gulf Coast states without access to emergency information for a period of time during tropical storm season.
- And in mid-December, thousands of Time Warner Cable subscribers in the Corpus Christi area lost access to KRIS-TV and several other stations owned by Cordillera Communications, Inc. That shutdown has continued for nearly three months and resulted in viewers being denied access to holiday programming and even the Super Bowl.

Moreover, from all indications, 2012 is off to a similarly disruptive start (including actual shutdowns impacting, *inter alia*, DirecTV subscribers in Boston and Miami, Dish Network

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[9] *Id.* at ¶ 2. *See also id.* at ¶ 17 ("Subscribers are the innocent bystanders adversely affected when broadcasters and MVPDs fail to reach an agreement to extend or renew their retransmission consent contracts.").

[10] Joint Commenters' review of newspaper reports of retransmission consent disputes indicates that consumers in at least 31 different DMAs were impacted by broadcast blackouts in 2011 and that blackouts already have occurred in another 16 DMAs in just the first two months of 2012. In addition to the growing number of actual shutdowns, there are even more situations (and the number is growing) in which shutdowns are averted only at the last minute and only after consumers have been subjected to a confusing array of messages as to whether they are or are not about to lose access to certain stations. These situations also are inimical to the public interest.

subscribers in the New Orleans market, and Verizon subscribers in Harrisburg, Pennsylvania and in Syracuse and Albany, New York).[11]

Second, there is no question that the main reason for these shutdowns (and threatened shutdowns) is the skyrocketing price demands that broadcasters are making for retransmission consent. Again, the broadcasters attempt to dismiss the seriousness of the situation, arguing that the cost of retransmission consent is a mere drop in the bucket for cable operators and satellite providers.[12] But according to SNL Kagan, the average retransmission consent fee grew by 47 percent over just the past two years and there is no sign that the pace at which retransmission consent fees are growing will diminish any time soon.[13] Indeed, News Corp. reported a 100

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[11] *See, e.g.*, Todd Spangler, DirecTV, *Sunbeam Locked in Retrans Standoff*, Multichannel News, Jan. 18, 2012, available at http://www.multichannel.com/article/479274-DirecTV_Sunbeam_Locked_In_Retrans_Standoff.php. Mike Farrell, *New Orleans Fox Station Goes Dark on Dish*, Multichannel News, Feb. 1, 2012 available at http://www.multichannel.com/article/479995-New_Orleans_Fox_Station_Goes_Dark_on_Dish.php; Steve Donahue, *Verizon Loses Stations in Albany, Syracuse, Harrisburg in Retransmission Dispute*, FierceCable, Jan. 13, 2012, available at http://www.fiercecable.com/story/verizon-loses-stations-albany-syracuse-harrisburg-retransmission-dispute/2012-01-13. These actual shutdowns are in addition to several threatened shutdowns that already have occurred this year. *See, e.g.*, Steve Donahue, *LIN TV Threatens to Pull Fox and CBS Signals from Cox,* FierceCable, Feb. 22, 2012, available at http://www.fiercecable.com/story/lin-tv-threatens-pull-fox-and-cbs-stations-cox/2012-02-22; Steve Donahue, *ABC Affiliates Threaten to Pull Signals From Time Warner Cable in Milwaukee, Albany,* FierceCable, Feb. 29, 2012, available at http://www.fiercecable.com/story/abc-affiliates-threaten-pull-signals-time-warner-cable-milwaukee-albany/2012-02-29?utm_medium= nl&utm_source=internal.

[12] *See, e.g.*, Katy Bachman, *Retrans Rumble: Broadcasters Slam Time Warner Cable*, Adweek, Jan. 27, 2012, available at http://adweek.com/news/television/retrans-rumble-broadcasters-slam-time-warner-cable-13771.

