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

REPLY COMMENTS OF TIME WARNER CABLE INC.

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Time Warner Cable Inc. ("TWC") respectfully submits these reply comments in response to the Notice of Proposed Rulemaking issued in the above-captioned dockets and the opening comments submitted on March 5, 2012.[1]

INTRODUCTION AND SUMMARY

The opening comments demonstrate the critical need for reform of the Commission's media ownership rules to prevent broadcaster misuse of sharing agreements and multicasting arrangements. Local marketing agreements ("LMAs"), joint sales agreements ("JSAs"), shared services agreements ("SSAs"), local news service agreements ("LNSAs"), and other forms of sharing and dual affiliation agreements are increasingly common in today's marketplace, and as a diverse group of commenters point out, broadcasters are using them in ways that drive up the price of retransmission consent and harm consumers.

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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*, Notice of Proposed Rulemaking, MB Docket Nos. 09-182, 07-294, FCC 11-186 (rel. Dec. 22, 2011) ("NPRM").

A broad base of commenters—representing all types of multichannel video programming distributors ("MVPDs") and an array of public interest organizations—therefore support a number of proposals that would close loopholes in the Commission's rules. TWC urges the Commission to heed these calls for reform. In particular, as recommended by the opening comments, the Commission should adopt an order that (i) clarifies that a sharing agreement effects a transfer of control when it directly or indirectly gives a third party (whether it be a station, the affiliated network, or some other entity) control over programming, operations, or carriage negotiations of a station; (ii) makes sharing agreements providing for joint retransmission consent negotiations attributable under the Commission's rules; (iii) bans the use of sharing agreements that enable multiple non-commonly owned stations operating in the same DMA to engage in such negotiations; (iv) updates the duopoly rule to ensure broadcaster compliance on an ongoing basis, rather than merely at the point at which a Commission application is pending; and (v) revises the duopoly and dual network rules to address the growing problem of dual affiliation with national networks through multicasting arrangements.

DISCUSSION

I. THE RECORD CONFIRMS THE CONCERNS RAISED BY TWC AND OTHERS REGARDING BROADCASTERS' RAMPANT ABUSE OF SHARING AGREEMENTS

A. The Opening Comments Provide Powerful Evidence That Sharing Agreements Routinely Are Used To Transfer Control of Critical Station Functions.

As a threshold matter, the Commission should reject the efforts of broadcasters to avoid scrutiny of sharing agreements by pointing to the Commission's ongoing retransmission consent reform proceeding.[2] The NPRM squarely raises the issue of sharing agreements in this proceeding. The NPRM acknowledges concerns that "broadcasters may be using [particular sharing agreements] to circumvent the Commission's multiple ownership rules," and, in retransmission consent negotiations, to demand "higher fees for signal carriage, which are passed on to consumers in the form of higher rates."[3] Accordingly, the NPRM specifically (and appropriately) seeks comment on whether sharing agreements "create interests in licensees that confer a degree of 'influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.'"[4] The NPRM also asks whether the Commission should "consider the impact of these agreements on … retransmission consent negotiations."[5]

That a number of broadcast-affiliated commenters chose not to respond to the NPRM's "strong[] encourage[ment]" to address these issues in a substantive manner,[6] but instead to criticize MVPDs and public interest groups who have identified the harmful, anti-competitive uses to which sharing agreements are being put,[7] is perhaps not surprising. But broadcasters'

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2 *See, e.g.*, Comments of the Coalition to Preserve Local TV Broadcasting, MB Docket Nos. 09-182, 07-294, at 16 (filed Mar. 5, 2012) ("Broadcaster Coalition Comments"); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182, 07-294, at 28 n.52 (filed Mar. 5, 2012); Comments of Entravision Holdings, LLC, MB Docket Nos. 09-182, 07-294, at 18 (filed Mar. 5, 2012).

3 NPRM ¶ 200.

4 *Id.* ¶ 204.

5 *Id.* ¶ 207.

6 *Id.* ¶ 208. *See generally, e.g.*, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket Nos. 09-182, 07-294 (filed Mar. 5, 2012); Comments of Belo Corp., MB Docket Nos. 09-182, 07-294 (filed Mar. 5, 2012); Comments of CBS Corporation, MB Docket Nos. 09-182, 07-294 (filed Mar. 5, 2012) ("CBS Comments").

