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 TIME WARNER CABLE INC.

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Time Warner Cable Inc. ("TWC") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceedings.[1]

INTRODUCTION AND SUMMARY

TWC applauds the Commission for undertaking a comprehensive review of the effectiveness of its media ownership rules, and agrees that more effective regulation of combinations and joint conduct among local television broadcasters is "necessary to promote competition."[2] As the NPRM recognizes, "the media marketplace is in transition,"[3] and as broadcasters invent new ways to coordinate their negotiations, consolidate control over network programming, and reduce local competition, the Commission should update its rules accordingly. In this vein, the NPRM aptly shines a light on two emerging strategies used by broadcasters to

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1 *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182 and 07-294, Notice of Proposed Rulemaking, FCC 11-186 (rel. Dec. 22, 2011) ("NPRM").

2 *Id.* ¶ 26.

3 *Id.* ¶ 4.

evade the media ownership restrictions and aggregate market power. First, competing broadcasters are using "sharing" agreements—including local marketing agreements ("LMAs"), joint sales agreements ("JSAs"), and shared services agreements ("SSAs")—to collude in the sale of retransmission consent to multichannel video programming distributors ("MVPDs").[4] Second, broadcasters are increasingly affiliating with two or more national networks to multicast multiple streams of network programming in a single DMA, and are thereby able to consolidate control of multiple Big Four signals in the hands of a single entity.[5]

The NPRM appropriately recognizes the significant public interest concerns that arise from these practices. Each strategy allows broadcasters to circumvent the plain language of Commission's duopoly rule,[6] which prohibits common ownership of two Big Four stations in the same DMA.[7] Moreover, although both strategies enable a Big Four station to seize control over another Big Four affiliate, the Commission has not required broadcasters employing these strategies to obtain prior approval for such transfers of control under Section 310(d),[8] and has not invoked other potentially applicable rules, such as the dual network rule,[9] to bar such conduct. Moreover, these strategies have harmful real-world effects on consumers. In particular, by pooling and augmenting the bargaining power of multiple Big Four outlets in a DMA, sharing

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4 *Id.* ¶ 200.

5 *Id.* ¶ 56.

6 47 C.F.R. § 73.3555(b).

7 *See* NPRM ¶ 56 (noting concerns that "multicasting permits stations to create 'virtual duopolies'" without triggering the duopoly rule); *id.* ¶ 200 (discussing concerns that "broadcasters may be using [sharing agreements] to circumvent the Commission's multiple ownership rules").

8 *See* 47 U.S.C. § 310(d) (prohibiting all "transfer[s] of control" over a station license "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby").

9 *See* 47 C.F.R. § 73.658(g) (providing that a broadcaster may not "affiliate with a person or entity that maintains two or more [Big Four] networks").

agreements and dual affiliations allow broadcasters to diminish or eliminate competition among themselves and drive up retransmission consent fees for MVPDs and their subscribers.[10]

TWC therefore urges the Commission to adopt proposals in the NPRM that seek to tighten the restrictions relating to local television ownership and control. By clarifying and adopting modest amendments to the existing rules, the Commission can ensure more effective enforcement of the longstanding policies that undergird the media ownership restrictions. Specifically, the Commission should clarify that certain sharing agreements require Commission approval as a "transfer of control" under Section 310(d) and confer an attributable interest for purposes of the local television ownership rule. In addition, the Commission should adopt a bright-line rule banning all sharing agreements that authorize or otherwise enable broadcasters to collude in negotiating retransmission consent. The Commission should close other loopholes in the local television ownership rule—including the provision that broadcasters need only comply "at the time [of] application" and the reference to controlling multiple "stations" instead of multiple "signals"[11]—that frustrate the purpose and enforcement of the rule. Relatedly, the Commission should take steps to ensure that broadcasters cannot evade the purpose of the Commission's dual network rule by affiliating with two or more of the Big Four networks.

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[10] *See* NPRM ¶ 56 & nn.122-23 (citing record submissions discussing the impact of dual affiliation on rising retransmission consent fees); *id.* ¶ 200 (pointing to evidence in the record that sharing agreements "permit local broadcast stations to exercise additional leverage with respect to MVPDs leading to higher fees for signal carriage, which are passed on to consumers in the form of higher rates").

[11] 47 C.F.R. § 73.3555(b)(1)(i).