[13] Mike Farell, *Kagan: Retrans Fees Up 47% Since 2009*, Multichannel News, February 15, 2012, available at http://www.multichannel.com/article/480598-Kagan_Retrans_Fees_Up_47_Since_2009.php.

percent increase in retransmission consent revenues in 2011 compared to 2010[14] and individual MVPDs report having received demands for increases of 200 percent or even higher at the end of last year.[15] Overall, Kagan has predicted that retransmission consent fees will hit $3.61 billion in 2017, an estimate that may well turn out to be conservative.[16] These hyperinflationary cost increases, which divert resources not only from the development of new and independent sources of diverse video content but also from the deployment of advanced broadband services, and which are occurring in a period of slow economic recovery and growth, are not something that the Commission can or should ignore. Doing so would be inconsistent with the Commission's general statutory duty to ensure that communications services are available "at reasonable charges" as well as with its more specific obligation under Section 325 to prevent retransmission consent fees from having an "unreasonable" impact on basic cable rates.[17]

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[14] Steve Donohue, *News Corp. Reports 100% Increase in Retransmission Consent Fees*, FierceCable, February 9, 2012, available at http://www.fiercecable.com/story/news-corp-reports-100-increase-retransmission-consent-fees/2012-02-09.

[15] *See, e.g.*, Allen Thayer, The Lingle Guide, *Dish Stand-off With Fox Continues*, Jan. 17, 2012, http://www.lingleguide.com/v2_news_articles.php?heading=0&page=72&story_id=1790 ("more than 200 percent increase" demanded by broadcaster); Opposition and Answer of Time Warner Cable Inc. to Petition for Finding of Bad Faith Retransmission Consent Negotiations, File No. CSR-8578-C, MB Docket No. 12-15 (filed Feb. 1, 2012) (station initially demanded increase of more than 700 percent).

[16] Mike Farrell, *Kagan: Retrans Revenue to Double by 2017*, Multichannel News, May 30, 2011, available at http://www.multichannel.com/article/468942-Kagan_Retrans_Revenue_to_Double_by_2017.php. CBS CEO Les Moonves has stated that his own prediction that his company alone would be garnering $1 billion in retransmission consent revenues by 2017 may be "very). conservative." Georg Szalai, *Les Moonves Eyes "Huge Numbers" for "Two and a Half Men" Fall Premiere*, The Hollywood Reporter, June 2, 2011, available at http://www.hollywoodreporter.com/news/les-moonves-eyes-huge-numbers-19418. Indeed, according to Moonves, when it comes to retransmission consent, "the sky's the limit." CableFAX Daily, June 3, 2011, at 2.

[17] *See* 47 U.S.C. §§ 151, 325.

Third, and of particular relevance for the purposes of this proceeding, there is ample evidence that the increased level of local television ownership concentration that has occurred in recent years is a significant factor driving the rapid escalation in retransmission consent prices. For example, a study conducted by Suddenlink in 2009 (and cited in an economic analysis prepared by William Rogerson and filed by ACA in the Retransmission Consent Reform docket) found a bump of more than 20 percent in the average retransmission consent fees paid for Big 4 stations where a single entity controls the retransmission consent negotiations for more than one such station in a market.[18] A separate study, prepared by Steve Salop for Time Warner Cable Inc., indicates that "LMAs and...sharing agreements strengthen the broadcasters' bargaining position" in retransmission consent negotiations, making shutdown threats more successful as a weapon in such negotiations.[19]

The fact that the aggregation of local market power in retransmission consent negotiations harms consumers and is contrary to the public interest is not a novel concept. Early in the history of retransmission consent, the Department of Justice ("DOJ") challenged a collusive arrangement under which several stations in the Corpus Christi DMA agreed to coordinate with each other with respect to their retransmission consent negotiations with the local cable operators. According to DOJ, such behavior violates the antitrust laws by allowing

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[18] *See* William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (filed May 18, 2010 in MB Docket No. 10-71 by the American Cable Association). *See also* Suddenlink Communications, "Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant,* CSR No. 8233-C, 8234-M at 5 (filed Dec. 14, 2009).