7 *See, e.g.*, Comments of Sinclair Broadcast Group, Inc., MB Docket Nos. 09-182, 07-294, at 20 (filed Mar. 5, 2012) ("Sinclair Comments"); Broadcaster Coalition Comments at 16.

efforts to skirt the ownership rules and the policies that underlie them represent a serious problem that requires immediate attention. Broadcast stations receive licenses to use immensely valuable beachfront spectrum at no charge in exchange for their commitment to use the public airwaves to serve the public interest. The substantial evidence in the record revealing conduct that directly contravenes those public interest obligations demands more than *ad hominem* attacks on the motivations of consumer groups and other industry stakeholders.

As TWC has explained in numerous filings in this and the retransmission consent reform proceedings, the increasing prevalence of broadcast stations' coordination in carriage negotiations with MVPDs not only warrants remedial action in the retransmission consent rulemaking, but also requires clarification of, and minor revisions to, the media ownership rules.[8] Numerous commenters echo TWC's concerns. In particular, commenters submit compelling evidence that broadcasters are using sharing agreements to circumvent the Commission's prohibition of station duopolies. For example, Free Press explains that "stations are entering into [sharing agreement] deals with increasing and alarming alacrity," citing examples in Honolulu, Hawaii; Tucson, Arizona; Charleston, South Carolina; and Scranton, Pennsylvania, among others, as evidence of "the increasing problem of covert consolidation."[9] In joint comments, Mediacom and Suddenlink point out that, when a station surrenders control of its right to negotiate retransmission consent to another station, it places the "station's availability to the

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8 *See, e.g.*, Comments of Time Warner Cable Inc., MB Docket Nos. 09-182, 07-294, at 8-9 (filed Mar. 5, 2012) ("TWC Comments"); 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); Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 21 (filed May 27, 2011); Comments of Time Warner Cable Inc., MB Docket No. 09-182, at 10 (filed July 12, 2010); Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR Nos. 8233-C, 8234-M, at 16-17 (filed Dec. 8, 2009).

9 Comments of Free Press, MB Docket Nos. 09-182, 07-294, at 58, 61 (filed Mar. 5, 2012) ("Free Press Comments"); *id.* at 51-55.

viewers it is licensed to serve" at risk, and effectively "surrenders *de facto* or *de jure* control to another station."[10] Similarly, DIRECTV notes that sharing agreements "permit[] a third party to exert significant influence over core licensee functions"—namely, the power to "control … a station's finances."[11]

DIRECTV also raises the critical issue of networks' interfering with the retransmission consent negotiations of independent affiliates. As its comments explain, veto or approval rights in network affiliation agreements are "similar to … JSAs and SSAs" in that they "plac[e] the ever increasing retransmission revenue stream outside the station's control, subject to the different (and potentially adverse) strategic objectives of a third party."[12] TWC agrees with DIRECTV that, like sharing agreements, network veto or approval rights enable networks to exert "extensive influence over station finances."[13] As a result, "such arrangements give a network tools that can be used to override a licensee's judgment on … issue[s] … critical to station operations, which can be leveraged to reach additional core licensee functions" of personnel, programming, or policy.[14]

Broadcasters' attempts to brush aside the concerns expressed in the NPRM—for instance, by claiming that the Commission "has long recognized that [sharing] agreements lack the hallmarks of 'control' that should give rise to attribution"—are unavailing.[15] Indeed,

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10 Joint Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket Nos. 09-182, 07-294, at 17 (filed Mar. 5, 2012) ("Mediacom/Suddenlink Comments").

11 Comments of DIRECTV, LLC, MB Docket Nos. 09-182, 07-294, at 1-2 (filed Mar. 5, 2012) ("DIRECTV Comments").

12 *Id.* at 6.

13 *Id.* at 8.

