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

In the Matter of:	)	
	)	
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rule 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

To: The Secretary

COMMENTS

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Summary

As set forth herein, Entravision Holdings, LLC urges the Commission to reform its ownership rules to reflect the reality currently facing broadcasters, namely, intense competition from an unprecedented number of diverse, sophisticated content providers, all vying for the same viewers and advertisers. In particular, Entravision believes that the ever-increasing substitutability of traditional and non-traditional media platforms warrants duopolies in all television markets and three commonly-owned television stations in large markets with 18 or more television stations. At the same time, the Commission should promulgate a set of narrowly-focused behavioral regulations designed to prevent specific anticompetitive abuses in order to limit any threat consolidation may pose to competition and diversity.

With respect to Shared Services Agreements, Entravision submits that SSAs in no way threaten the Commission's ownership rules and should not be treated as attributable interests. Broadcasters should not be penalized for relying on these agreements to continue providing local news and public affairs programming to the viewing public in the face of deteriorating economic conditions and declining ad revenues. As to retransmission consent, Entravision believes that cable operator complaints about the retransmission consent process are unfounded and should be rejected outright. To the extent the Commission chooses to review its retransmission consent regime, any such review should properly take place in the pending retransmission consent proceeding instead of the instant ownership proceeding.

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COMMENTS

Entravision Holdings, LLC ("Entravision"), the licensee of numerous Spanish-language broadcast television and radio stations, by its attorneys, hereby submits these Comments in connection with the above-referenced proceeding and in response to the Commission's recent Notice of Proposed Rulemaking ("NPRM").[1] With respect to the Commission's ownership limits for broadcast television, Entravision requests that the Commission take into account the undeniable impact of new content sources and alternative delivery systems on the traditional media marketplace and, in order to permit the local broadcast station owner to compete, relax the ownership rules accordingly.

Specifically, Entravision submits that the Commission should allow common

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1 *See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rule 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, Notice of Proposed Rulemaking, FCC 11-186 (rel. Dec. 22, 2011).

ownership of two television stations in all markets and three television stations in markets with 18 or more stations. In order to prevent any deleterious side-effects of such media consolidation, the Commission should simultaneously adopt a narrow set of behavioral rules designed to promote and protect competition and diversity against anti-competitive practices on the part of the consolidate entities and their affiliates. Specifically, the Commission should adopt a "syndicated programs" rule, a "TV listings" rule, a "preferred ad rate" rule, and such other behavioral rules that the Commission determines will serve to prevent media conglomerates from driving smaller broadcasters and minority-owned media companies from the local television marketplace.

With respect to Shared Services Agreements ("SSAs"), Entravision submits that SSAs in no way threaten the Commission's ownership rules and should not be treated as attributable interests. Based on its experience, Entravision believes that SSAs have proven to benefit local television stations in today's highly competitive and economically difficult times. Entravision believes that broadcasters should not be penalized for relying on these agreements to continue providing local news and public affairs programming to the viewing public when they face of deteriorating economic conditions and declining ad revenues. If anything, Entravision urges the Commission to ratify further the use of SSAs.

Entravision also believes that cable operator complaints concerning the retransmission consent process are unfounded and should be rejected outright. To the extent the Commission chooses to review its retransmission consent regime, any such review should properly take place in the Commission's pending retransmission consent proceeding instead of the instant ownership proceeding. In support thereof, Entravision states as follows.

I. Ownership Limits

In the NPRM, the Commission acknowledges the broadcast television medium's singular role in delivering local news and public affairs to the public, and insists that a "major goal" of its ownership rules must be to "encourage the provision of local news."[2] Given this objective, overhauling the Commission's ownership rules to ensure the competitive viability of broadcasters, and hence the continuing availability of quality local programming, would seem to be in order. Instead, amidst the sea changes transforming the media marketplace, the Commission incorrectly proposes doubling down on its existing ownership limits.

Respectfully, Entravision submits that the Commission cannot advance the cause of diverse local programming with outmoded regulations that bear no connection to marketplace reality. The Commission appears to agree with many public interest advocates that diversity in broadcast ownership is more important than the economic viability of the broadcast industry against the powerful and economically vibrant cable, satellite, Internet and mobile content providers.[3] Many assumptions underlie this approach: that government regulations can, on their own, secure ownership diversity, that

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[2] NPRM at ¶ 6.