[19] Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinksmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 54 (filed June 3, 2010 in MB Docket No. 10-71 by Time Warner Cable Inc.).

the stations to "extract...more favorable terms from the cable companies than they would have otherwise obtained."[20]

While examples of overt collusion among unrelated broadcast stations are uncommon today, the practices that DOJ identified as harming consumers are continuing in a new form. Today, stations are causing the same anticompetitive harms by taking advantage of technological developments (*i.e.*, the introduction of multicasting) and gaps in the ownership rules (*i.e.*, the Commission's approval of and/or acquiescence in contractual arrangements that allow multiple stations in a single market to delegate control over their retransmission consent decisions to one station) that allow multiple stations or affiliates to engage in collusive, joint negotiations.[21]

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[20] Competitive Impact Statement, *United States v. Texas Television, Inc., Gulf Coast Broadcasting Company and K-Six Television, Inc.*, Civ. No. C-96-64 (S.D. Tex. February 2, 1996) at 6; *see also id.* at 8 (stating that the antitrust laws require that broadcasters exercise their retransmission consent rights "individually and independently" and that coordination of retransmission consent negotiations by stations that compete with one another in the market "violates the Sherman Act.").

[21] *Id.* at ¶ 23. Notably, even where retransmission consent agreements are not simultaneously negotiated, management sharing arrangements between stations can have an adverse impact on competition between stations and distort the retransmission consent market. For example, as indicated above, Cordillera Communications, Inc. has been denying Time Warner Cable's Corpus Christi-area subscribers access to KRIS-TV for nearly three months. One would expect that the other stations in the market would view this situation as creating an opportunity for them to promote the availability of their programming as an alternative to the KRIS programming that has been withdrawn from Time Warner Cable's subscribers. However, according to Time Warner Cable, the market's CBS affiliate, KZTV, has been actively encouraging subscribers to find an alternative way to receive KRIS' programming. Why would one station attempt to assist its competitor in this way? The answer is that Cordillera operates KZTV pursuant to an SSA with SagamoreHill Broadcasting (KTZV's licensee). This relationship gives Cordillera both the incentive and ability to protect itself against competition from KZTV and to engage in collusive behavior designed to put pressure on Time Warner Cable. *See* Opposition and Answer of Time Warner Cable Inc. to Petition for Finding of Bad Faith Retransmission Consent Negotiations, File No. CSR-8578-C, MB Docket No. 12-15 (filed Feb. 1, 2012).

B. The broadcasters' opposition to changes in the local ownership rules is self-serving and does not stand up to scrutiny.

While it is entirely appropriate and, indeed, necessary for the Commission to take the opportunity presented by the instant quadrennial review proceeding to make changes in its ownership rules to prevent market-distorting collusion and the exercise of unfair leverage in the negotiation of retransmission consent agreements, the broadcast industry not surprisingly opposes any suggestion that the Commission's ownership rules consider the impact of local concentration of television station ownership or control on retransmission consent negotiations or take any action to close the gaps that exist in the current rules.[22] However, the broadcasters cannot and do not offer a persuasive case for Commission inaction.

For example, the broadcasters contend that the use of joint operating agreements such as Local Marketing Agreements ("LMAs"), Shared Services Agreements ("SSAs"), and Joint Sales Agreements ("JSAs") are beneficial to the public because they produce cost savings for individual television stations.[23] Even if these agreements produce the claimed savings, the evidence is at best inconclusive as to whether those cost savings are reflected in improved programming, particularly local programming. Indeed, the record shows that when stations enter into such agreements, one of the first things that happens is that news rooms are consolidated, leaving consumers with less competition, less diversity, and less unique local content than

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[22] *See, e.g.,* Letter from Erin L. Dozier, Sr. Vice President and Deputy General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 09-182 and 10-71 (filed Nov. 30, 2011) ("*Nov. 28 NAB Letter*"); Letter from Jonathan D. Blake, Counsel for the Coalition of Smaller Market Television Stations, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 09-182 and 10-71 (filed Dec. 21, 2011) ("*Dec. 21 CSMTS Letter*").

