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 SINCLAIR BROADCAST GROUP, INC.

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March 5, 2012

Summary

Section 202(h) of the Act specifically requires the Commission to review its broadcast ownership rules at regular intervals to "determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest ." As Sinclair has repeatedly shown in numerous filings before the Commission and with the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Third Circuit, neither the "top-four" restriction nor the "eight voices" test are necessary in the public interest as the result of competition, and they therefore should both be repealed. In fact, the United States Court of Appeals for the District of Columbia Circuit in *Sinclair Broad. Group, Inc. v. FCC* agreed with Sinclair and found the "eight voices" test to be arbitrary and capricious. Yet inexplicably, in 2008 the FCC reinstated the "top-four" restriction and the "eight voices" test despite the fact that between 1999 and 2008 (and now 2012) the increase in media competition generally, and video competition in particular, has been stunning to say the least.

Despite this dramatically changed media market place and explosion in video competition, the FCC is once again proposing to limit its definition of "competition" to television stations as *only* competition from other local television stations, and to ignore competition from other video news and programming sources. The number of local television stations cannot increase because the FCC controls the allocation process, and has frozen allocation of new television channels nationally. In fact, the Commission plans to reallocate the equivalent to 20 television channels nationally from broadcast to mobile broadband use. Therefore, under the FCC's definition of "competition," there will never be greater competitive

forces than at present, despite the massive growth of cable and satellite programming outlets, and the explosive growth of video delivery via broadband technology.

To make matters worse, the NPRM in this proceeding incredibly requests comments regarding whether the Commission should treat news sharing agreements and other types of arrangements as attributable interests, which would impose considerably greater constraints on many broadcasters, since attributable interests trigger the Commission's media ownership rules. However, real-world experience demonstrates that these agreements and arrangements result in more, not less news, which is purportedly a primary goal of the FCC. Indeed, none of the NPRM's proposals to potentially increase restrictions on local television broadcast ownership or operation are within the proper scope of this proceeding, and, in any event, are not justified in the public interest. For these and the numerous other reasons discussed in these Comments, the Commission should eliminate its unnecessary restrictions on the marketplace and refrain from imposing new and unnecessary ownership regulations.

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Sinclair Broadcast Group, Inc. ("Sinclair") hereby responds to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-referenced proceeding.[1] Sinclair is filing these comments to address the Commission's local television ownership rules. Sinclair has already commented on these rules numerous times in the past. Accordingly, Sinclair incorporates herein by reference each of the filings listed on Exhibit A hereto.

Background

In 1996 Congress required the FCC to review its broadcast ownership rules at regular intervals to "determine whether any of such rules are necessary in the public interest as the result of competition."[2] The Commission must therefore "repeal or modify any regulation it determines to be no longer in the public interest."[3] In 1999 and again in 2003, the FCC

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[1] *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 Proposed Rulemaking, FCC 11-186, MB Docket Nos. 09-182 and 07-294 (rel. December 22, 2011) ("NPRM").
[2] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat 56, 111-112 (1996) (*1996 Act*).
[3] *Id.*

conducted proceedings under § 202(h) of the *1996 Act* and concluded that increasing competition in the video marketplace required its broadcast ownership rules to be relaxed. Notwithstanding the holding of the United States Court of Appeals for the District of Columbia Circuit in *Sinclair Broad. Group, Inc. v. FCC,* that found the "eight voices" test to be arbitrary and capricious, and the Commission's subsequent admission that it could not justify that test under § 202(h),[4] in 2008 the FCC reverted to the more stringent 1999 local television ownership rule, including the "eight voices" test and the "top-four" restriction, without providing any coherent explanation for doing so.[5] Yet between 1999 and 2008, and even more so in 2012, the increase in media competition generally, and video competition in particular, has been stunning.

Because § 202(h) of the *1996 Act* requires the Commission to repeal or relax its ownership rules to respond to increased competition in the market, consideration of the market changes between 1999 and 2012 must form the central pillar of the FCC's NPRM and rulemaking proceeding. Nevertheless, the Commission in the NPRM has once again made the determination that the "eight voices" test and the "top-four" restriction remain necessary to promote competition. While the FCC's NPRM begrudgingly acknowledges the ubiquitous availability of non-broadcast video services (e.g., cable, Internet), the Commission stubbornly clings to its earlier position that television broadcasters compete for viewers only against

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4 The Court specifically determined that the FCC failed to justify the "eight voices test" as "necessary in the public interest" as required under § 202(h) of the *1996 Act*. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The D.C. Circuit also determined that the FCC had not justified why non-broadcast sources (such as newspapers and radio stations) counted as "voices" for the purposes of cross-ownership of different media while the number of "voices" for local television ownership purposes included only broadcast television stations and remanded the matter to the FCC, with instructions to better justify the "eight voices test" or eliminate it. The Commission found in 2003 that it could not justify the continued imposition of the "eight voices test" under § 202(h). *See In Re 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 F.C.C. R. 13620, 13688 at ¶133 (2003).