[3] The Commission cites with approval commenters for whom the economic woes of broadcasters, including declining audiences and ad revenues, "have sounded an alarm... that non-traditional media sources are not adequate substitutes for the provision of local news and information by broadcasters subject to public interest obligations," and who believe the Commission's "media ownership limits remain vitally important, as increased consolidation places control of programming choices in the hands of too few owners, limiting diversity and underserving the needs of local and minority communities." NPRM at ¶ 3.

ownership diversity, in the absence of economic vitality, translates into robust local programming from multiple viewpoints, and that the competitiveness of the broadcast industry is not hampered by this asymmetrical regulation and selective manipulation of the market, or at least not hampered enough to threaten the economic viability of local broadcast television stations. These assumptions are rooted in the past, not present-day reality, and the only interests they serve in practice are those of broadcasters' unregulated, and often monopolistic, competitors.

While the Commission certainly has the authority to regulate broadcasters, it cannot effectively mandate the survival of diverse local programming in today's highly competitive and diverse marketplace for video viewing at home and on the go. In the end, the marketplace decides, and Entravision believes the Commission's current efforts to shape the local television market segment in accordance with public interest-diversity aspirations do more harm than good, as that segment is competitively inseparable from a much larger media marketplace over which the Commission exercises no power. Instead, the Commission should acknowledge that today's intensely competitive, multi-platform media marketplace has a direct impact on television broadcasters, and relax media ownership limits to ensure that broadcast stations, the engines of local news, remain economically viable and able to compete in that marketplace.

To capture the reality of today's media universe, the Commission's yardstick for competition should not be whether cable operators, satellite operators, Internet and mobile content providers "alter their programming decisions based on the actions of individual local television stations,"[4] but whether local television can maintain audience

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[4] *Id.* at ¶ 33.

share and advertising revenue in the face of a rising tide of alternative sources of programming and advertising messaging, that draw away both viewers and the advertisers that support the over-the-air television business model.[5] The answer to the latter question is undeniably that broadcasters cannot today compete with unregulated parties when they are hamstrung by restrictive ownership regulations.

With respect to the video programming market, the Commission must take into account new competition coming each day from Internet and mobile content providers, such as Amazon, Hulu, You Tube, Wal-Mart's Vudu, and Netflix to name just a few. Further, the Commission must give proper weight to the competitive offerings made available by cable and satellite multichannel video programming distributors. The term TV Everywhere, originally promoted by cable television companies,[6] is a concept that is quickly becoming a reality as video offerings are available not only on traditional receivers, but on any of the myriad of devices that can access the Internet. According to "The Huffington Post" (itself an example of new media that is encroaching on the old media of newspapers and magazines):

> The top video destinations on the Web are suddenly flush with original programming: documentaries, reality shows and scripted series. Over the next few months, YouTube, Netflix and Hulu will roll out their most ambitious original programming yet – a digital push into a traditional

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5 As the Commission must be aware, broadcast television's competitors, such as MVPDs, survive on a dual revenue stream of subscriptions and advertising. Interestingly, broadcast television's effort to open a second revenue stream, in the form of retransmission consent revenue, is open to attack by the MVPDs in this and other proceedings and broadcast networks have begun to view retransmission consent revenues as their own reverse compensation from local broadcasters.

6 *See* http://gigaom.com/video/what-you-need-to-know-about-tv-everywhere/

television business that has money, a bevy of stars and a bold attitude of reinvention.[7]

The following is merely a sampling of the alternative programming sources, announced during the pendency of the instant Notice of Proposed Rulemaking, that will divert audience share and advertising revenue from broadcasters:

- Comcast recently announced its "Streampix" service that will provide access to 75,000 television shows and movies to cell phones, tablets, and laptops that themselves can be played on traditional television receivers using readily available cables. The Comcast service is expected to provide programming from Disney, Sony Pictures, Warner Brothers and, most significantly, NBCUniversal, the broadcast network owned by Comcast.[8] Not too long ago, this was the province of independent television.

- YouTube recently announced the creation of YouTube Original Channels, new YouTube channels featuring original content developed for the site.[9] Not too long ago, this was the province of the broadcast networks.

- Disney and YouTube recently announced partnership to create an original video series based on a popular app to be produced by Disney and distributed on a co-branded channel on both YouTube and Disney.com.[10] Not too long ago, Disney programming was available only on broadcast television and Disney's own pay cable channel.

