

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| 2010 Quadrennial Regulatory Review – |) | MB Docket No. 09-182 |
| 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. 07-294 |
| Promoting Diversification of Ownership |) | |
| In the Broadcasting Services |) | |

**REPLY COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (“NTCA”) hereby submits these reply comments in response to the above captioned Notice of Proposed Rulemaking (“NPRM”).¹ NTCA represents more than 580 rate-of-return regulated telecommunications providers. All of NTCA’s members are full-service local exchange carriers (“LECs”), and many of its members provide wireless, cable, Internet, satellite, and long-distance services to their communities. Video is an important component of the service suite provided by rural LECs in the small markets that they serve, particularly as it helps to promote broadband adoption.

In its NPRM, the Federal Communications Commission (the “Commission”) “reaffirms that its media ownership rules are necessary to further the Commission’s long-standing policy goals of fostering competition, localism, and diversity.”² NTCA agrees with the Commission

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 No. 09-182, MB Docket No. 07-294, Notice of Proposed Rulemaking (rel. Dec. 22, 2011), (“NPRM”).

² NPRM ¶ 6.

that the retention of the local broadcast ownership rules is in the public interest. Further, NTCA maintains that the Commission must use this proceeding to address common broadcaster practices which harm consumers and multichannel video program distributors (“MVPDs”). This includes: (i) any arrangement which allows broadcast stations to collude to set retransmission consent practices; (ii) multicasting which allows a broadcast station to effectively operate multiple networks in a single market; and (iii) network involvement or interference in content carriage and fee discussions which prevents affiliated stations from independently negotiating with MVPDs. Any such practice is directly against the public interest tenets of the Commission’s broadcast ownership rules.

I. ANY AGREEMENT WHICH ALLOWS STATIONS TO COLLUDE TO SET RETRANSMISSION CONSENT PRICES UNDERMINES THE COMMISSION’S POLICY GOALS OF LOCALISM, COMPETITION AND DIVERSITY

Increasingly, broadcaster affiliated stations are combining their efforts and pooling their resources. As the NPRM concludes, the coordination between stations can take several forms, including joint sales agreements (“JSAs”), local marketing agreements (“LMAs), and shared services agreements (“SSAs”). Regardless of the structure, any formation of bargaining groups or in-kind arrangements that enables broadcasters to collude to set retransmission consent fees, rather than compete against one another, is contrary to the public interest. NTCA agrees with ACA that “coordinated retransmission consent negotiations by separately owned, same-market broadcasters lessen competition in local broadcast markets, as evidenced by these broadcasters

ability to drive up prices beyond levels achievable if each station were to negotiate consent separately.”³

A similar arrangement is multicasting, where one station will broadcast the feeds of two or more broadcast networks. As a result, for all intents and purposes, one physical station is now operating multiple broadcast feeds or stations in the same market. Multicasting reduces competition in a local area, and provides stations with additional marketplace power in retransmission consent negotiations to set higher content prices and additional contract terms.

Further, NTCA members report that network influence in retransmission consent proceedings is increasingly common, with networks demanding the power to veto, approve, or solely negotiate agreements for their affiliates. This practice negatively affects the creation of local content. NTCA agrees with ACA’s assertion that “when a network dictates the terms under which independent affiliates negotiate retransmission consent agreements with MVPDs by demanding a portion of retransmission consent revenues for themselves, it siphons off funds that Congress and the Commission intended to be used to enhance local station’s provision of community-oriented news and public affairs programming.”⁴

³ Comments of the American Cable Association, *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, Promoting Diversification of Ownership In the Broadcasting Services*, MB Docket No. 09-182, MB Docket No. 07-294, Notice of Proposed Rulemaking (filed March 5, 2012), (“ACA”) at 8.