DISCUSSION

I. THE COMMISSION SHOULD PREVENT BROADCASTERS FROM USING SHARING AGREEMENTS TO EVADE COMMISSION RULES AND TO FACILITATE ANTICOMPETITIVE CONDUCT

A. Broadcasters Are Misusing Sharing Agreements To Sidestep the Transfer of Control and Duopoly Rules.

The NPRM highlights widespread concerns that broadcasters increasingly are using sharing agreements—and SSAs in particular—to "circumvent the Commission's multiple ownership rules" and to shift substantial "influence or control" over a station from one broadcaster to another.[12] Indeed, TWC and numerous other MVPDs and consumer and public interest groups have long argued that local broadcast stations are misusing sharing agreements as a means of circumventing the Commission's media ownership rules. For example, the American Cable Association ("ACA") has identified at least 56 instances among its members alone in which Big Four affiliates are operating under some form of sharing arrangement with another in-market broadcast station.[13] TWC also has provided evidence of the widespread use of sharing arrangements among broadcast stations operating in the same DMA to create "virtual duopolies" in those markets. Sinclair Broadcast Group provides one such example, among many; it uses sharing agreements to aggregate market power in at least four DMAs in which TWC provides cable services: Columbus, OH, Charleston, WV, Dayton, OH, and Rochester, NY.[14]

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12 NPRM ¶¶ 200, 204.

13 *See* Comments of American Cable Association, MM Docket Nos. 00-168, 00-44, at 10-11 & n.23 (filed Dec. 22, 2011) ("ACA Broadcast Disclosure Comments"); Comments of American Cable Association, MB Docket No. 10-71, at 7 & App. B (filed May 27, 2011) ("ACA Retrans NPRM Comments").

14 *See* Comments of Time Warner Cable Inc., MB Docket No. 09-182, at 8 (filed July 12, 2010) ("TWC Media Ownership NOI Comments"); ACA Retrans NPRM Comments at App. B.

These and other similar arrangements enable broadcasters to evade the Commission's rules governing transfers of control and station duopolies with impunity. Although Section 310(d) of the Act bars transfers of control of a broadcast license without Commission authorization,[15] broadcasters continue to use sharing agreements to grant *de facto* control to another broadcaster in violation of the Act and the Commission's rules. And while the Commission has asserted that its "analysis 'transcends formulas[']… and must be determined on a case-by-case basis"[16] by "examin[ing] the policies governing station programming, personnel, and finances" to determine whether a *de facto* transfer has occurred,[17] the use of sharing agreements in a manner that effects such transfers has largely gone unscrutinized and unpunished by the Commission. Indeed, the Media Bureau has declined to consider whether use of sharing agreements by broadcasters violates the Commission's rules, even in the context of specific broadcast transactions in which the harms flowing from such agreements were squarely at issue.[18]

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[15] 47 U.S.C. § 310(d) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."); *see also* 47 C.F.R. § 73.3540(a) (requiring broadcast licensees to obtain prior approval before transferring control of a station).

[16] *KHNL/KGMB License Subsidiary, LLC, Licensee of Stations KHNL(TV) and KGMB (TV), Honolulu, Hawaii, and HITV License Subsidiary, Inc., Licensee of Station KFVE(TV), Honolulu, Hawaii*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 11-1938, at ¶ 3 (MB rel. Nov. 25, 2011) ("*Raycom SSA Order*") (quoting *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FC Rcd 8452, 8514 (1995)).

[17] *SagamoreHill of Corpus Christi Licenses, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2809, 2813 (MB 2010) (citing *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC* 444 F.2d 841 (D.C. Cir. 1970)).

[18] *See* Letter of Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Lewis J. Paper, Esq., Counsel for ACME Television Licenses of Ohio, LLC *et al.*, DA 11-648, at

The Commission's current duopoly rule is similarly riddled with loopholes. In particular, the NPRM notes that, under the duopoly rule, "[t]he point of applicability of the top-four prohibition" is "at the time of an application to the Commission."[19] As a result, a Big Four station can "evad[e] the intent of the rule" if it gains control of another Big Four station after—or even absent—an application.[20] In fact, the Media Bureau recently acknowledged that a series of transactions involving Raycom Media effectively accomplished such an evasion; although the Bureau determined that the transactions at issue had allowed Raycom to obtain control of two of the top four stations in the Honolulu, HI DMA[21]—a situation it found to be "clearly at odds with the purpose and intent of the duopoly rule"[22]—it nevertheless declined to enforce the rule because "no application was involved in these transactions, and none was required."[23]

Sharing agreements allow broadcasters to take advantage of this loophole in the duopoly rule, because such agreements on their own often will not trigger the filing of a new or separate application. As the NPRM points out, SSAs and JSAs are not attributable under the existing local television ownership rules,[24] while LMAs are attributable only if they allow one station to

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2 & n.6 (rel. Apr. 8, 2011) (denying TWC's petition to deny assignment of a station license involving a sharing agreement and stating that the "public interest harms associated with cooperative arrangements between in-market broadcasters" would be "more appropriately raised in the context of the Commission's pending review of its media ownership rules").