- Online video site Hulu recently announced it would be increasing its output of original shows, a move The Wall Street Journal described as "the latest in an

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7 Jake Coyle, *Netflix, Hulu, YouTube Corner the Traditional TV Market with Their Own Programming*, The Huffington Post, January 26, 2012, available at http://www.huffingtonpost.com/2012/01/27/netflix-hulu-youtube-internet-tv_n_1236218.html?ref=email_share (visited February 27, 2012).

8 *See* http://mediadecoder.blogs.nytimes.com/2012/02/21/comcast-to-start-streampix-video-service/?hp.

9 *See* John Seabrook, *Streaming Dreams*, The New Yorker, January 16, 2012, available at http://www.newyorker.com/reporting/2012/01/16/120116fa_fact_seabrook) (visited February 27, 2012). According to Forrester Research, by 2016 half of all households will have Wi-Fi-enabled devices attached to their television monitors, bringing Internet video channels into their living rooms. *See id.*

10 *See* Brooks Barnes, *Disney and YouTube Make a Video Deal*, The New York Times, November 6, 2011, available at http://www.nytimes.com/2011/11/07/business/media/disney-and-youtube-make-a-video-deal.html?_r=1&emc=eta1 (visited February 27, 2012).

escalation of TV-like programs being made directly for the Internet, further blurring the lines between the Web and TV."[11] Not too long ago, the networks that own Hulu would reserve such original programming for their networks.

- Netflix recently announced it would be creating new original shows for its streaming video service, including a show called "House of Cards," directed by David Fincher, director of "The Social Network," and starring Kevin Spacey.[12] Not too long ago, such well-regarded actors and directors worked in the motion picture and broadcast network spaces.

- Yahoo is currently rolling out around 20 original shows a month, mostly short-form reality shows.[13] Not too long ago, reality shows were broadcast network productions.

These developments are harbingers of things to come. According to The Wall Street Journal:

> The rise of tablet computers and Web-enabled TVs makes watching Web video sometimes even more convenient than browsing your cable dial for something to watch while plopped on the couch. In December 2011, nearly 182 million people spent an average of 23 hours watching online video in the U.S., according to comScore. That total number of viewers was up 6% and the average amount of time was 59% longer than a year earlier. Meanwhile advertisers are becoming more interested in spending money to reach those viewers. U.S. online video advertising is expected to grow 43% to $3.09 billion in 2012, eMarketer says.[14]

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11 *See* Sam Schechner and Christopher S. Stewart, *Hulu to Create More Original Shows*, The Wall Street Journal, January 17, 2012, available at http://online.wsj.com/article_email/SB10001424052970204468004577163162257430538-lMyQjAxMTAyMDIwNjEyNDYyWj.html?mod=wsj_share_email (visited February 27, 2012). Hulu already poses a threat to broadcast stations. As more and more viewers watch network shows on Hulu, local stations see their advertising revenues decrease. *See, e.g.*, Sarah Morgan, *Will Hulu be the Death of TV?*, Smart Money, May 13, 2010, available at http://www.smartmoney.com/invest/stocks/will-hulu-be-the-death-of-tv/ (visited February 27, 2012).

12 *See* Brian Stelter, *Netflix Gets Into the TV Business*, The New York Times, March 18, 2011, available at http://mediadecoder.blogs.nytimes.com/2011/03/18/netflix-gets-into-the-tv-business-with-fincher-deal/?emc=eta1 (visited February 27, 2012). *See also* Schechner and Stewart, *supra*.

13 *See* John Jurgensen, *Web TV's New Lineup*, The Wall Street Journal, February 17, 2012, available at http://online.wsj.com/article_email/SB10001424052970204883304577223630028525366-lMyQjAxMTAyMDIwNjEyNDYyWj.html?mod=wsj_share_email (visited February 27, 2012).

14 *See* Schechner and Stewart, *supra*.

The Commission must factor such developments and the corresponding audience fragmentation and diversion of advertising dollars away from broadcast television and to such other media as the Internet, Facebook, Groupon, social media sites, and the next creation that will appear before this proceeding is even concluded, into its consideration of the ownership rules. Anything less than such across-the-market consideration of media competition and the forces that are turning television broadcasting, especially at the local station level, into another player, and not the leading player, in the programming and advertising worlds, unacceptably privileges inertia and the regulatory status quo over the marketplace reality broadcasters must confront every day.