⁴ Comments of the Independent Telephone and Telecommunications Alliance, *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, Promoting Diversification of Ownership In the Broadcasting Services*, MB Docket No. 09-182, MB Docket No. 07-294, Notice of Proposed Rulemaking (filed March 5, 2012), (“ITTA”) at 4. See Phillip Napoli, “Retransmission Consent and Broadcaster Commitment to Localism,” Nov. 2011, attached to AVTA Letter, at 11-16.

II. AN ATTRIBUTABLE INTEREST SHOULD BE FOUND TO EXIST WHEN SEPARATELY OWNED STATIONS IN THE SAME MARKET ENGAGE IN THE COORDINATED NEGOTIATION OF RETRANSMISSION

The NPRM seeks comment on the broadcast attribution rules, defined as the financial or other interests of the licensee which must be taken into account when applying the Commission's broadcast ownership rules.⁵ The attribution rules identify the interests in licensees that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licenses or other core operating functions."⁶

As NTCA has stated in the Commission's ongoing retransmission consent proceeding, a station should not be permitted to grant an unaffiliated station the right to negotiate or the power to approve its retransmission consent agreements.⁷ In regard to the Commission's broadcast ownership rules, such arrangements grant an attributable interest in the bargaining authority.

The practice of coordinating or colluding in retransmission consent negotiations—through a JSA, SSA or LMA or similar agreement—allows a third party to grant permissions for a local station, when the requirements of the broadcast license place local responsibilities on the license holder, not a designee. The bargaining authority can use its sole discretion to decide when it will negotiate and what price it will accept. NTCA agrees with DirecTV's assertion that "such delegation empowers the owner of another in-market station to determine whether and when retransmission consent agreements will be reached and resulting revenues will flow to the delegating authority, thereby giving the negotiating station control over a significant aspect of

⁵ NPRM ¶ 194.

⁶ Id. Also see *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, paragraph 1 (1999).

⁷ Comments of the Organization for the Promotion and Advancement of Small Telecommunications companies; The National Telecommunications Cooperative Association; The Independent Telephone and Telecommunications Alliance; The Western Telecommunications Alliance; and the Rural Independent Competitive Alliance, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, (filed May 27, 2011), ("Retransmission Consent Comments").

the delegating station's finances.”⁸ NTCA concurs that the Commission's broadcast attribution rules must be expanded to address cases where an unaffiliated station is granted the right to negotiate retransmission consent agreements.

The Commission already has established a similar precedent. As it stands today, the Commission's local television ownership rules prevent mergers between two of the top-four stations (ABC, CBS, Fox and NBC) in a local market.⁹ In this NPRM, the Commission tentatively concluded that it should retain this rule to protect localism and competition.¹⁰ NTCA agrees with this conclusion, and also asserts that competition is equally impaired when two or more stations allow a single broadcast licensee to exert its decision-making authority over multiple broadcasts stations in the same market, thereby undermining the local television ownership rules.

In initial comments filed in this proceeding, ACA said that it has identified 62 instances where separately owned same-market full-power big four affiliates are operating under some form of a sharing arrangement.¹¹ In 46 of these instances, two entities are allowing a single representative to negotiate retransmission consent carriage and associated fees.¹² NTCA advises the Commission to maintain its Big Four rule and further conclude that “an attributable interest exists when separately owned stations in the same market engage in the coordinated negotiation

⁸ Comments of the DirecTV, *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, Promoting Diversification of Ownership In the Broadcasting Services*, MB Docket No. 09-182, MB Docket No. 07-294, Notice of Proposed Rulemaking (filed May 5, 2012), (“DirecTV”) at 4.

⁹ 47 CFR § 73.3555(b).

¹⁰ NPRM ¶ 40

¹¹ ACA at 6.