[23] *See, e.g., Nov. 28 NAB Letter; Dec. 21 CSMTS Letter.*

before.[24] In addition, there is no evidence that consolidating authority to negotiate retransmission consent agreements produces benefits for the public that offset the higher fees that have been shown to result when two or more stations negotiate as one.

Nor is there any merit to the broadcasters' contention that shared retransmission consent negotiating authority is necessary to counteract the alleged market power of the MVPDs with whom broadcasters negotiate retransmission consent. Mediacom has previously addressed this argument in detail, pointing out that the broadcasters' assertion that MVPDs enjoy regulatory advantages that would make it unfair for the Commission to restrict broadcasters from engaging in coordinated retransmission consent negotiations in a market has no basis in fact and is nothing more than an effort by the broadcasters to divert attention from the unfair advantages the current rules give them in retransmission consent negotiations.[25]

As Mediacom pointed out, the argument that local stations' leverage in retransmission consent negotiations has diminished because the top four MVPDs' share of the national multichannel market has increased over the past decade is contrary to logic and common sense. While horizontal concentration in the MVPD industry has increased, the cable industry long ago lost any vestige of monopoly power that it might have once possessed.[26]

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[24] For example, University of Delaware Professor Danilo Yanich has published a study (partially funded by the Communications Workers of America) confirming that where stations enter into management sharing arrangements, it is common for one of the stations to have its separate newscast eliminated and replaced with the other station's programming content. A copy of Professor Yanich's report can be found at http://files.cwa-union.org/national/News/Misc/dyanich-news-service.pdf.

[25] *See* Letter from Joseph E. Young, Senior Vice President and General Counsel, Mediacom Communications Corporation, to William T. Lake, Chief, Media Bureau, MB Docket Nos. 09-182 and 10-71 (filed Dec. 7, 2011).

[26] *Id.*

First, the top four MVPDs do not negotiate retransmission consent deals jointly with each other or with any of the hundreds of other companies that account for the 30% of the market not controlled by the top four. Indeed, two of those four (DISH and DirecTV) compete aggressively with cable providers (and other wired providers) of all sizes. The fact that the top four MVPDs are relatively large and have grown in size over the past decade certainly does not help the Joint Commenters (or any other cable company) secure better terms in retransmission consent negotiations. Furthermore, the fact that retransmission consent revenues have grown at rates far in excess of inflation (as broadcasters themselves cannot and do not deny) belies the claim that the market shares of the largest MVPDs (individually or in the aggregate) have somehow held down broadcasters' retransmission consent fees for the industry as a whole.

Second, what is relevant in measuring bargaining power in retransmission consent negotiations is not the national market shares of MVPDs or station owners, clustering, HHI numbers, ratings, or relative percentages of off-air and pay-TV households. What is relevant is how much damage that the parties to a retransmission consent negotiation can inflict on each other if there is an interruption of service. When broadcasters were first accorded retransmission consent rights in 1992, Congress and the Commission expected that the "balance of terror" (*i.e.*, the relatively equal opportunity to harm the other party to the negotiation) that then existed would keep each side in check and protect consumers from service disruptions.

But the balance of terror that made retransmission consent work disappeared when the MVPD marketplace became highly competitive. With subscribers able to move to a new provider if their chosen MVPD could not reach agreement to carry a desired local station, broadcasters (who continue to enjoy a local monopoly over a substantial portion of the program day because of contractual restrictions on the grant of retransmission consent by out-of-market

stations and the enforcement of territorial exclusivity provisions through the network non-duplication and syndicated exclusivity rules) gained the upper hand.

Thus, the only significant downside risk to a station that denies an MVPD retransmission consent is the potential loss of advertising revenues. But the availability to consumers of an alternative source for the station's programming (including not only a competing MVPD but also Internet retransmissions by the station or network) mitigates the impact that a shutdown will have on a broadcaster's ratings and ad revenues. And to the extent that consumers switch to a competing MVPD, the station continues to collect retransmission consent fees. In contrast, the MVPD that loses a customer to a competing distributor may never get back the revenues that subscriber represented.