14 *Id.*

15 CBS Comments at 15.

broadcasters themselves have insisted elsewhere that "[t]he future of free, over-the-air broadcast programming" depends on the ability to garner retransmission consent revenues, and that retransmission consent cash is necessary to broadcasters' "continuing ability to offer programming relevant to the needs and interests of their local communities."[16] Such assertions squarely contradict NAB's claim here that "the terms and conditions of the retransmission of broadcast signals by MVPDs do not impact a licensee's … 'core operating functions.'"[17] Whether or not retransmission consent revenue is as indispensible as broadcasters typically claim, it plainly has a major impact on broadcast stations' finances and operations now that they have exploited their market power and the preferences available under the Commission's rules to extract well over $1 billion annually from MVPDs,[18] with total fees expected to climb to $3.6

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[16] DIRECTV Comments at 3 (*quoting Facts About Fox's Negotiations with DISH* (*formerly available at* http://getwhatipaidfor.com/home/story/view/182)); Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 3 (filed May 27, 2011); *id.* at 3-5 (citing broadcaster public statements regarding their use of retransmission consent fees to invest in programming); *see also, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 14 n.48 (2011) (citing comments of broadcast-affiliated commenters regarding the purported need to establish retransmission consent revenue streams in order to compete in the marketplace, recoup programming investments, among other alleged purposes); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 10-71, at 14 (filed May 27, 2011) (claiming that retransmission consent fees will lead to "higher broadcast station revenues, greater investment by local stations in programming, [and] more and better local programming"); Comments of LIN Television Corporation, MB Docket No. 10-71, at 12 (filed May 27, 2011) (asserting that revenue from retransmission consent is "critically needed" for independent stations to pay for network programming).

[17] Comments of the National Association of Broadcasters, MB Docket Nos. 09-182, 07-294, at 69 (filed Mar. 5, 2012) ("NAB Comments").

[18] *See, e.g.*, Jon Lafayette, *SNL Kagan: Broadcasters Retrans Revenues Rose 47% in 3Q*, BROADCASTING & CABLE (Feb. 15, 2012), *available at* http://www.broadcastingcable.com/article/480595-SNL_Kagan_Broadcasters_Retrans_Revenues_Rose_47_in_3Q.php.

billion annually within five years.[19] Moreover, the fact that SSAs, LNSAs, network affiliation agreements, and other forms of sharing agreements "contain very similar provisions to LMAs and JSAs"—agreements that the Commission has found to be attributable for ownership purposes—further undermines these attempts to distinguish control of retransmission consent negotiations from other telltale hallmarks of "control" cognizable under the Commission's media ownership rules.[20]

Broadcasters also misstate the extent to which the Commission has examined the impact of sharing agreements as a general matter.[21] Broadcasters are not required to obtain Commission approval prior to entering into sharing agreements.[22] Indeed, in most cases, stations are not even required to disclose the existence of such agreements to the Commission.[23] As a result, the

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19 *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.

20 NPRM ¶ 200; *see also id.* ¶ 197 (citing history of the Commission's attribution rules for radio and television LMAs, radio JSAs, and the Commission's tentative conclusion with respect to television JSAs); *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, 26 FCC Rcd 16087 ¶ 5 (MB 2011) (describing the terms of Raycom's SSA with HITV, under which "Raycom is to provide certain back-office support to HITV's station and to produce local newscasts for the station, not to exceed 15% of Station KFVE(TV)'s weekly programming hours," in addition to "leas[ing] certain of its employees to assist in the sale of advertising time on KFVE(TV)").

21 *See, e.g.*, Comments of LIN Television Corporation, MB Docket Nos. 09-182, 07-294, at 15 (filed Mar. 5, 2012) ("LIN Comments") (claiming that "the FCC has long known about and *approved* sharing agreements" (emphasis added)); *id.* (pointing to the Commission's "approv[al]" of LIN's sharing agreements with ACME and Vaughan Media); CBS Comments at 15.

22 *Cf.* 47 C.F.R. §§ 73.3526(e)(14), (16); 73.3613(b), (c), (d) (requiring stations to disclose or file certain broadcast sharing agreements).

23 As TWC explained in reply comments submitted in the Commission's enhanced disclosure proceeding regarding broadcasters' public files, greater transparency is

Commission has reviewed sharing agreements only in very limited circumstances. By the same token, contrary to LIN's assertion, the Media Bureau recently declined to consider the impact of sharing agreements between in-market broadcast stations in the context of a specific transaction involving LIN and ACME, instead encouraging TWC to voice its concerns in *this* proceeding, as well as in the retransmission consent reform docket.[24] Indeed, in such proceedings the Commission generally has *not* been willing to address concerns that sharing agreements "impermissibly transfer too much control over station operations … on an individualized basis."[25] To the contrary, this rulemaking presents the first meaningful opportunity to do so in years.