¹² ACA at 7.

of retransmission consent, whether formally or informally, because such practices result in the same harms to competition, localism, and diversity as a merger between the top-four stations.”¹³

III. THE COMMISSION SHOULD DECLARE THAT IT VIOLATES ITS ATTRIBUTION RULES FOR A BROADCAST NETWORK TO INFLUENCE ITS AFFILIATE’S RETRANSMISSION CONSENT NEGOTIATIONS

NTCA also urges the Commission to address the separate but closely tied issue of network influence and involvement in an affiliated station’s retransmission consent negotiations. This is an increasingly common practice.

Retransmission consent fees derived from negotiations between affiliated stations and MVPDs has increasingly become a source of revenue for major broadcast networks. In initial comments filed in this proceeding, ITTA directs attention to a recent industry analysis:¹⁴

By demanding what amounts to about half their affiliates’ retransmission consent revenue, the major broadcast networks — the Big Four plus Univision — have tapped a major new revenue stream that will grow from \$146 million this year to \$1.3 billion in 2015, according to a new report from SNL Kagan. ‘For major networks, sharing in affiliates’ retrans revenue stream is now a given, and although slightly different models are emerging, network partners appear to be planning to receive at least half of the income flowing to affiliates.’¹⁵

As a result, major broadcast networks wish to exert more control over content carriage and fee negotiations. In comments filed in 2011, Fox Entertainment Group noted that its network affiliation agreement includes a provision calling for the affiliate to “obtain Fox’s approval before finalizing an agreement with an MVPD for retransmission consent that includes

¹³ ITTA at 7.

¹⁴ ITTA at 10.

¹⁵ Harry A. Jessell, “SNL Kagan: Reverse Comp to Hit \$1.3 B in ’15,” *TVNewsCheck*, Nov. 1, 2011, available at <http://www.tvnewscheck.com/article/2011/11/01/55125/snl-kagan-reverse-comp-to-hit-13b-in-15>.

distribution of Fox's network programming."¹⁶ Taking this one step further, NBC is seeking to negotiate retransmission-consent deals with operators on behalf of each of its affiliated stations, in exchange for keeping an unspecified percentage of the fees that stations would collect from MVPDs.¹⁷

NTCA does not dispute here that networks have the right to receive retransmission fees generated by agreements involving the stations owned and operated by the network. However, when networks demand the right to approve, veto, or place other restrictions on the agreements of the independently owned affiliates, the networks are asserting direct control over negotiations between MVPDs and affiliated stations. In short, such arrangements are similar to those described above, "placing the ever increasing retransmission revenue stream outside the station's control, subject to the different (and potentially adverse) strategic objectives of a third party."¹⁸

NTCA has argued that it is a *per se* violation for a broadcast station to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD.¹⁹ In respect to the media ownership proceeding, the Commission also should conclude that a veto or right-of-approval provision gives the network an attributable interest in each of its affiliated stations.

¹⁶ Comments of the Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71, at 13 (filed May 27, 2011).

¹⁷ ITTA at 11. See Wallenstein, Andrew, "NBC Affiliate Deal Proving Elusive," *Variety*, Dec. 5, 2011, available at <http://www.variety.com/article/VR1118046999>.

¹⁸ DirecTV at 6.

¹⁹ Retransmission Consent Comments at 9-11.

IV. CONCLUSION

For the foregoing reasons, NTCA affirms that the Commission should amend its local broadcast rules to address these common broadcaster practices which undermine the public interest goals of promoting diversity, competition and localism.

Respectfully submitted,



By: /s/ Jill Canfield
Jill Canfield
Director, Legal & Industry

Its Attorney

/s/ Jesse Ward
Jesse Ward
Policy Analyst

4121 Wilson Blvd., 10th Floor
Arlington, VA, 22203
(703) 351-2020

March 29, 2012

CERTIFICATE OF SERVICE

I, Barbara Fitzpatrick, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in MB Docket Nos.09-192 and 07-294, was served on this 29th day of March 2012 via electronic mail to the following persons:

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Julius.Genachowski@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Mignon.Clyburn@fcc.gov

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

/s/ Barbara Fitzpatrick
Barbara Fitzpatrick