Given that the ability to harm an MVPD by denying it the consent needed to provide its customers with a local station gives the broadcaster bargaining leverage over the MVPD, it is a simple matter of common sense that the broadcaster's ability to inflict harm, and thus its leverage, is significantly enhanced where the broadcaster can deny the MVPD access to more than one of the stations or network affiliates serving the market. As discussed above, this common sense conclusion is backed up by empirical data showing that prices are substantially higher where negotiations are conducted jointly on behalf of multiple Big Four affiliates in a market. The losers, of course, are the viewers who are faced with paying a market-power based premium for access to "free" local stations or risk of losing access to those stations from their chosen MVPD.

In short, it is clear that the aggregation of local market power by local television stations – whether through actual or virtual control of two (and, increasingly, three) Big Four affiliates in market – can and does encourage and enable those stations to make unreasonable retransmission

consent demands and to use coercive negotiating tactics in an effort to force MVPDs to capitulate to those demands. Consumers end up being the ones harmed because the broadcasters' demands and tactics result in higher prices and/or disruptions of service. What are needed, therefore, are not band-aid solutions, but meaningful reforms, including strengthened restrictions on a single entity's ability to exercise either actual or virtual control of the retransmission consent negotiations of multiple Big Four affiliates in a market.

II. There are Several Steps the Commission Can and Should Take to Strengthen Its Rules Prohibiting Common Ownership or Control of More Than One Big-Four Affiliated Station in a Market and to Limit the Impact of Such Common Ownership on Retransmission Consent Negotiations.

As alluded to above, the Commission currently has pending before it a rulemaking proceeding in which it is considering certain proposed reforms of its rules governing retransmission consent negotiations.[27] According to the NPRM, some broadcasters take the position that issues regarding the coordinated retransmission consent negotiations should be addressed in that proceeding, not here.[28] However, the two proceedings are not mutually exclusive. Thus, even as the Commission considers in the retransmission consent reform rulemaking whether to adopt a blanket prohibition on joint retransmission consent negotiations by stations that are not commonly owned (a proposal that Joint Commenters support), it should not be deterred from considering in the instant proceeding other changes to its ownership rules that are necessary and appropriate to protect the retransmission consent process from the broadcasters' market power abuses.[29] In particular, the Commission should adopt measures to close loopholes in its rules that allow broadcasters to aggregate market power through, *inter alia*,

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[27] *Retransmission Consent Reform NPRM, supra.*

[28] *NPRM* at ¶ 203.

[29] *Retransmission Consent Reform NPRM* at ¶ 23.

contractual agreements, affiliate "swaps," and the creation of multicast duopolies. Furthermore, the Commission should back up any new ownership rules with strengthened oversight and enforcement measures.

A. Retransmission consent affects a station's "core operating functions" and the Commission therefore should make clear that any arrangement allowing one station to decide whether and/or how another station's retransmission consent rights will be exercised will be deemed to create an attributable ownership interest between the two stations.

Under the Commission's current local television ownership rules, certain time brokerage agreements between non-commonly owned television stations (known as "local marketing agreements" or "LMAs") are deemed to create attributable ownership interests. However, other arrangements, including JSAs and SSAs do not give rise to attributable interests under the current rules. The NPRM asks whether the Commission should expand the universe of agreements that will deemed to create an attributable ownership interest between stations to encompass these types of agreements.[30] The answer is yes – the Commission at minimum should revise its rules to make clear that any arrangement under which one station can negotiate retransmission consent on behalf of another station will be deemed to create an attributable ownership interest between the two stations.

As the NPRM points out, the Commission has recognized that arrangements between stations should be deemed to create attributable ownership interests where they confer a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees <u>or other core operating functions</u>."[31] In the past, the Commission has not been particularly vigilant in enforcing this standard. However, if anything constitutes a "core

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[30] *NPRM* at ¶ 204.