19 NPRM ¶ 45.

20 *Id.*

21 *See Raycom SSA Order* ¶ 3 ("Raycom now controls the licensee of Station KHNL(TV), the NBC affiliate, and Station KGMB(TV), the CBS affiliate, in the Honolulu market.").

22 *Id.* ¶ 23.

23 *Id.* ¶ 14.

24 *See* NPRM ¶ 196.

"broker" more than 15 percent of the other station's programming time.[25] In fact, the Commission's rules generally do not require broadcasters to disclose the existence of sharing agreements to which they are a party *at all*, a related problem that the Commission has proposed to rectify in a parallel proceeding.[26] Accordingly, a Big Four station can use a sharing agreement to gain control over another Big Four station in the same DMA without ever facing Commission scrutiny under the rules. Indeed, in TWC's experience, that is precisely what a number of station groups are doing.

B. Sharing Agreements Also Facilitate Collusion Among Competing Stations in Retransmission Consent Negotiations.

Sharing agreements also allow broadcasters in the same DMA to coordinate their retransmission consent negotiations—and, as a result, to engage in price-fixing. In fact, the joint negotiation of retransmission consent is a key feature of many sharing agreements. For example, in at least 36 of the 56 instances identified by ACA where multiple Big Four affiliates in the same DMA operate under some form of sharing agreement, the stations have relied on a single bargaining representative to negotiate retransmission consent in those markets.[27] In addition, as TWC previously explained, certain station groups routinely engage in joint retransmission

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25 *Id.* ¶ 196; *see also* 47 C.F.R. § 73.3555, Note 2(j).

26 *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398),* Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket Nos. 00-168, 00-44, FCC 11-162, at ¶ 35 (rel. Oct. 27, 2011).

27 *See* ACA Broadcast Disclosure Comments at 10-11; ACA Retrans NPRM Comments at 18.

consent negotiations in markets where the broadcasters each own stations, including Nexstar and Four Points, Nexstar and Mission, LIN and ACME, and Gray and Young.[28]

Accordingly, as the NPRM recognizes, the Commission should "consider the impact of these arrangements on other matters of Commission interest, such as retransmission consent negotiations."[29] Indeed, in seeking comment on the interplay between media ownership and retransmission consent, the NPRM acknowledges the importance of retransmission consent-related harms to this proceeding as well as to the pending proceeding exploring reforms to the broader retransmission consent regime.[30] As TWC has pointed out in numerous filings both in this proceeding and the retransmission consent reform docket, sharing agreements that facilitate and encourage broadcaster brinkmanship in retransmission consent disputes also raise independent concerns regarding the broadcast licensee's compliance with the spirit, and often the letter, of the Commission's media ownership rules.[31]

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28 TWC Media Ownership NOI Comments at 8; *see also* Letter of Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 09-182, 10-71 (filed Dec. 22, 2011).

29 NPRM ¶ 207.

30 *Id.* ¶¶ 200, 207.

31 *See, e.g.*, Letter of Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB. Docket Nos. 09-182, 10-71, at 1 (filed Nov. 18, 2011) (explaining that the "increasing prevalence of broadcast stations' coordination in the negotiation of retransmission consent … warrant[] remedial action in the retransmission consent rulemaking" and also "require clarification of the media ownership rules"); TWC Retrans NPRM Comments at 21 ("The potential for one of the Big Four stations to own or control two of the four highest-rated broadcast programming streams in a given DMA certainly violates the spirit, if not the letter, of the Commission's media ownership rules, and it facilitates collusive negotiations that exacerbate the already severe problems plaguing the retransmission consent process."); TWC Media Ownership NOI Comments at 10 (arguing that broadcasters "violate the Commission's [duopoly] rule[] when they own one of the top four stations in a DMA and then, through an LMA or similar arrangement, control the retransmission consent negotiations (among other key functions) of a second top four station"); Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR

Joint carriage negotiations directly undermine the very interests the media ownership rules were designed to advance. The NPRM thus appropriately recognizes the concern that sharing agreements "harm local competition[,] particularly when they permit stations to jointly negotiate retransmission consent."[32] Notably, DOJ reached the same conclusion in 1996 when it sued three stations in Corpus Christi, Texas under Section 1 of the Sherman Act for jointly withholding retransmission consent until they had extracted favorable carriage terms. According to DOJ, "[t]he effect of this combination and conspiracy was to increase the price of retransmission consent and to restrain competition among the defendants in the sale of retransmission rights."[33]