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desperately needed regarding broadcasters' use of sharing agreements in order to ensure that the Commission (and the public) can, among other things, (i) evaluate the propriety and full impact of such agreements on the public interest, (ii) document the harms associated with such agreements, (iii) adequately protect the public against the harms associated with sharing agreements and broadcasters' associated coordinated conduct, and (iv) robustly enforce broadcaster compliance with the Commission's rules, including rules against unauthorized transfers of control and limitations on broadcast station ownership. *See* Reply Comments of Time Warner Cable Inc., MM Docket Nos. 00-168, 00-44 (filed Jan. 17, 2012). TWC therefore urged the Commission to require broadcasters to include sharing agreements in their online public files. *See id.* To the extent the Commission declines to compel greater disclosure in that proceeding, TWC urges the Commission to do so as part of the order issued in this proceeding *in addition to* adopting rules to prohibit or curb the use of sharing agreements. *See* NPRM ¶ 205.

24 *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 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").

25 Comments of Tribune Company, Debtor-in-Possession on Notice of Proposed Rulemaking, MB Docket Nos. 09-182, 07-294, at 75 (filed Mar. 5, 2012) ("Tribune DIP Comments").

B. Broadcaster Abuse of Sharing Agreements Is Causing Harm.

Not only are sharing agreements enabling broadcasters to sidestep the Commission's rules, but they are causing substantial public interest harms as a result. As an initial matter, virtually all commenters agree (*i.e.*, all but those representing broadcast interests) that sharing agreements "undermine the Commission's goals of competition, localism, and diversity."[26] 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.[27] TWC has witnessed such declines in its own service areas.[28]

Broadcast stations that coordinate their carriage negotiations also lessen competition in the marketplace and thus are able to "command significantly higher fees for carriage solely through the exercise of increased market power and regardless of other factors such as audience share."[29] Indeed, ACA submits evidence in its comments that retransmission consent fees range

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26 Comments of the Independent Telephone and Telecommunications Alliance, MB Docket Nos. 09-182, 07-294, at 3 (filed Mar. 5, 2012) ("ITTA Comments"); *see also*, *e.g.*, Free Press Comments at 49 ("As reliance on [sharing agreements] increases, local news competition is being reduced and the quality and quantity of independently reported and produced local news is declining.").

27 *See*, *e.g.*, Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, at 18-25 (Nov. 2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2011/11/Retransmission-Consent-and-Localism-Paper-by-Napoli-FINAL.pdf; Danilo Yanich, *Local TV News & Service Agreements: A Critical Look*, at 105-107 (Oct. 2011), *available at* http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf.

28 *See* TWC Comments at 12-13 (describing illustrative situation in Corpus Christi, Texas, where KRIS, the NBC affiliate, produces the newscasts for KZTV(TV), the separately owned CBS station, which has resulted in the airing of nearly identical opinion pieces masquerading as "news" stories on both stations).

29 Comments of American Cable Association, MB Docket Nos. 09-182, 07-294, at 21 (filed Mar. 5, 2012).

from 21.6% to 161% higher when in-market stations coordinate their negotiations for carriage.[30] As numerous commenters have explained, and significant expert analysis confirms, skyrocketing retransmission consent fees impact the prices that consumers pay to subscribe to MVPD service.[31] Thus, contrary to the conclusory assertions of Sinclair and other broadcast interests,[32] these comments and others like them provide incontrovertible evidence of the relationship between retransmission consent fees, MVPD subscription prices, and most importantly, consumer welfare.

C. The Commission Can and Should Apply Its Media Ownership Rules to *All* Sharing Agreements.

The opening comments thus militate strongly in favor of adopting reforms to halt such abuses of sharing agreements. TWC therefore urges the Commission to adopt a rule banning sharing agreements that facilitate any form of coordination between or among non-commonly owned, in-market broadcasters in negotiating retransmission consent with MVPDs. TWC also supports adoption of the "bright line, multi-factor test for attribution" proposed by a group of public interest and non-profit organization commenters led by the United Church of Christ and endorsed by other stakeholders.[33] Under the proposed test, a sharing agreement would

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30 *Id.* at 9.

31 *See, e.g.*, TWC Comments at 3; *id.* at 10-11 (citing economic studies); Comments of Office of Communication of United Church of Christ, Inc.; Media Alliance; National Organization for Women Foundation; Communications Workers of America; Common Cause; Benton Foundation; Media Counsel Hawai'i, MB Docket Nos. 09-182, 07-294, at 6 (filed Mar. 5, 2012) ("United Church of Christ *et al.* Comments") ("With joint negotiations, television stations can demand higher prices that are passed on to consumers.").