[31] *Id.*, *citing Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559 (1999) at ¶ 1 (emphasis added).

operating function" of a broadcast station, it is the station's availability to the viewers it is licensed to serve. The decisions made by or on behalf of a station regarding whether and on what terms to grant retransmission consent plainly can and do affect this core operating function.[32]

Thus, the Commission should make clear that any formal or informal arrangement by which a station surrenders *de facto* or *de jure* control to another station over the decision to elect retransmission consent or the negotiation of the terms for granting retransmission consent has the effect of conveying an attributable ownership interest fully subject to the limitations of the local television ownership rules.[33] In particular, such arrangements should be deemed to trigger the prohibition on a single entity possessing an attributable interest in more than one Big Four station in a market.[34]

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[32] Indeed, the broadcasters themselves have suggested that retransmission consent can be essential to a station's very survival. *See, e.g.*, John Eggerton, *Cable, Satellite Ops Seek Congressional Review of Retrans*, Multichannel News, March 10, 2010, available at http://www.multichannel.com/article/449955-Cable_Satellite_Ops_Seek_Congressional_Review_Of_Retrans.php.

[33] As indicated above, Joint Commenters also support the adoption of a bright line rule banning all joint negotiations of retransmission consent by non-commonly owned broadcasters, even where the stations have an otherwise permitted management sharing arrangement. As has been demonstrated, coordinated negotiations drive up the price of retransmission consent and have been deemed *per se* violations of the antitrust laws by the Department of Justice. *See Joint Commenters Comments in MB Docket No. 10-71*, *supra* at 19.

[34] While the evidence is at best mixed regarding the benefits, if any, that accrue to the public from various cost sharing arrangements, the proposed modification of the attribution rule to encompass agreements by which a station delegates retransmission consent negotiating and/or decisionmaking authority to another station in the same market would not necessarily prohibit all JSAs, SSAs, etc. Such arrangements, if otherwise consistent with the Commission's rules, would be permitted provided that each station was contractually required to exercise independent responsibility over its own retransmission consent-related decisions. The Commission should make clear that it will carefully scrutinize the behavior of stations that are alleged to be skirting the prohibition on coordinated negotiations by using the same individuals to conduct negotiations or by otherwise allowing the dissemination of information about one station's retransmission consent negotiations to be communicated to the other station.

B. The Commission should close the gaps in its rules that permit stations to create Big Four duopolies through "affiliate swaps" or by using a station's multicast capacity.

The NPRM seeks comment on two sets of circumstances that currently fall outside the Commission's prohibition on the common ownership of two or more Big Four affiliates in a market. One is the situation that arises where a station with a permitted duopoly consisting of a Big Four affiliate and a non-Big Four affiliate replaces the non-Big Four affiliation with a second Big Four affiliation.[35] The second situation arises where a station uses a portion of its multicast capacity to become the market affiliate of more than one of the Big Four networks.

There is no justification for allowing either of these situations to escape scrutiny under the Commission's local television ownership rules. As the Commission has pointed out, permitting a single entity to obtain a Big Four duopoly by switching the affiliation of one of its existing stations from a non-Big Four network to a Big Four network "creates the potential for evading the intent of the [prohibition on ownership of two Big Four stations]."[36] The fact that the transaction by which the Big Four duopoly was created occurred subsequent to the creation of a permitted non-Big Four duopoly should make no difference – the harm to the public interest remains the same as if the second station had been a Big Four affiliate at the time it was acquired.

Similarly, a station's use of its multicast capacity to exercise control over two or more Big Four affiliations in a market poses the same threats to the public interest as common ownership of two or more separately licensed local stations whose primary signals are Big Four affiliates. Indeed, allowing a station to control multiple Big Four affiliations in a single market

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[35] *NPRM* at ¶ 204

[36] *Id.* at ¶ 44.

through the use of multicast capacity not only harms competition, it also reduces diversity and localism since the multicast capacity is not available for new, innovative programming and is likely to simulcast much of the local programming found on the station's primary signal.