The Commission therefore should reject the view that "because broadcast content is available for free to end-users, … the Commission cannot examine changes in price to assess the impact of different levels of ownership concentration."[34] As an initial matter, broadcast television content is *not* free to MVPDs, which in recent years have been forced to pay substantial cash consideration in exchange for retransmission consent. And because of the mandatory nature of the basic tier on which broadcast stations are carried, these higher fees inevitably must be passed on to consumers in the form of higher subscription rates. Moreover, the vast majority of U.S. households today—a total of 91 percent—choose to subscribe to

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Nos. 8233-C, 8234-M, at 16-17 (filed Dec. 8, 2009) (explaining that Sinclair evidently has skirted [the Commission's duopoly rule] by acquiring control over two stations in several DMAs through abuses of LMA structures and other sham agreements, including its joint operation of two of the top-four stations in some cases").

32 NPRM ¶ 200.

33 *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement, at 2 (S.D. Tex. Filed Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/ texast0.htm.

34 NPRM ¶ 11.

MVPD services,[35] and, as a result, these consumers *do*, in fact, pay for broadcast programming. Thus, the notion that broadcast television programming "do[es] not have end user prices," or that competition cannot be evaluated on the basis of price,[36] not only is at odds with the DOJ's conclusions, but also is wholly inconsistent with the experience of nearly all consumers of broadcast television.

Moreover, compelling economic studies before the Commission demonstrate that the use of sharing agreements between ostensibly competing stations has significantly impacted rates for retransmission consent. Former FCC Chief Economist William Rogerson has authored two studies on the effect of joint negotiation on the fees for retransmission consent, both of which conclude that such conduct inevitably leads to higher rates for MVPDs and their subscribers.[37] Michael Katz, Jonathan Orszag, and Theresa Sullivan likewise conclude in a joint study that "joint negotiations [facilitated by sharing agreements] eliminate competition … [and] result in higher fees and consumer harm."[38] Another study authored by Professor Steven Salop suggests that the bargaining tactic of brinkmanship—that is, when a station threatens to "go dark" unless

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35 *See* Nielsen, *State of the Media: The Cross-Platform Report, Quarter 2, 2011*, at 9, *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/nielsen-cross-platform-report-q2-2011.pdf.

36 NPRM ¶ 173.

37 *See* William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 27, 2011); William P. Roberson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees*, MB Docket No. 10-71 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

38 Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269, at 27 (filed Dec. 16, 2009).

its demands for higher carriage fees are met—is more successful in DMAs where stations have executed sharing agreements with one another, because "LMAs and … sharing agreements strengthen the broadcasters' bargaining position" vis-à-vis MVPDs.[39] Relatedly, a report compiled by the Congressional Research Service identified these harms as early as 2007, noting that "it was striking how often the broadcaster involved in a [retransmission consent] dispute owned or controlled more than one broadcast station," and explaining that such conduct places MVPDs "in a very weak negotiating position since it would be extremely risky to lose carriage of both signals."[40]

Empirical evidence leaves no doubt that the use of sharing agreements to engage in joint negotiations has contributed to sharp increases in retransmission consent rates. For example, ACA has provided evidence that joint carriage negotiations by separately owned Big Four affiliates in a single DMA results in significantly higher fees (from 21.6% to 161%) than each station could garner through separate negotiations.[41] It should come as no surprise, therefore, that as sharing agreements have become more pervasive among broadcasters, rates for retransmission consent have skyrocketed nationwide. Industry analysts now expect retransmission consent-related revenues of broadcast networks *alone* to grow to $3 billion by

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39 Steven C. Salop *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 53 (June 3, 2010), filed as an attachment to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed June 3, 2010).

40 CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at CRS-70 (July 9, 2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.

41 *See* ACA Retrans NPRM Comments at 10.