In other proceedings, the Commission has recognized the profound impact of broadband and mobile broadband technologies and overhauled its rules accordingly.[15] The Commission has not adequately explained how the profound technological, social, and economic changes requiring significant regulatory reform in one communications sector can nonetheless leave the broadcast sector untouched.[16] The shadow of *Prometheus* should no longer prevent the Commission from bringing its ownership limits

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[15] *See, e.g., In the Matter of Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208; Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, rel. Nov. 18, 2011.

[16] In the NPRM, the Commission seems to suggest that the enormous impact of broadband and mobile broadband is not yet relevant to broadcast, as the United States has not yet achieved universal deployment and adoption of broadband. *See* NPRM at ¶ 4. Once again, the Commission is applying the wrong yardstick. It is not broadband adoption rates, but the market-transforming impact of alternative programming sources, such as broadband and mobile broadband, that are relevant to the need for, and real-world effects of, broadcast ownership limits.

in line with a media marketplace in which broadcast is just one among many strong participants.[17]

Entravision submits that the substitutability of non-broadcast for broadcast media and the merits of selective consolidation more than justify targeted relaxation of the Commission's existing local television ownership limits. Relaxing the local television ownership limits will allow group owners of television stations to achieve efficiencies that will enable them to compete with these non-broadcast content providers.[18] In particular, the allowance of duopolies in all markets[19] and triopolies in markets with 18 or more television stations is absolutely reasonable given the highly competitive video marketplace, the increasing substitutability of broadcast and non-broadcast content, and the proven public interest benefits that accompany consolidated television ownership. By

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[17] *See Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004), *stay modified on rehearing,* No. 03-3388 (Sept. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

[18] *See. e.g.*, Belo Comments, MB Docket No. 06-121 *et al.*, at 22-25 (Oct. 23, 2006) (duopolies in Seattle-Tacoma, Phoenix, Tucson, and Spokane markets resulted in increased local news, including addition of daily newscasts, weekly local public affairs program, and public affairs specials); Gannett Comments, MB Docket No. 06-121 *et al.*, at 46 (Oct. 23, 2006) (same public interest benefits in Gannett's duopoly markets of Jacksonville, Denver, and Atlanta); Waterman *et al. Ex Parte*, MB Docket No. 02-277 *et al.* (May 23, 2003) (noting the local news increases and public interest benefits resulting from duopolies, in Ft. Myers, Honolulu, Cleveland, Grand Rapids, Hartford-New Haven, Norfolk-Portsmouth-Newport News, Austin, and Providence-New Bedford); Coalition of Smaller Market Television Stations Reply Comments, MB Docket No. 06-121 *et al.*, at 13 and cites therein (Jan. 16, 2007) (noting that "the record evidence convincingly demonstrates that station combinations in smaller and mid-size markets provide localism benefits").

[19] The current duopoly rule essentially prohibits the common ownership of two television stations in markets outside the top 50 largest markets. As shown in NAB Comments, the Commission's prohibition on common ownership of two television stations in markets outside the top 50 largest markets "prevents the efficient combination of television stations in markets (DMAs 50-210) where stations experienced a 63.7 percent decline in pre-tax profits from 1998-2008..." *Comments of National Association of Broadcasters*, GN Docket No. 10-25 (May 7, 2010) at 41.

facilitating such efficiencies, a relaxed local television ownership rule will provide the basis upon which local television stations will be able to offer local news and additional programming responsive to the needs and interests of local viewers, a phenomenon already occurring in the television multicasting area.

The necessity of group ownership in the face of competition from non-broadcast sources and the localism-based benefits to the public from consolidation support relaxation of the Commission's local television ownership limits. The expanding media universe and the market conditions described above evidence a media marketplace in which relaxed local television ownership limits will not harm diversity, localism or competition, particularly in large markets where viable alternative programming sources, including news services,[20] are abundant, so long as such limits are properly applied and enforced.

While consolidation promises certain benefits, its also poses a number of threats to competition and diversity, insofar as it threatens the viability of small and medium-size broadcasters. Significantly, many minority-owned broadcast operations count among the ranks of small and medium-sized companies. In order to maximize the benefits of consolidation while minimizing its threat to competition and diversity, Entravision urges the Commission to adopt narrowly-tailored measures to monitor and prevent anti-competitive practices on the part of any newly-formed media combinations. Establishing procedures for the detection and elimination of abuses of market power by broadcast

[20] Pay cable provides 24 hour local news services in such markets as New York and Washington. The Internet delivers a multitude of news services from diverse sources, including broadcasters, newspapers, and national programming services. The Internet, through such services as AOL's Patch, are offering news focused on local communities that even local television stations were not able to offer.

group owners or broadcast/newspaper owners will help deter such abuses and reinforce the effectiveness and validity of the Commission's ownership limits.