Joint Commenters are particularly concerned about the impact that the creation of multicast "virtual" duopolies is having on retransmission consent negotiations. Based on an informal review of publicly available data, it appears that nearly one out five DMAs now has at least one multicast "Big Four duopoly" and the number of such arrangements appears to be growing rapidly.[37] Moreover, as Joint Commenters detailed in their comments and reply comments in the retransmission consent reform proceeding, the unfair retransmission consent bargaining power that having control over two Big Four affiliations in a market gives a broadcaster clearly is one of the principal motivating factors (if not the motivating factor) behind this surge of multicast combinations.[38]

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[37] In April 2011, it was reported that there were around 70 multicast (or "D2") duopolies combining either two Big Four network affiliates or one Big Four affiliate and one "Little Two" (*i.e.*, MyNetwork or CW) affiliate. *See* NPRM at note 123 *citing* Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck, Apr. 20, 2011. Today, Joint Commenters estimate there are nearly 150 multicast duopolies that involve a Big Four/Little Two combination. In some instances, multicast capacity has been used to create "triopolies" consisting of a combination of three Big Four and Little Two affiliates.

[38] *See Comments of Joint Commenters in MB Docket No. 10-71*, *supra* at 18-22; *Reply Comments of Joint Commenters in MB Docket No. 10-71*, *supra* at 6-7. The trend towards the creation of virtual multicast Big Four duopolies, and the relationship between that trend and retransmission consent, is illustrated by Fox's decision to move its affiliation in the Fort Wayne, IN DMA from Nexstar-owned WFFT's primary stream to a multicast stream of Granite Broadcasting Corporation's WISE, the market's NBC affiliate. Granite also has an LMA with Malara Broadcasting, licensee of WPTA, the market's ABC and (via multicast) CW affiliates. Nexstar has filed an antitrust suit against Granite, citing the fact that it effectively controls the affiliates of three of the Big Four networks and five of the top six networks in Fort Wayne. *See* Michael Malone, *Nexstar Files Suit Against Granite,* Broadcasting & Cable, July 25, 2011, available at http://www.broadcastingcable.com/article/471496-Nexstar_Files_Suit_Against_Granite.php.

Because affiliate swaps and the creation of "virtual" multicast duopolies threatens to make a mockery of the local television ownership rules, the Commission should amend those rules to limit the circumstances in which a single entity may control the affiliation of two or more the Big Four networks in a single market. In particular, the rule should provide that it does not matter whether a second Big Four affiliation is entered into at the time the station is acquired or after-the-fact. Moreover, stations should be barred from using multicast capacity to serve as the affiliate of more than one Big Four network in a market in those instances where there is an unused commercial allocation that could be licensed to serve the DMA or where the DMA is served by a commercial station that is not affiliated with a Big Four network and has unused multicast capacity.[39]

C. The Commission should aggressively enforce restrictions on virtual Big Four duopolies and other arrangements that give a single station control over the retransmission consent-related activities of multiple stations in a market.

The Commission has asked for comment on the whether any new restrictions it adopts on agreements between stations in a DMA should be applied to existing arrangements.[40] While the Commission is understandably reluctant to interfere with existing relationships that it allowed to be created under the existing rules, simply grandfathering those relationships will leave MVPDs and their customers vulnerable to the anticompetitive forces that the proposed revisions to the rules are supposed to keep in check. Therefore, the Joint Commenters suggest that the Commission offer stations a series of options as to how to come into compliance with any new

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[39] In the alternative, the Commission should at very least, bar a network that terminates an existing affiliate relationship with a station in a DMA from entering into a new affiliation agreement using the multicast capacity of another Big Four station in the same market.

[40] *NPRM* at ¶ 205.

rules adopted to prevent common control from being exercised over the retransmission consent-related activities of more than one station in a market.