2015,[42] a sharp increase in fee estimates released less than one year ago *for the entire broadcast television industry*.[43]

Sharing agreements also pose serious competitive concerns even in circumstances where the colluding stations negotiate retransmission consent at different times. In particular, when only one station is up for retransmission consent renewal, sharing agreements between or among broadcasters in the same DMA enable separately owned stations to collude in more subtle—but equally harmful—ways. TWC's ongoing retransmission consent dispute with Cordillera is instructive. Cordillera owns KRIS, the local NBC affiliate in the Corpus Christi, TX DMA, and uses sharing agreements to control KZTV, the local CBS affiliate owned by another station group, SagamoreHill. Although only KRIS had an expiring retransmission consent agreement with TWC in 2011 (KZTV continues to be carried on TWC's Corpus Christi system pursuant to a separate agreement), Cordillera leveraged its control of the two stations to air malicious, virtually identical "news" stories on both KRIS *and* KZTV that criticize TWC and urge viewers to switch to another MVPD. Cordillera accomplished this joint attack, in part, by installing the same management team at both stations. Thus, while one would expect the separately owned KZTV to take advantage of the competitive opportunity presented by KRIS's withdrawal of

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42 *See* Joe Flint, *Broadcast Networks Will Rake In Retransmission Fees, Report Says*, LOS ANGELES TIMES (Nov. 1, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/11/broadcast-networks-retransmission-consent-fees.html (citing SNL Kagan report estimating 2015 retransmission consent fees for Fox, CBS, NBC, ABC, CW, and Univision).

43 *See* Georg Szalai, *Broadcasters to Boost Retrans Fees to $3.6 Billion by 2017*, HOLLYWOOD REPORTER (May 25, 2011), *available at* http://www.hollywoodreporter.com/news/broadcasters-boost-retrans-fees-36-192349 (citing an SNL Kagan study predicting "total industry retrans fees could increase from $1.14 billion in 2010 to $3.61 billion by 2017, with average per-subscriber fees potentially more than doubling over that time period").

retransmission consent, it has done the opposite. Pursuant to its sharing agreements with KRIS, KZTV is aiding and abetting KRIS's withholding of retransmission consent.

The joint conduct of broadcasters in Corpus Christi also highlights how a single entity's ability to dictate and replicate the news content of multiple stations undermines the Commission's core interests in localism and diversity. Currently, KRIS, the NBC affiliate, "is responsible for producing the news on KZTV(TV)," the separately owned CBS station and, as noted above, apparently caused KZTV to air nearly identical "news" stories that served only the interests of KRIS.[44] Such arrangements are typical among broadcasters with sharing agreements. Indeed, a recent study explains that such agreements often result in "shared scripts, news personnel, graphics, and in some instances … the exact same newscasts."[45] As a result, production of local news and community-related content is reduced and consolidated, and "[t]he overall effect is one in which the diversity of information, and the diversity of sources, available to citizens diminishes dramatically."[46]

The Commission should reject attempts by broadcasters to sanitize their collusive behavior with claims that sharing agreements result in greater efficiencies.[47] As the Commission has recognized, greater competition among broadcasters—not greater "collaboration"[48]—

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44 Reply of KVOA Communications, Inc., MB Docket No. 12-15, at 10 (filed Feb. 15, 2012).

45 Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, at 25 (Nov. 2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2011/11/Retransmission-Consent-and-Localism-Paper-by-Napoli-FINAL.pdf ("Napoli Localism Study").

46 *Id.*

47 *See* NPRM ¶¶ 201-03.

48 NPRM ¶ 195 (noting that "broadcasters assert that [sharing] agreements facilitate greater collaboration between media outlets and permit stations to sustain labor intensive

promotes localism and the public interest.[49] It therefore is no answer for broadcasters to point to cost savings resulting from reduced news production costs as justification for sharing agreements. As an initial matter, the Commission should be skeptical of any claims that such cost savings allow stations to "invest more money in news production and other local programming,"[50] as recent studies indicate that the dramatic rise in broadcast stations' use of sharing agreements has precipitated a significant *decline* in original, diverse local news and public affairs programming.[51] In any event, even assuming that the consolidation of news operations can be beneficial in some limited respects, the sharing of local news resources certainly does not justify broadcasters' joint negotiation of retransmission consent agreements. As TWC has explained previously, such collusion reflects a violation of either the Commission's rules (if the broadcast stations are under common control as a result of a sharing agreement) or

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journalism, thereby offering more communities access to local news content than could otherwise be achieved").

49 *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 ¶ 97 (2008) ("*2006 Quadrennial Review Order*") (finding that "[t]he public is best served when numerous rivals compete for a viewing audience, that broadcaster incentives "to respond to conditions in local markets … may be diminished by mergers").

50 NPRM ¶ 203.

51 *See, e.g.*, Napoli Localism Study at 18-25; Danilo Yanich, *Local TV News & Service Agreements: A Critical Look*, at 105-07 (Oct. 2011), *available at* http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf (concluding that "the production of news was consolidated as previously competitor news operations were combined into one news production entity" and "the news that was produced by that entity was presented on the newscasts of the combined stations" when broadcast stations used sharing agreements and summarizing evidence gathered from eight television markets that demonstrated the regularity with which competing broadcast stations share news stories).

the antitrust laws (in the event that the stations remain separately controlled competitors).[52] Either way, such collusion cannot be allowed to persist.