Specifically, Entravision proposes that the Commission promulgate behavioral regulations along the lines of the "syndicated programs" rule, "TV listings" rule, and "preferred ad rate" rule proposed by Entravision in its Comments in the 2006 quadrennial review.[21] In taking these steps, the government should not have any role in dictating the format or audiences that any station or group of stations – regardless of whether there is combined ownership with a local, daily newspaper – might choose to program and serve. However Entravision believes that, as part of the Commission's review of stations' performance in the public interest, particularly as these stations submit applications for license renewal and station transfers/assignments, the agency should require affirmative certifications as to these licensees' or their parent, consolidated companies' competition-related behavior being in the public interest.[22]

Under this regulatory approach, additional consolidation would be allowed in local markets, but existing and new media conglomerates would be required to disclose to

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[21] *See Comments of Entravision Holdings, LLC*, MB Docket No. 06-121 (Oct. 23, 2006) ("*Entravision Comments*") at 13-17. Under Entravision's proposed rules, as revised to reflect the growing role of electronic media, media conglomerates that also own broadcast stations would be prohibited from using such tactics as: (1) having their print or other media affiliates list their owned-and-operated stations in print or electronic station guides but refuse to list – or list less favorably (in terms of typeface, page location and programming detail, etc.) – some or all competing radio and television stations; (2) providing preferential rates or treatment to advertisers who buy time on their stations exclusively and/or with co-owned print or electronic media; and (3) arranging with syndicators to restrict the sale of syndicated programs to other stations in a market.

[22] The Commission has already experimented with behavioral regulation involving broadcasters. It has recently adopted a policy prohibiting broadcasters from engaging in advertising sales contracts that discriminate on the basis of race or ethnicity and requiring that such contracts contain nondiscrimination clauses. *Promoting Diversification of Ownership in the Broadcasting Services,* 23 FCC Rcd 5922, 5940 (2008).

the Commission and to the public whether they have engaged in, or may engage in, activities that threaten competition and diversity, and place in question these stations' operations in the public interest. This kind of behavioral regulation combined with periodic review will result in direct and continuing benefits to television viewers and to local television markets generally, with even greater benefits flowing to non-consolidated stations serving minority and special interest audiences and the viewers comprising those audiences.

II. Shared Services Agreements

Contrary to the fears of public interest advocates, and the allegations of the cable television industry that benefits from broadcast programming but wishes to limit the sharing of its revenues with broadcasters, Shared Services Agreements ("SSAs") are not shady pacts broadcasters enter into to evade ownership limits at the expense of localism, competition and diversity. Given the combination of general economic conditions and the prolonged, broadcast-specific decline in advertising revenue, SSAs are more often than not a matter of necessity. Broadcasters that can stand on their own do not consider SSAs or other arrangements; it is only when the cost of operations, including the high cost of the digital transition, outweighs revenue that SSAs are given consideration and entered into. In those instances, where the broadcaster has to cut costs and ratchet back its news and programming expenses, the alternative of an SSA provides critical access to the resources local television stations need to bring local news and public affairs programming to the viewing public, even if the result it is not as vibrant a competitive environment as might exist with two independent news operations. But, at least, if there are multiple news sources that is certainly better than a station that eliminates its news in its entirety or reduces it to the point where it is no better than a "rip and read" operation.

For example, Entravision's decision to enter into a Shared Services Agreement with Schurz Communications Inc. had nothing to do with ownership limits, and everything to do with Entravision's desire to develop and improve the quality of local programming for Station KDCU-DT, Derby, Kansas, a new television station that Entravision secured in an auction of a broadcast channel. With Schurz's assistance, Entravision was able to launch the Station's digital operations six months ahead of schedule and to provide local news programming years before it would otherwise have been able to do so, owing to the Hispanic population and revenue potential in the Wichita, Kansas market. As a result of resources made available through the KDCU-DT SSA with Schurz, the Station is now providing the only Spanish-language local television news operation in the state of Kansas.[23]