5 *See 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, ¶¶ 87-109 (2008).

themselves in a market separate from non-broadcast operators.[6] On that basis alone, the FCC concludes that stringent and outdated local television ownership rules should remain in place. In doing so, the NPRM is based upon the untenable premise that in 2012 the media landscape has not sufficiently changed since 1999, even though any objective observer would not dispute that the video marketplace and the competitive landscape that existed in 1999 bear no resemblance to the hyper-competitive video marketplace that exists today, and that the NPRM's proposal to maintain the local television ownership rules in their current form ignores reality.

If this were not ominous enough news for television broadcasters, the FCC incredibly requests comments regarding whether it should treat news sharing agreements and other types of arrangements as attributable interests.[7] Specifically, the Commission asks whether it should revise its rules to make certain arrangements between stations -- such as shared services agreements, local news sharing arrangements, and agreements related to joint retransmission consent negotiations -- attributable to the stations' owners. Not only is this expansion of regulation beyond the permissible scope of a quadrennial review under § 202(h), but altering the concept of attribution to include such contractual relationships would impose considerably greater constraints on many broadcasters, since attributable interests trigger the Commission's media ownership rules. As shown below, the public interest benefits of these arrangements clearly outweigh any perceived detriments.

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6 To the extent that competition issues arise relating to advertising, they are better suited for antitrust review by the Department of Justice ("DOJ"). The DOJ, not the FCC, is the expert agency with respect to issues of economic competition, and has adopted rational methods for analyzing competition based on the characteristics of particular geographic and economic markets, rather than utilizing the "one-size-fits-all" approach adopted by the FCC, which fits no market. The DOJ is the appropriate forum for review of competition rules in this area.

7 NPRM at ¶¶ 194-208.

Discussion

As demonstrated in the filings incorporated herein, as well as in the comments of Sinclair, dated July 12, 2010, submitted in this proceeding, neither the "eight voices" test nor the "top-four" restriction are necessary in the public interest and as a result must be eliminated. Although the FCC has never been convinced that this is the case with respect to the "top-four" restriction, in 2003 the FCC concluded that the "eight voices" test " is not necessary in the public interest to promote competition…[and] does not promote, and may even hinder, program diversity and localism."[8]

Notwithstanding this finding, in 2008, in a remarkable turnabout not tempered by the continued explosive growth of alternative sources of news and entertainment between 2003 and 2008, the FCC suddenly discovered that the "eight voices" test was in fact necessary to promote competition for viewers and advertisers.[9] The FCC explained its 180 degree turn as being based on the conclusory statements of three special interest groups, although a disinterested observer might have concluded the only thing that had changed was the Circuit Court reviewing the FCC's actions.

It is difficult to comment on the FCC's remarkable positional change of heart given that the FCC was not entirely clear regarding what exactly it means by "competition" (which apparently requires the protection of the "eight voices" test) and how this differs from program diversity (which the FCC concluded does not require such protection). But to the extent any distinction does exist, neither competition nor program diversity requires the "eight voices" test.

[8] *In Re 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, supra*.

[9] Again, the DOJ and not the FCC is the proper agency to review whether the effect of a proposed merger may be to "substantially to lessen competition" in the market. 15 U.S.C. § 18. The FCC's one-size-fits all approach here is also inappropriate and inadequate when compared to the DOJ's more sophisticated approach that considers individual market factors.

As has been fully documented in Sinclair's prior filings, the combination of broadcast television stations in a single market leads to efficiencies which lead to improved programming. Numerous examples exist of duopolies, LMAs and news sharing arrangements leading to increased news programming and other public interest benefits.

Conversely, the self-styled "public interest" groups who oppose consolidation do so based on theoretical concerns which are far removed from the actual operation of television stations and which are not supported by any examples of harm. It bears repeating that in the twenty years of television station combinations, which began with local marketing agreements in 1992, not a single example of any harm to program diversity or competition for viewers has ever been identified.

The parties that oppose consolidation might take exception to the immediately preceding statement by pointing to claimed reductions in news staffs from the consolidation of news operations. Such a view, however, reveals a complete misunderstanding of the real-world operation of television stations, presumably resulting from the fact that such commentators likely do not have experience operating television stations.

The fundamental flaw in their argument, and indeed in the entire underpinning of the Commission's local television ownership rules, is the mistaken understanding that in the absence of one station producing news for two in-market stations, both stations would produce news programs on their own. However, this theory does not reflect the competitive real-world business of television broadcasting and is simply not the case. In reality, the alternative to a station receiving its news from another station in the market is not, in most cases, for the receiving station to produce its own news. The alternative is no news programming at all on the first station. If, as the Commission claims, "a major goal of the [ownership] rules is to encourage the provision of local news,"[10] then the Commission should take into account the real-world impact its outdated rules have on the television industry. Should the Commission bar news sharing arrangements, the net result will be less news available to viewers, not more.