C. The Commission Should Adopt Targeted Reforms To Prevent and Address Harms Caused by Sharing Agreements.

The prevalence of sharing agreements and collusive negotiations leaves no doubt that the Commission's media ownership rules are no longer accomplishing their intended goals. The Commission should take this opportunity to close the loopholes discussed above by tightening its transfer of control and duopoly rules and stepping up enforcement of the rules.

First, the Commission should clarify that an LMA, SSA, JSA, or any other sharing agreement that directly or indirectly gives a third party (whether it be another station, the affiliated network, or some other entity) control over the programming, operations, or carriage negotiations of a station constitutes a "transfer of control" that requires Commission approval under Section 310(d) and the Commission's rules.[53] The Commission also should determine that a broadcaster that has an LMA, SSA, JSA, or some other sharing arrangement satisfying the description above with a separately owned station in the same DMA is deemed to have an attributable interest in that station.

Second, to address the pervasive problem of broadcaster collusion in the context of retransmission consent negotiations, the Commission should adopt a bright-line rule banning any sharing agreement that enables broadcasters to engage in coordinated activity related to carriage. Such a rule should prohibit sharing arrangements that facilitate *any* form of collusion in negotiations with MVPDs—not merely the joint withholding of retransmission consent. Short of an outright ban on such collusion, the Commission, at a minimum, should find that an

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52 *See* TWC Media Ownership NOI Comments at 10-12.

53 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540.

attributable interest exists when a sharing arrangement between two stations allows for the joint negotiation of retransmission consent.

Third, the Commission should take action to prevent circumvention or evasion of the media ownership rules. To start with, the Commission should update the local television ownership rule so that compliance with the top-four prohibition is determined on an ongoing basis, not merely "[a]t the time the application to acquire or construct the station(s) is filed."[54] Relatedly, the Commission should "adopt a broader regulatory scheme that encompasses all agreements, however styled, that relate to the programming and/or operation of broadcast stations," as the NPRM proposes.[55] Broadcaster coordination in recent years has taken on a number of different and novel forms. As a result, the Commission's rules should be sufficiently adaptable to address (and therefore discourage) efforts to devise new types of sharing arrangements and new methods of collusion that are "clearly at odds with the purpose and intent" of the Commission's rules.[56]

The Commission therefore should eliminate the regulatory distinctions among functionally equivalent agreements (LMAs, SSAs, and JSAs) that broadcasters continue to exploit and instead adopt rules that pertain to *all* sharing agreements, regardless of label, that facilitate coordinated conduct among broadcasters, including coordinated carriage negotiations. Such a rule would be more effective in preventing broadcasters from inventing new classes of agreements designed to sidestep Commission oversight and would discourage broadcasters from entering into informal, unwritten sharing agreements that also would implicate and/or violate the Commission's rules.

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54 47 C.F.R. § 73.3555(b)(1)(i).

55 NPRM ¶ 207.

56 *Raycom SSA Order* ¶ 23.

This updated regime also should encompass agreements between stations and *networks* that raise transfer of control issues. As the Commission is aware, the Big Four networks often include veto or approval rights in their affiliation agreements with independently owned stations as a means of exerting control over the affiliates' retransmission consent agreements with MVPDs. As TWC has explained previously, network interference increases the risk of impasse in retransmission consent negotiations.[57] In addition, network interference with the retransmission consent negotiations of independent affiliates undermines the Commission's localism goals by siphoning off funds intended to support local broadcasting.[58] Accordingly, the Commission should scrutinize broadcasters' increasingly common practice of abdicating their authority over retransmission consent to the Big Four networks and, as with sharing agreements involving stations, find that such behavior constitutes a *de facto* transfer of control that requires Commission approval.[59]

II. THE COMMISSION SHOULD PROHIBIT STATIONS FROM AFFILIATING WITH MULTIPLE BROADCAST NETWORKS

Since the advent of digital television, broadcasters have yet another option for sidestepping the Commission's rules and aggregating market power: a station can now affiliate

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57 TWC Retrans NPRM Comments at 15 ("[N]etwork interference with the retransmission consent negotiations of independent affiliates, including a network's exercise of its contractual approval right to bless or veto retransmission consent agreements, … hinders the progress of negotiations.") (internal quotation marks and alterations omitted).