32 *See, e.g.*, Sinclair Comments at 20; Comments of Gray Television, Inc., MB Docket Nos. 09-182, 07-294, at 14 n.41 (filed Mar. 5, 2012).

33 United Church of Christ *et al.* Comments at 15-16; Free Press Comments at 59-60. *See also, e.g.*, ITTA Comments at 5-6 (arguing in favor of making sharing agreements attributable under the Commission's rules); DIRECTV Comments at 5-7 (same).

automatically be attributable under the Commission's rules if any of a number of the enumerated factors is satisfied, including if the sharing agreement enables one broadcaster to "outsource[] its retransmission consent negotiations" to another broadcaster.[34] Other steps also are necessary to ensure that broadcast stations do not circumvent or evade the media ownership rules, including (a) clarifying that sharing agreements that involve joint retransmission consent provisions constitute a "transfer of control" under Section 310(d) and the Commission's rules; (b) updating the duopoly rule so that compliance with the top-four prohibition is determined on an ongoing basis; and (c) addressing the increasingly pervasive problem of network interference with the retransmission consent negotiations of independent affiliates.

Some broadcasters claim that such updates to the Commission's rules would constitute "improper retroactivity," but that is clearly incorrect.[35] The courts have recognized the Commission's broad public interest authority includes the ability to apply its rules to existing contracts in ways that may frustrate the expectations of the contracting parties.[36] As the D.C. Circuit explained, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. Such expectations, however legitimate, cannot furnish a sufficient basis for identifying impermissibly retroactive rules."[37] The Commission has not hesitated to invoke that authority in

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34 United Church of Christ *et al.* Comments at 15.

35 LIN Comments at 15 n.20. LIN also is mistaken in asserting that the Commission affirmatively "approved" its current sharing agreements with ACME and Vaughan Media, *id.* at 15, as discussed above. *See supra* at 7-8.

36 *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).

37 *Id.*

settings where it has imposed new restrictions on cable operators,[38] and there is no sound argument that broadcasters should be permitted to continue engaging in conduct after the Commission finds that it contravenes the public interest.

Relatedly, the Commission should reject the calls of broadcasters to "grandfather" approval of the use of anti-competitive and anti-consumer sharing agreements.[39] Placing such an unwarranted limitation on the application of the Commission's media ownership rules would gut the effectiveness of the intended reforms. For example, to the extent that broadcasters could rely on existing sharing agreements and continue to engage in joint retransmission consent negotiations on behalf of ostensible in-market competitors for years to come, grandfathering would only further entrench the use of such agreements when the purpose of reform is to eliminate them, or at the very least limit their use. Grandfathering thus would thwart the Commission's goals of promoting competition, localism, and diversity in the local marketplace.

II. THE COMMISSION SHOULD PROHIBIT MULTICASTING ARRANGEMENTS INVOLVING BIG FOUR NETWORKS

The opening comments also demonstrate that broadcast stations' increasing use of multicast arrangements (*i.e.*, dual affiliation) is cause for serious concern. Like sharing agreements, multicasting allows one entity to control multiple signals in a single DMA although, as a result of digital broadcasting technology, no additional spectrum is required. As TWC explained in its opening comments, multicasting thus is yet another way that broadcasters are

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38 *See id.* at 670-71 (upholding prohibition on enforcement of exclusive contracts with building owners and immediate application of ban to existing agreements); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 64 (2010) (applying new program access rules to existing contracts, thereby enabling "an MVPD [to] file a program access complaint after the effective date of the rules alleging that a cable operator's continued reliance on or enforcement of this contract violates these rules," and explaining that such application of new rules is not "impermissibly retroactive").