The previous Sinclair filings and comments of other television broadcasters alike are replete with examples of news programming beginning *after* the commencement of an operational relationship between two stations in the same market. Recently, the industry has seen a marked increase in news sharing, *i.e.*, one station in the market producing news for a second station in the market with which it does not otherwise have an operational relationship. A recent survey by The Radio Television Digital News Foundation ("RTNDA") and Hofstra University indicates that 25.1% of TV news departments produce news for another local television station.[11] An even greater percentage of stations provide some news that airs on another local station even when not producing their news in its entirety.[12]

Practical experience within Sinclair's operations strongly suggests that such news sharing arrangements are a necessary component for many stations to broadcast any news at all. Although Sinclair would generally prefer to produce its own news at each of its stations, it utilizes the services of other stations to produce news where it cannot profitably produce the news on its own. For example, Sinclair recently added news produced by others on its stations in St. Louis, Missouri and Greensboro, North Carolina, neither of which had broadcast local news for many years.[13] That, as the Commission seems to suggest, such arrangements represent some

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[10] NPRM at ¶ 6.

[11] *See* RTNDA/Hofstra University 2011 TV and Radio News Staffing and Profitability Survey, www.rtnda.org/pages/media-items/2011-tv-and-radio-news-staffing-and-profitability-survey2033.php (last accessed February 27, 2012).

[12] *See id.*

[13] It is worth noting that news is being provided to KDNL in St. Louis by KSDK-TV, the NBC affiliate in St. Louis, while in Greensboro WXLV broadcasts news produced by News 14 Carolina, a 24-hour a day statewide news channel operated by Time Warner Cable. Not only does it defy logic to claim that Time Warner Cable does not count as a voice in Greensboro, but simply makes no sense that anyone would argue that WXLV can obtain news

sort of Machiavellian attempt to influence viewers by not disclosing the origin of the news is simply incorrect. In fact, in numerous instances the actual name of the news programming incorporates the identity of the producing station,[14] in an effort to increase viewership by lending the credibility of a known news source to a news product on another station.

The Commission, and the groups seeking to have the Commission further restrict broadcast operations, seem to believe that news sharing arrangements reflect a decline in public service. They cite the number of news sharing arrangements and allege that there are detrimental effects that are self-evident. Again, this theory is based on a misunderstanding of how the television industry operates and should not play a role in serious policymaking, particularly when the policy to be made potentially involves curbs on dissemination of information and protected speech. As noted above, the allegations assume that news sharing displaces an independent newscast. In fact, in many if not most cases, news sharing results in a new newscast that otherwise would not exist at all. In other cases, it improves the quality of the newscast for both stations involved, because producing local news is inherently a high fixed cost activity with relatively low marginal cost for additional output. Better economics to support the fixed costs means better output for all distribution points.

News sharing is not a conspiracy. Arrangements develop depending on the unique facts and circumstances of each market. Sometimes a very strong local news service, feeling pressure to cut costs because viewership is lower and advertising revenue is eroding, will seek additional distribution outlets to maintain critical mass and high quality. In other cases, news sharing allows the producing station to upgrade staff and equipment. In still other cases, news sharing is

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from Time Warner Cable, but KDNL cannot provide a similar public service to the residents of St. Louis simply because KSDK is a television station and not a cable operator.

14 For example, the news produced by WPXI, the NBC affiliate in Pittsburgh, Pennsylvania, which broadcasts on Channel 11, for the Sinclair Pittsburgh FOX affiliate, is branded as “Channel 11 News on FOX 53”.

often a last resort for a television station -- an alternative to dropping local news programming altogether. Sometimes news sharing means pool coverage or sharing equipment, with different talent or editors or both for different newscasts. Occasionally, the same newscast is run at different times on different stations.

The notion that running the same newscast at two different time slots is somehow bad for viewers is uninformed opinion at best. Not every household chooses to subscribe to cable service or owns a DVR. Making a newscast available at different times makes it accessible to more people. Any television media buyer knows that the demographic of a 5 AM newscast is very different from that of a 7 AM newscast, just as viewership of a 10 PM newscast is very different from that of an 11 PM newscast. Indeed, the Commission can point to no studies that support the supposition underlying this concept -- that viewers who watch news on one station, say at 10:00 PM, would also watch an 11:00 PM newscast on another station.