KDCU-DT's on-the-ground experience directly contradicts the speculative claims of SSA critics, and demonstrates how localism, competition and diversity can be greatly enhanced rather than harmed by SSAs. As such, Entravision urges the Commission to reject calls for treating SSAs as attributable interests. Broadcasters should not be penalized for doing what is necessary in tough economic times to provide local news and public affairs programming. While Entravision commends public interest advocates'

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[23] *See also* Counsel for the Coalition of Smaller Market Television Stations, Notice of Ex Parte Presentations, MB Docket Nos. 10-71, 09-182, 07-294, (Feb. 1, 2012) at 2 ("Feb. 1, 2012 TV Coalition Ex Parte Notice") (describing "many instances in which Coalition members have seen SSAs breathe new life into struggling stations, at minimum by enabling the stations to preserve existing but expensive news operations, and in many cases by allowing such stations to expand the quality and the quantity of the news they provide").

tireless work on behalf of a robust media marketplace filled with independent voices and competing perspectives, they must not let the perfect become the enemy of the good. SSAs represent a practical solution available to many beleaguered broadcasters enabling them to continue providing local news to viewers, and thereby maintaining the hallmark of local broadcast service. Rules based on an ideal rather than economic conditions on the ground could do great harm to many local broadcasters and result in a media marketplace even further removed from the model aspired to by public interest advocates.

III. Retransmission Consent

Entravision respectfully submits that Commission review of the retransmission consent regime properly belongs in the Commission's retransmission consent proceeding.[24] The ownership proceeding is filled with pressing issues that merit the Commission's undivided attention. The Commission should not allow the cable industry's retransmission consent allegations to delay or complicate the Commission's timely resolution of critical ownership issues, such as the substitutability of non-broadcast and broadcast video programming.

A number of cable operators insist that retransmission consent issues belong in the instant proceeding, given their connections to SSAs and localism, competition and diversity. While Entravision concedes that just about any topic can be connected to localism, competition and diversity, it has yet to see a reasonable explanation of why these tangential connections require retransmission consent issues' inclusion in an already-crowded ownership docket instead of in the aptly-named retransmission consent proceeding.

[24] *See In the Matter of Rulemaking to Amend The Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71.

However, should the Commission decide to consider retransmission consent in the instant proceeding, it must first consider the appropriate credence due cable industry complaints about broadcasters' daunting market share and unfair negotiating power. To begin with, based on the public record, the cable industry's "evidence" of broadcasters' retransmission consent abuses consists of: (i) self-reported claims from cable operators of broadcasters using the same representation to negotiate retransmission consent fees, and (ii) analyses performed by cable operators from private data culled by cable operators allegedly demonstrating that "joint ownership/control" of stations increases retransmission consent fees.[25] This evidence is neither objective nor verifiable, as actual figures are never provided. More to the point, it fails to demonstrate any illegal or anti-competitive broadcaster conduct, let alone the kind of industry–wide abuse it would take to justify the sweeping, across-the-board regulations sought by cable operators. Anecdotes and speculation from cable operators simply do not provide any legitimate bases for abandoning the case-by-case approach to ferreting out occasional bad actors on display in *United States v. Texas Television, Inc.*[26] While cable operators cite this 1996 Justice Department case as evidence of the problem,[27] in fact, that case demonstrates that

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[25] *See* American Cable Association ("ACA") Notice of Ex Parte Presentation, *In the Matter of Rulemaking to Amend The Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71; *In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182 (filed Nov. 3, 2011) at Attachment A, 19-20.

[26] Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/texast0.htm.

[27] *See, e.g.*, Notification of *Ex Parte* Presentation of Time Warner Cable Inc. in *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; and *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

effective enforcement and remedial measures are already in place to combat any retransmission consent-related abuses. The current system works. Cable operators have failed to provide any evidence that new, bright-line rules and sweeping, across-the-board regulation are necessary to maintain an equitable balance in cable-broadcast relations. Cable operators' complaints in the instant proceeding evidence only an industry eager to permanently fix retransmission consent negotiations in its favor by imposing unnecessary regulatory constraints on the bargaining power of broadcasters, who supply the cable operators with the program content that makes their service attractive to the public.