58 TWC Media Ownership NOI Comments at 19; *see also* TWC Mediacom Ex Parte at 11-14 (explaining that "[a] station's control over its retransmission rights clearly falls within the ambit of Section 310(d)" and that a contractual restriction in a network affiliation agreement regarding a station's ability to grant retransmission consent would violate "[t]he prohibition against improper delegation of control").

59 To the extent necessary, the Commission also should consider opening a separate rulemaking to determine whether a network veto or approval right over an independent affiliate's retransmission consent agreements should be attributable for purposes of determining the network's compliance with 39 percent national television ownership cap. *See* 47 C.F.R. § 73.3555(e); *2006 Quadrennial Review Order* ¶¶ 143-44.

with two or more Big Four networks in the same DMA and then multicast those signals.[60] As the NPRM points out, this practice is becoming increasingly widespread in the industry. One report cited in the NPRM identified 68 instances of dual affiliation involving at least one Big Four affiliate—35 instances involving Fox, 20 for ABC, 7 for NBC, and 6 for CBS.[61] As those figures show, and as the report describes in greater detail, Fox has been particularly active in migrating its existing affiliations to multicast arrangements that include the programming stream of another major network.[62] In fact, parties in this docket have documented at least 26 instances of dual affiliation involving *multiple* Big Four affiliates in a given DMA, and the vast majority of these instances involve a Fox affiliate.[63] Many of the stations with multiple Big Four affiliations are in TWC's service area, including KMBT (NBC/ABC) in Beaumont, TX,[64] KECY (ABC/Fox) in Yuma, AZ,[65] and KESQ/KDFX (ABC/Fox) in Palm Springs, CA.[66]

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60 NPRM ¶ 56 (explaining that, with the advent of digital television, broadcasters "have the ability to use their available spectrum to broadcast not only their main program stream but also, if they choose, additional program streams, an activity commonly referred to as multicasting").

61 *See* Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNEWSCHECK (Apr. 20, 2011), *available at* http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offers-a1-opportunity-for-big-four-nets (cited at NPRM ¶ 56).

62 *Id.* (reporting that, as part of Fox's widely publicized demands for a cut of its affiliates' retransmission consent revenues, Fox has punished reluctant stations by "yank[ing] its affiliation and hand[ing] it off to another station in the market that would carry it on a subchannel," thus giving Fox "ample experience with D2 affiliates").

63 *See* Comments of the American Cable Association, MB Docket No. 09-182, App. A (filed Jul. 12, 2010).

64 TWC Channel Lineup, Beaumont, TX, *available at* http://www.timewarnercable.com/texas/support/clu/clu.ashx?CLUID=436&Image1=&Zip=77701.

65 TWC Channel Lineup, Yuma, AZ, *available at* http://www.timewarnercable.com/Yuma-ElCentro/support/clu/clu.ashx?CLUID=629&Image1=&Zip=85364.

66 TWC Channel Lineup, Palm Springs, CA, *available at* http://www.timewarnercable.com/sandiego-desertcities/support/clu/clu.ashx?CLUID=475&Image1=&Zip=92264.

In addition, an increasing number of broadcasters are now using multicasting in tandem with sharing agreements to gain even greater control—and in some cases *total* control—over major network programming in a given DMA. For example, in the Lima, OH DMA, Block Communications effectively controls *all four* of the Big Four stations and five of the six broadcast affiliates overall. Block owns WLIO, which multicasts both NBC and Fox programming, and uses an SSA to control WOHL, a multicasting ABC/CBS affiliate owned by West Central Ohio Broadcasting Inc.[67] Similarly, Granite Broadcasting (WISE-TV) is using a combination of sharing arrangements and multicasting to control three of the four Big Four networks as well as five of the six national networks in the Fort Wayne, IN DMA.[68] As the Commission is aware, Nexstar Broadcasting, the owner of the station that lost its Fox affiliation in Fort Wayne, has filed a civil antitrust suit alleging that Granite's aggregation of market power violates the Sherman Act.[69] New Vision Television (WKBN) is using similar arrangements to control three of the Big Four networks in the Youngstown, PA DMA.[70]

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67 *See* Lima Communications Corp. History, *available at* http://www.hometownstations.com/story/13968290/your-hometown-stations-history (noting that, in August 2009, "WLIO (8.1-NBC/8.2-FOX) and WOHL-CD (35.1-ABC/35.2-CBS) [had] become[] the first single operation in the United States to have all 4 major Television Networks").