It is ironic that when local stations work together to increase news output they are criticized for doing so because local content is shared. In the majority of cases, the programming displaced by the shared newscast is syndicated fare. Early morning newscasts and news sharing arrangements have been crucial in the launch of 5 AM and (in some markets) 4 AM newscasts on many television stations and early morning newscast have often displaced paid programming. And, to be frank, in most cases, the same key newsworthy events are covered by all news operations in a market, and the coverage is, by its nature, remarkably consistent. After all, there are not really many different ways to cover a car crash, a fire, or a crime. There is no real public interest basis for the Commission taking action that would place a number of newscasts in jeopardy, just to encourage having one extra set of cameras and one extra reporter at a news scene.

While the FCC continues to downplay the impact of cable and the Internet as alternative outlets for news, television stations' finances and ratings tell a far different story. While cable news channels do focus generally on national news stories, the popularity of these channels and the declining rating of local news programs suggest that a vast segment of the population would prefer watching national news to the exclusion of watching local news.[15] Not only are such channels substitutes for local broadcast television channels, rendering the FCC's local ownership restrictions archaic, but the very existence of these cable channels as well as the burgeoning Internet continues to increase the economic necessity of joint television station operations.

It is becoming harder and harder for broadcast stations to compete with cable and Internet news offerings because the viewing public is demanding much more immediacy in their access to news content. Viewers are no longer willing to wait for the traditional broadcast news windows at 5:00-6:30 PM and 11:00-11:30 PM. They want coverage of news events as they break. This is driving viewers more and more to the media that can more easily provide immediate coverage, on the Internet and cable, and forcing broadcasters to spend additional money to provide breaking news coverage via station websites and social media.

It is beyond argument that cable and the Internet are causing an erosion of viewership of local news on television. The Commission's position that cable news is not a substitute for local news because cable news tends to focus on issues of national and local importance overlooks the fact that many viewers tune in to local news to obtain coverage on national news, weather and sports. Indeed, weather is perhaps the greatest driver of viewership of local news. Cable now

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[15] *See, e.g.*, "February Sweeps Ratings: Declines for leading stations as people watch less TV" Tampa Bay Times, March 8, 2011; Pew Project for Excellence in Journalism's "State of the Media Report 2010 (State of the media.org/2010/) "Local Television news is now seeing rapid audience declines beyond those in network, and those numbers appeared to accelerate in 2009." Although the Pew Research Center's 2011 report (state of the media.org/2011/) indicated that local news audience numbers remained steady in 2010, this resulted from an increase in the number of independent stations offering news (no doubt in most cases as a result of broadcasting news produced by another station) and from the addition of a new early time slot of 4:30 AM, in more than 40 cities. The same report noted the rapid growth of the Internet as a source for news.

offers channels that are solely devoted to weather coverage, and include regular and frequent coverage of local weather conditions and forecasts. Similarly, while stations such as those operated by Sinclair cover local professional and amateur sports teams and events in the sports portions of their news programming, they also devote a considerable portion of their coverage to national news coverage, from national sports leagues (NFL, NBA, NHL, MLB), international events such as the Olympics, major golf tournaments, and the like. And, despite the Commission's skepticism, there is real and growing competition between cable and broadcast television for advertising dollars. In many markets, cable ad revenues from sale of local availabilities provided by national cable programming services such as CNN, ESPN, Fox News and hundreds of other channels, already place the local cable system equal or above many broadcast stations in their markets. The Commission cannot ignore the reality that cable is a real competitor to broadcast television for viewership and advertising dollars.

The Internet is having an even faster growing impact on viewing habits. The two largest mobile broadband providers, AT&T and Verizon, have indicated that they are "throttling" service to high demand users because of the impact growing video downloads are having on their network capacity. Indeed, the Commission has itself recognized this fact, which is the basis for the Commission's support for having television broadcasters surrender massive amounts of spectrum so that the bandwidth can be reallocated to mobile broadband. The Commission cannot have it both ways. By choosing to champion the reallocation of broadcast spectrum to the broadband industry, the Commission has already recognized the fact that far more spectrum is needed to permit continued growth of the spectrum-wasteful practice of using the Internet for video distribution purposes.

The FCC's rules are similarly anachronistic given present day realities by concluding that the Internet does not constitute a substitute for local news because of limitations on the amount of, and access to, video news programming on the web. The Internet is clearly ubiquitous and continuing to grow and it defies logic to suggest that it does not provide a news voice simply because much of the news available on the Internet takes written form.

Sinclair has also repeatedly pointed out the obvious fact that the deregulatory directives of § 202(h) were designed specifically to prevent precisely what the FCC has apparently failed to recognize for years, namely, despite that it is now 2012, and that we live in the world of YouTube, Facebook, Twitter, Netflix, blogging, MySpace, Hulu, BitTorrent, TV Everywhere, TiVo, 24/7 cable news, and the overall explosion of video competition on the Internet and elsewhere, we are nevertheless debating whether rules adopted by the FCC in 1999 are the appropriate rules for the FCC to maintain in today's video marketplace. While the FCC mentions changes in the marketplace throughout the NPRM in attempting to defend its proposal to maintain the outdated "eight voices" test and "top-four" restrictions, the FCC's NPRM chooses to nevertheless continue to rely on the untenable premise that the media landscape has not changed "enough" to warrant a relaxation of the FCC's local television ownership rules. This remains the case even though any objective observer would not dispute that the video marketplace and the competitive landscape that existed in 1999 bear no resemblance to the hyper-competitive video marketplace that exists today.