In any case, MVPD laments over the monopoly power of broadcasters are, at least, entertaining . As legions of captive cable subscribers burdened with high cable rates and poor service can testify, cable operators enjoy *de facto* monopoly power in markets across the country. Many local television stations are confronted with this market power at every retransmission consent negotiation and recall the days when they had to struggle to even secure must-carry rights from cable operators. The ACA attempts to overcome the obvious disparity in cable/broadcaster power by insisting that broadcasters simply paint with too broad a brush: "What about DMAs that do not have a dominant MVPD? What about small MVPDs in DMAs that have a dominant MVPD? Bad public policy to solve a monopsony problem by creating monopolies."[28] First, Entravision wishes to note that ACA's request for case-by-case consideration on the question of MVPD power is hardly in keeping with its penchant for sweeping generalizations on matters such as broadcaster behavior and the impact of SSAs on retransmission consent fees, or its call for concrete, bright-line rules to solve speculative

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[28] ACA Nov. 3, 2011 Ex Parte Notice at 14.

problems. It is, of course, bad public policy to pile sweeping generalizations on top of sweeping generalizations. Second, ACA is off-base in its suggestion that second-tier MVPDs are more or less equal in stature to local broadcast stations. As pointed out by the Coalition of Smaller Market Television Stations, ACA's membership includes comparatively large cable operators such as Mediacom, whose 2010 revenue of $1.46 billion dwarfs that of even the most successful independent broadcast television groups.[29]

Finally, retransmission consent is not a simple matter involving local television stations and cable operators that can be effectively regulated in isolation. The Commission must focus on the retransmission consent regime's place within the wider broadcast television universe. As both cable operators and broadcasters have pointed out, many network-affiliate agreements allow networks currently capture a portion of affiliates' retransmission consent fees and collect financial contributions from affiliates for premium programming (such as major league sporting events), in what has become a system of reverse network compensation. Changes to the retransmission consent regime that further cut local television stations' revenues could result in the migration of many of these premium programs migrating from free broadcast television to pay television platforms, with the attendant loss of viewing and advertising revenue for local television stations.[30]

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29 *Counsel for the Coalition of Smaller Market Television Stations*, Notice of Ex Parte Presentations, MB Docket Nos. 10-71, 09-182, 07-294, (Dec. 21, 2011) ("Dec. 21, 2011 TV Coalition Ex Parte Notice") at 4 (citing LIN ($420 million); Trinity Broadcasting ($235 million); Belo Corporation ($206.2 million); Barrington ($122 million); Meredith ($104 million)).

30 *See* Dec. 21, 2011 TV Coalition Ex Parte Notice at 4 (noting that "undermining the retransmission consent regime will result in such programming migrating behind the 'pay wall' of subscription television services").

Entravision believes the retransmission consent regime is working, though it still fails to provide broadcasters with any significant portion of the value that broadcasters deliver to MVPDs in the form of programming that MVPD customers want and demand. Entravision has been able to negotiate agreements with its MVPDs and has never had a situation where its MVPD viewers were without their Entravision station signal for a single day. Cable operators and broadcasters are required to negotiate in good faith, and bad actors can be dealt with through the Commission and the Justice Department's Antitrust Division. If the Commission wishes to launch a broad investigation into and/or overhaul of the its retransmission consent system, then the instant ownership proceeding is not the place to do so. Any such undertaking must include a rigorous examination of MVPD monopoly power and its exercise and the role of broadcast networks and reverse network compensation alongside any inquiry into local broadcaster power in retransmission consent negotiations. And such an undertaking must be comprehensive enough to extend to important related matters such as network-affiliate agreements. Any such review would best be undertaken in Docket No. 10-71, *In the Matter of Rulemaking to Amend The Commission's Rules Governing Retransmission Consent.*

In sum, Entravision urges the Commission to take stock of current video market conditions, and to raise ownership limits based on the expanding number of legitimate media sources and the ever-increasing substitutability of traditional and non-traditional media sources. In particular, Entravision urges the Commission to allow duopolies in all markets and permit three commonly-owned television Stations in large markets with 18 or more television Stations. At the same time, the Commission should promulgate a set of narrowly-focused behavioral regulations designed to prevent specific anticompetitive abuses in order to limit the threat consolidation may pose to competition and diversity. With respect to Shared Services Agreements, Entravision submits that SSAs in no way threaten the Commission's ownership rules and should not be treated as attributable interests. Broadcasters should not be penalized for relying on these agreements to continue providing local news and public affairs programming to the viewing public in the face of deteriorating economic conditions and declining ad revenues. Finally, Entravision believes that cable operator complaints about the retransmission consent process are unfounded and should be rejected outright. To the extent the Commission chooses to review its retransmission consent regime, any such review should properly take place in the pending retransmission consent proceeding instead of the instant ownership proceeding.

Respectfully submitted,

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