68 *See* Harry A. Jessell, *Nexstar Files Antitrust Suit Against Granite*, TVNEWSCHECK (Jul. 25, 2011), *available at* http://www.tvnewscheck.com/article/2011/07/25/52738/nexstar-files-antitrust-suit-against-granite (reporting that a combination of sharing agreements and multicasting had given Granite control over the stations in Fort Wayne affiliated with Fox, NBC, ABC, CW, and MNT).

69 *See* Complaint, *Nexstar Broadcasting, Inc. v. Granite Broadcasting Corp.*, No. 11-cv-249 (N.D. Ind. Jul. 25, 2011), attached to *Ex Parte* Letter of Elizabeth Ryder, Vice President and General Counsel, Nexstar Broadcasting, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (Jul. 27, 2011).

70 Press Release, *New Vision Television Emerges From Restructuring Process Well-Positioned for Growth*, PR NEWSWIRE (Sep. 30, 2009), *available at* http://www.prnewswire.com/news-releases/new-vision-television-emerges-from-restructuring-process-well-positioned-for-growth-62916722.html

As with sharing agreements, dual affiliation offers broadcasters a means of circumventing the rules and evading Commission oversight. Dual affiliation enables broadcasters to accomplish precisely what the duopoly rule was designed to prevent: the consolidation of multiple Big Four signals under the control of a single entity.[71] Dual affiliation also violates the spirit—if not the letter—of the dual network rule, which bars a broadcast station from "affiliat[ing] with a person or entity that maintains two or more" of the Big Four broadcast networks."[72] Moreover, the Commission currently does not require stations acquiring new affiliations to seek authorization under Section 310(d)[73]—even though acquiring a Big Four affiliation is the functional equivalent of acquiring a Big Four station. As a result, multicasting broadcasters have been able to gain control over multiple Big Four signals in a DMA without ever facing Commission scrutiny under the media ownership or transfer of control rules.

In addition, consolidation through dual affiliation presents many of the same competitive concerns as collusion through sharing agreements. As with sharing agreements, dual affiliation enables one entity to negotiate retransmission consent for two local signals that each carry programming from a different Big Four network. The Commission has repeatedly explained that when a broadcaster achieves such consolidation via merger, the combination of two of the Big Four signals in a given DMA "'would be the most deleterious to competition.'"[74] Consolidation via dual affiliation is no different. Like a merger of two Big Four stations, dual affiliation

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71 The Commission has not enforced the duopoly rule against dual-affiliating stations presumably because the text of the rule refers to ownership or control over multiple "stations" instead of "signals," and measures compliance "at the time [of] application," whereas stations typically do not file an application when acquiring an affiliation. *See* 47 C.F.R. § 73.3555(b).

72 47 C.F.R. § 73.658(g).

73 47 U.S.C. § 310(d) (requiring authorization for the transfer or assignment of a "construction permit or station license").

74 NPRM ¶ 40 (quoting *2006 Quadrennial Review Order* ¶ 102).

involving two Big Four stations in the same DMA would "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."[75] By reducing or eliminating local competition, dual affiliation makes it easier for broadcasters to raise the price of retransmission consent and makes threats to withhold signals—which now may include two or more streams of major network programming—more powerful and pervasive.

Therefore, TWC strongly agrees with the suggestion in the NPRM to "limit the ability of station owners to form dual affiliations involving certain networks."[76] In particular, the Commission should require a broadcaster seeking to affiliate with multiple national networks to apply to the Commission for approval, much like a broadcaster seeking to purchase another station. Likewise, the Commission should revise its duopoly rule to prohibit the ownership, operation, or control of two or more television station "signals" (as opposed to "stations") in a single DMA unless the conditions of 47 C.F.R. § 73.3555(b)(1) are otherwise met. The Commission also should take steps to ensure that broadcasters cannot evade the purpose of the Commission's dual network rule by affiliating with two or more of the Big Four networks. After all, it does little good for the Commission to bar a station from affiliating with two national networks owned by the same entity, when a station now can aggregate market power just as easily by affiliating with each network separately. These reforms, taken together, would close significant loopholes in the media ownership rules that multicasting broadcasters routinely exploit.

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75 *Id.*

76 *Id.* ¶ 57.

CONCLUSION

More than ever before, broadcasters are using sharing agreements and dual affiliations to reduce competition and drive up retransmission consent fees in local DMAs. These new strategies fly in the face of the interests the media ownership rules were designed to promote, and though the rules have not yet caught up with these practices, the NPRM is a step in the right direction. TWC strongly urges the Commission to follow through with the reforms discussed above, and to subject sharing agreements and dual affiliations—which are often every bit as harmful to competition as outright duopolies—to the same exacting scrutiny used to address other methods of aggregating market power.

Respectfully submitted,

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