Moreover, the Commission's entire analysis overlooks the fact that the Commission -- not TV broadcasters -- is the gatekeeper to enhanced competition in the television marketplace. It is the Commission that, through its allocation process, establishes the number of stations that are licensed in a particular markets. And, perhaps more strikingly, it is the Commission that is now encouraging television broadcasters to surrender their channels so that they can be used to provide even more spectrum to a competitive medium which the Commission refuses to even recognize as a competitor to television for viewership or advertising dollars -- the broadband industry. The Commission's actions, both directly and through its support for Congressional action designed to cause broadcasters to "voluntarily" relinquish spectrum to be auctioned to broadband carriers, could not be a more explicit acknowledgment that there is active, vital and adequate competition in both the television and the overall video marketplace.

If the Commission is interested in promoting the provision of news, it should repeal its ownership rules completely and allow the free market to work to generate efficiencies which actual experience (rather than politically-biased ivory tower theory) has shown leads to more, not less news. To the extent that concerns about competition for viewers actually exist -- and that this really differs from viewpoint diversity, which the Commission has acknowledged does not require at least the "eight voices" test aspect of the rule -- the free market will also address this as profit driven owners will strive to maximize profits by meeting the needs of their customers, the viewing public. To the extent antitrust concerns exist, such concerns are adequately (and more properly) addressed by two other Federal agencies, the Department of Justice and the Federal Trade Commission, which are specifically charged with enforcing the nation's antitrust laws.

To the extent any ownership rules do continue to exist going forward (which they should not) Sinclair provides the following comments on specific proposals raised by the FCC in the NPRM.

The FCC's proposal to eliminate the Grade B contour overlap provision of the current rule, clearly should include a grandfathering of existing-duopolies which have been in compliance with the current rule. Fundamental fairness suggests that parties which have relied in good faith in making acquisitions should not suddenly be forced to liquidate certain holdings because of a change in the rules. Moreover, the geographic separation of stations in a single DMA which do not have any Grade B overlap, such as KUVT and KMYU which were both recently acquired by Sinclair and which are located approximately 300 miles apart, suggests that despite MVPD carriage, these stations to a greater degree than is typical serve separate audiences.[16] Grandfathered stations should also be freely transferable together without regard to a change in the rules given this as well as the significant impact that separating stations would have on the value of the stations.

In response to the FCC's request in the NPRM for information on the cost savings associated with combinations of two TV stations in a market, Sinclair notes that such savings can be both substantial and recurring. Such cost savings generally result from the efficiencies inherent in combining operations in a single location and from requiring fewer employees to perform combined tasks for two television stations (such as management, engineering, finance, master control, traffic, etc.).

The Commission has steadfastly held to the top-four prohibition during the last 13 years since the rule was first enacted. Such restriction, however, continues to rest on a shaky and unsupported foundation, such as the Commission's erroneous belief that mergers of two top-four stations "would often result in a single firm obtaining a significantly larger market share than other firms in the market and would reduce incentives for local stations to improve programming that appeals to mass audiences."[17]

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[16] It should be noted that according to TVB.org the MVPD penetration in Salt Lake City is only 63.2%, meaning 36.8% of the DMA's homes receive television only over-the-air, dramatically limiting the audience overlap of KUTV and KMYU (www.tvb.org/market.profiles#!id=167&type=market).

[17] NPRM at ¶ 40.

The first of these unsupported conclusions has simply not been the case in Sinclair's experience. Sinclair currently has grandfathered arrangements involving two of the top-four stations in six markets, three LMAs and three shared services agreements.[18] In four of these six markets according to BIA's 2010 market share reports, the combined stations have a smaller combined market share than the market leader: 30.7% vs 44% in Dayton, Ohio; 36.2% vs 46.1% in Charleston, West Virginia; 35.2% vs 56.0% in Peoria, Illinois and 27.9% vs 38.9% in Cedar Rapids, Iowa (where the second ranked station also has a greater share of the advertising market than does the Sinclair combination). In the other two markets, although the combined market share is larger than the single market share of any one other station, in both cases the combined market share is only slightly larger than the market shares enjoyed by the remaining two largest robust broadcast competitors: combined market share in Rochester, New York of 39.6% versus individual competitor market shares of 32.8% and 23.9% and combined market share in Columbus, Ohio of 40.3% versus individual competitor market shares of 31.7% and 24.1%.[19]