For example, in the case of LMAs, JSAs, SSAs, and other agreements that give a single entity control over the retransmission consent negotiations of more than one Big Four affiliate in a market, the Commission should require that the parties to the agreement terminate or reform their arrangement prior to the expiration of any existing retransmission consent agreements involving the stations. The Commission should make clear that the severing of the prohibited relationship must be complete and retransmission consent-related actions must be taken by the stations "individually and independently"[41]– that the stations cannot use a common agent to conduct retransmission consent negotiations nor can they share any information with each other, directly or indirectly, regarding their decisions to elect retransmission consent or the conduct of any negotiations for a retransmission consent agreement.

With respect to situations involving commonly-owned Big Four affiliates in single market – including any such situations currently allowed by a waiver or that fall under the "affiliate swap" gap in the rules, the Commission should require divestiture within one year unless the owner of the stations agrees to limit its election of retransmission consent to no more than one Big Four affiliate in a market. Considering that the Commission has the authority to order divestiture of existing ownership arrangements that would not be permitted under its rules (even where the rules are revised subsequent to the creation of the prohibited combination), there is no legal barrier to the Commission imposing on the prohibited combination a condition that is reasonably calculated to address the risk of collusion and/or unfair leverage that would otherwise exist.

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[41] *See* note 20 *supra*, *citing* Competitive Impact Statement, *United States v. Texas Television, Inc., Gulf Coast Broadcasting Company and K-Six Television, Inc.*

In the case of "virtual" multicast duopolies, limiting the election of retransmission consent to a single Big Four affiliate is not an option because stations only have must carry rights as to their primary streams and it would be possible for stations to "game" the condition by assigning non-Big Four affiliates to their primary streams. Thus, in order to establish a modicum of structural protection against collusive negotiations and/or unfair leverage, the Commission should exempt multicast duopolies from divestiture only if the station agrees to stagger the expiration dates of its Big Four affiliate retransmission consent agreements so that there is at least six months separation between the dates on which any two Big Four stations' grant of retransmission consent expires.

D. Joint Commenters also support proposals to require greater transparency with respect to the terms of affiliation agreements and agreements between stations serving the same market.

Finally, Joint Commenters urge the Commission, in formulating revised local television ownership rules, keep in mind the old adage that "sunlight is the best disinfectant." Although broadcasters are required to file their network affiliation agreements and certain management agreements with the Commission and to make copies available to the public either as part of the station's public file or upon request, it has been Joint Commenters' experience that current copies of such agreements often are not on file or readily accessible to the public.[42] Moreover, agreements such as SSAs that do not create attributable ownership interests under the current rules are not subject to mandatory public disclosure (although the Commission is considering requiring such disclosure in its "Enhanced Disclosure Requirements" proceeding).[43] Thus, Joint

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[42] *See, e.g.,* 47 C.F.R. § 73.3613.

[43] *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket Nos. 00-168 and 00-44 (rel. Oct. 27, 2011).

Commenters agree with ACA and others that certain and complete public disclosure of any and all agreements that could be relevant to determining whether a station is a party to a prohibited relationship is critical if the Commission's substantive rules are to be effective.[44]

CONCLUSION

For the reasons stated above, the Commission should modify its local broadcast television multiple ownership rules to close gaps that currently are allowing broadcasters to obtain and abuse market power in retransmission consent negotiations.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION AND CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS

By: /s/ Seth A. Davidson
Seth A. Davidson

Edwards Wildman Palmer LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Their Attorneys

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[44] *See, e.g.,* Comments of the American Cable Association, MM Docket Nos. 00-168 and 00-44 (filed Dec. 22, 2011). Joint Commenters also have endorsed the adoption of regulations mandating public disclosure of the terms of retransmission consent agreements. *See Comments of Joint Commenters in MB Docket No. 10-71*, *supra* at 27-28; *Reply Comments of Joint Commenters in MB Docket No. 10-71*, *supra* at 8.