The circumstances noted above suggest a fundamental problem with the FCC's one-size-fits-all approach to ownership regulation. Such an approach is also inconsistent with the individualized attention given to business combinations by the FTC and the Antitrust Division of the Department of Justice and unfairly treats all combinations without regard to important and varying market conditions. It should be noted that each of the six station combinations referenced above involves a FOX affiliate, which continues to call into question the FCC's

[18] In one of the SSA markets Sinclair provides services to another station, while in two of the SSA markets a Sinclair station is the recipient of services provided by another station.
[19] In the case of Columbus, Ohio, as well documented in prior filings incorporated herein, the CBS station with its 31.7% share is an even more formidable competitor as the result of its joint ownership with Columbus' only daily newspaper and a 24-hour cable news network.

continued adherence to a top-four test which incorrectly treats FOX affiliates the same as ABC, CBS and NBC affiliates.[20]

The Commission asks for comments as to whether to adopt a procedure that would waive the "top-four," and, presumably, the "eight voices" tests to permit multiple ownership of television stations in "small" markets. Again, however, the proposal reflects the misguided efforts of the Commission to attempt to treat all stations and markets without regard to their unique characteristics. For example, although the Baltimore DMA is the 26th largest DMA in the country, it does not have enough broadcast television stations to allow for even one duopoly, largely as a result of its geographic proximity to Washington, D.C. As a result, Sinclair, the owner of the FOX affiliate in Baltimore has been unable to acquire Baltimore's CW affiliate. This is true despite the fact that (1) the combined market share of both stations in 2010 was 24.2% (still smaller than both the 30.1% share held by the CBS station and the 28.4% share of the NBC affiliate) and (2) Sinclair has programmed WNUV pursuant to a grandfathered LMA for almost 20 years without any detrimental impact on the Baltimore community. This prohibition is not necessary to preserve competition for advertising dollars; the simple fact is that Sinclair has no ability to control the advertising rates in Baltimore. Nor has the common programming of WBUF and WNUV harmed the public interest. In fact, the involvement of Sinclair in providing programming WNUV has permitted it to broadcast local news, which may not be possible for stand-alone CW affiliates. Although the Commission has not defined what is meant by its reference to "small" markets in connection with possible waiver process, presumably the definition will not encompass the Baltimore market, which again demonstrates

[20] As fully addressed in prior filings made by Sinclair, which are incorporated herein, FOX affiliated stations are very unlike affiliates of the Big-three networks as a result of (1) receiving far fewer hours of network programming, (2) the lack of significant network news, (3) the far fewer hours of local news programming and (4) the relative newness of FOX stations being highly viewed in contrast to the legacy nature (particularly in news programming) of most affiliates of ABC, CBS and NBC.

the need for a more individualized approach to the regulatory process than the one being used or considered by the FCC.

With regard to the waiver process itself, it should be more individualized and progressive than the Commission's current "failing station" waiver policy. It should take into account not only the performance of the station sought to be acquired, but also the unique market conditions which affect its ability to compete in its market. Moreover, given the deregulatory intent of Congress in instructing the Commission to eliminate rules which are not necessary in the public interest, the waiver process should be designed to permit combinations unless it can be definitively shown that a combination would be harmful to the public.

Assuming that the Commission continues to enforce a top-four restriction, the Commission should not promulgate rules which place any limitations on the owner of a legal duopoly turning both of its two stations into top-four stations through improved performance of the stations. Such improved performance can result from a variety of factors including improved programming and increased and/or improved promotion. As noted in the NPRM, the Commission has historically permitted such a result "to encourage licensees to improve the quality of the programming and operations of their stations and so not to constrain commercial activity that is designed to effect such improvements."[21]

Moreover, the top-four restriction, which the FCC has acknowledged specifically targets mergers between local stations affiliated with ABC, CBS, FOX, and NBC, ignores the important fact that network affiliations are not set in stone. Affiliations are transitory and have changed within a market from time to time since the beginning of network broadcasting.[22] This change

[21] NPRM at ¶ 44.

[22] In a series of cases involving objections to changes in stations' programming formats, the FCC declined to become involved because programming formats are transitory and freely can be changed. *See*, *e.g.*, *Dev. of Policy re Changes in the Entm't Formats of Broad. Stations*, 60 F.C.C.2d 858 (1976), *recons. denied*, 66 F.C.C.2d 78

in affiliation is not normally an attempt to circumvent the "top four" rule. Instead, these changes typically represent disagreement between a network and one of its affiliates over the financial terms of their relationship -- from the levels of compensation paid by the network to its affiliate (or, more typically now, by the affiliate to the network) to the level of preemption of network programming and advertising in order to accommodate local programming. For example, in 2002, CBS and Post-Newsweek Stations were unable to agree on the terms of a renewed affiliation for WJXT, Jacksonville, Florida. As a result, CBS entered into an agreement with Clear Channel to move the CBS Network affiliation to WTEV, then a UPN station, and sister station of Fox affiliate station WAWS. As a result, Clear Channel owned two "top four" stations in the Jacksonville market. Similarly, in 2011 FOX and Nexstar were unable to agree on network compensation issues in several markets, resulting in FOX shifting affiliation to competitors in each market. In Evansville, Indiana, this resulted in the FOX network being carried on the secondary digital channel of ComCorp's WEW-TV, which carries CBS programming on its primary channel. Similarly, when the ABC affiliate in the Macon, Georgia, market did not reach agreement with its network, the ABC affiliation moved to a secondary digital channel on WGXS, the local FOX affiliate. The "top-four" rule is misguided, does not do what it is intended to do, and, more importantly, is not needed to preserve or maintain competition in the marketplace for television viewing or advertising.

In the end, an affiliation agreement is nothing more than a contractual agreement to broadcast programming by a third party and to a large degree is substantially the same as a

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(1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838, 858 n.56 (D.C. Cir. 1979) (the public interest is best served by promoting diversity in entertainment formats through market forces and competition), *rev'd*, 450 U.S. 582 (1981); *see also*, *Riverside Broad. Co.*, 53 R.R.2d 1154 (1983), *recons. denied*, 56 R.R.2d 618 (1984), *remanded on other grounds sub nom.*, *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

contract to buy syndicated programming.[23] Just as the FCC would not restrict a station from purchasing a specific syndicated show which might improve the ratings of that station, the FCC should not limit the programming decision of a station to acquire a block of programming via a network affiliation agreement. To do otherwise, would not only interfere with the station's effort to improve the quality of the programming they provide to the public, but would be a clear violation of the First Amendment's protection of free speech. Any prohibition on the owner of a legal duopoly acquiring a network affiliation would also unfairly interfere with the free market in which, as noted, such affiliations have on numerous occasions switched stations for reasons totally unrelated to the single instance where the Commission believes an affiliation switch constituted an end run around the Commission's ownership rules.[24]

Restricting the owner of two television stations in a market from acquiring a network affiliation for one of the stations would also be irrational in light of the ability of the owner of one station to multicast a second programming stream and affiliate that programming stream with a network. Any similar effort of the FCC to restrict such an action by a station on a multicast stream would not only raise serious First Amendment concerns, but would also undermine the goal of programming such stations to better serve the community.

Moreover, any effort by the Commission to limit the right of multicasts to affiliate with a broadcast network would be improper in light of the numerous instances where networks that would not otherwise be available (at least over-the-air) in a particular DMA are now broadcast as

[23] The FOX network, for example, provides only two hours of programming a day Monday-Friday. In Sinclair's experience it is extremely common for television stations to enter into agreements with syndicators, involving similar amounts of programming (*e.g.*, blocks of judge shows).

[24] For example, in 1994, New World Communications agreed to switch many of its big-three affiliates to the FOX network. Sinclair's stations in Dayton and Champaign/Springfield switched from NBC to ABC in 2004, which followed in the case of the Dayton station an earlier switch from ABC to NBC. In Baltimore, the location of Sinclair's corporate headquarters, all three of the current big-three affiliates have at one time or another been affiliated with CBS.

a result of the advent of multicasting.[25] It would be a perverse result indeed if a community were denied access to particular programming because of a rule with the purported goal of increasing competition for programming or if the market for potential buyers of specific programming was limited due to government imposed restrictions.[26] It would, however, also be illogical if a station in a market with a small number of television stations were permitted to affiliate a multicast channel with a big-4 network, but a station in a larger market, with more voices, was denied the same right.

With regard to the difference between arrangements involving shared services agreements and arrangements currently attributable under the Commission's ownership rules, it is clear that this difference relates to the failure to provide programming in the former as compared to the latter. That this distinction must be relevant is evident in the Commission's claimed justification for its ownership restrictions, namely the impact of such combinations on competition for viewers. Clearly a rule which purports to place limitations on what one station can own as a result of concerns about how two jointly owned stations will be programmed, cannot be applied to limit arrangements which have absolutely nothing to do with programming.

Finally, the Commission continues to adversely impact the free market operations of the retransmission consent process by entertaining comments from the American Cable Association ("ACA") and others that joint operations of stations harm competition when such arrangements result in joint negotiations of retransmission consent. Yet while cable systems have, and continue to increase, their significant share of the advertising market, they simultaneously noisly

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[25] Gray Television, for example operates eight multicasts affiliated with the CW, four multicasts affiliated with FOX, and one multicast affiliated with ABC. Were these multicast channels instead separate full-power television stations, Gray's ownership of every one of these stations would violate the big-four restrictions, the eight voices test, or both.

[26] For example, when the FOX network was unable to come to terms on a renewal of its affiliation agreement in several markets with Nexstar, other broadcasters were available to agree to broadcast the programming on other stations or on multicasts.

complain that broadcasters should not share in subscription fees. While cable interests also make the inaccurate argument that service sharing by broadcasters diminishes local service, Sinclair notes that, to its knowledge, cable interconnects, which allow MVPDs to combine forces on local advertising sales, the consummate shared services agreements, have not resulted in a single hour of local programming. Moreover, such arrangements, as well as agreements such as that entered into by Comcast and Verizon for Comcast to sell Verizon's local and regional advertising avails in the markets where Comcast and Verizon's FiOS compete and for Comcast to sell ads for Dish Network's regional sports feeds,[27] have substantially impacted the ability of individual television stations to compete with MVPDs for such ad dollars. As a result, efforts by MVPDs to limit the ability of their competitors to compete for advertising dollars should be looked upon with a significant degree of skepticism.

The NPRM is not the proper forum for the consideration of the ACA's self-interested grandstanding considering that the Commission currently has a ongoing proceeding specifically focusing on retransmission consent issues and that such complaints are better considered by the FTC and the Justice Department's antitrust division. The ACA has presented absolutely no credible evidence whatsoever that the dual negotiations of retransmission consent leads to higher prices. Anecdotal information from similarly self-interested members of the ACA falls far short of the type of statistical evidence that would be required in a proper antitrust analysis.[28]

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[27] *See* "Comcast to Sell Advertising for Verizon FiOS TV" (http://www.physorg.com/news165038126.html)

[28] Even if the ACA is correct in its belief, this does not complete the analysis of whether any regulatory action is necessary. It is a well-established principle of antitrust law that the creation of efficiencies can override any price benefit resulting from business combinations. This is particularly true where, as here, the grossly unequal bargaining power that exists in the hands of monopolistic and oligopolistic cable companies has conspired to keep retransmission consent fees artificially low, considering the prices paid for far inferior programming streams.

Conclusion

Section 202(h) of the Act specifically requires the Commission to review its broadcast ownership rules at regular intervals to "determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." As Sinclair has repeatedly shown, neither the "top-four" restriction nor the "eight voices" test are necessary in the public interest as the result of competition, and they therefore should both be repealed. Moreover, none of the proposals to EXPAND restrictions on broadcast ownership or operation are within the proper scope of this proceeding, and, in any event, are not justified in the public interest. The Commission should, therefore, eliminate its unnecessary restrictions on the marketplace and restrain itself from imposing new and unnecessary regulations.

Respectfully submitted,

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March 5, 2012

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Exhibit A

1. Consolidated Comments of Sinclair Broadcast Group, Inc., dated February 7, 1997, on the Commission's Further Notice of Proposed Rule Making, MM Docket No. 91-221 *Review Of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 11 FCC Rcd 21655 (released November 7, 1996) and on the *Commission's* Further Notice of Proposed Rule Making, MM Docket No. 94-150, *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* (released November 7, 1996).

2. Petition of Sinclair Broadcast Group, Inc. for Reconsideration, dated October 18, 1999, of the Commission's Report and Order in the *Review Of the Commission's Regulations Governing Television Broadcasting* (MM Docket No. 91-221), *Television and Satellite Stations Review of Policy and Rules* (MM Docket No. 87-8) and *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest*s (MM Docket No. 94-150).

3. Comments of Sinclair Broadcast Group, Inc., dated January 2, 2003, on the Commission's Notice of Proposed Rule Making, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317 and MM Docket No. 00-244, in the *Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18401 (released September 24, 2002).

4. Comments of Sinclair Broadcast Group, Inc., dated October 27, 2004, on the Commission's Notice of Proposed Rule Making in MB Docket No. 04-256, *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 19 FCC Rcd 15238 (released August 2, 2004).

5. Comments of Sinclair Broadcast Group, Inc. dated October 23, 2006, on the Commission's Further Notice of Proposed Rule Making in MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317 and MM Docket No. 00-244, *2006 Quadrennial Regulatory Review – Review of The Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCC Rcd 8834 (released July 24, 2006).

6. Reply Comments of Sinclair Broadcast Group, Inc., dated January 16, 2007 on the Commission's Further Notice of Proposed Rule Making in MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317 and MM Docket No. 00-244, *2006 Quadrennial Regulatory Review – Review of The Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCC Rcd 8834 (released July 24, 2006).

7. Comments of Sinclair Broadcast Group, Inc. regarding the Media Ownership studies commissioned by the Commission in its Further Notice of Proposed Rule Making in MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317 and MM Docket No. 00-244, *2006 Quadrennial Regulatory Review – Review of The Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCC Rcd 8834 (released July 24, 2006).

8. Letter submitted by Sinclair Broadcast Group, Inc, dated December 11, 2007, in response to FCC's News Releases, MB Docket No. 06-121, dated November 13, 2007.