39 *See* LIN Comments at 15 n.20; Tribune DIP Comments at 75.

violating the spirit, if not the letter, of the Commission's media ownership rules—namely, the duopoly and dual network rules.[40] Mediacom and Suddenlink note that "a station's use of its multicast capacity to exercise control over two or more Big Four affiliations in a market poses the same threats to the public interest as common ownership of two or more separately licensed local stations whose primary signals are Big Four affiliates."[41] Likewise, ITTA recognizes that multicasting "arrangements 'allow stations to do locally what the networks are forbidden from doing nationally [under the dual network rule]: consolidate multiple Big Four signals under the control of a single entity.'"[42]

The record now demonstrates just how quickly the multicasting phenomenon is spreading. For instance, Mediacom and Suddenlink provide evidence documenting the rapid growth of Big Four multicast duopolies. They estimate that "nearly one out [of] five DMAs now has at least one" such duopoly, which translates to "nearly 150 multicast duopolies that involve a Big Four/Little Two combination"—a more than 100% increase from statistics reported approximately one year ago.[43]

Like TWC, these commenters agree that "unfair retransmission consent bargaining power … is one of the principal motivating factors (if not <u>the</u> motivating factor) behind this surge."[44] Indeed, it is well documented in the record that "when there is coordination of operational activities through negotiation of retransmission consent agreements, … by … a single station that multicasts major network signals, it reduces marketplace competition and permits stations to

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40 TWC Comments at 20.

41 Mediacom/Suddenlink Comments at 18.

42 ITTA Comments at 7-8.

43 Mediacom/Suddenlink Comments at 19 & n.37; *see also*, *e.g.*, ITTA Comments at 7.

44 Mediacom/Suddenlink Comments at 19.

charge higher fees."[45] The opening comments thus reflect support for TWC's recommendation that the Commission should prohibit anticompetitive multicasting arrangements.

Broadcasters that attempt to distinguish multicasting arrangements from common station ownership on technical grounds are missing the point.[46] Dual affiliations involving Big Four network signals frustrate the core purpose of the duopoly rule—to promote competition.[47] Further, the Commission has long held that "combinations of top four stations … would be the most deleterious to competition,"[48] due to the market power conferred by the "must-have" nature of the national programming supplied by the Big Four networks.[49] By reducing or eliminating local competition, dual affiliation facilitates broadcasters' aggregation and exercise of market power. It makes no difference that multicasting arrangements do not involve ownership of two separate stations, as the market power conferred by control of two or more streams of "must-have" programming is the same. Thus, as TWC explained in its opening comments, the acquisition of multiple signals of must-have programming via multicasting raises precisely the same concerns as common ownership of multiple stations in the same DMA or the consolidation

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45 ITTA Comments at 3.

46 *See* NAB Comments at 31.

47 *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*").

48 *Id.* ¶ 102; *see also, e.g.*, NPRM ¶ 40 (citing *2006 Quadrennial Review Order* ¶ 102).

49 *See, e.g.*, *General Motors Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 4 (2004) (describing News Corp., as the owner of a television broadcast network, among other properties, and as a "supplier of crucial inputs" to MVPDs); *id.* ¶ 48 (recognizing "the importance of local television broadcast signals … as 'must-have programming'" for MVPDs); *see also* 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).

of station operations using a sharing agreement.[50] As a result, such harms are central to the Commission's review of the ownership rules at issue in this proceeding.

Likewise, Sinclair's warning that "limit[ing] the right of multicasts to affiliate with a broadcast network" will somehow reduce broadcasters' incentives to make multicast programming available is a red herring.[51] The concern that TWC and others have articulated relates to the leveraging of multiple Big Four signals through multicast arrangements. The proliferation of such arrangements has not resulted from any effort to expand the *over-the-air* reach of Big Four programming, as Sinclair disingenuously suggests.[52] Rather, the causes have been station groups' efforts to aggregate market power that can be exploited through the retransmission consent process and the Big Four networks' reshuffling of affiliations where incumbent stations refuse to meet increased "demands for a large portion of … [retransmission consent] fees."[53]

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50 TWC Comments at 20-21.

51 Sinclair Comments at 18.

52 *See id.* at 18-19.

53 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). *See also*, *e.g.*, Mediacom/Suddenlink Comments at 14-15 (explaining that "it is clear that the aggregation of local market power by local television stations ... [through multicasting and other arrangements] can and does encourage and enable those stations to make unreasonable retransmission consent demands and to use coercive negotiating tactics in an effort to force MVPDs to capitulate to those demands"); Complaint, *Nexstar Broadcasting, Inc. v. Granite Broadcasting Corp.*, No. 11-cv-249, at ¶¶ 73, 55 (N.D. Ind. July 25, 2011), attached to Letter of Elizabeth Ryder, Vice President and General Counsel, Nexstar Broadcasting, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (filed July 27, 2011) (alleging violations of Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and several provisions of the Indiana Antitrust Act because Granite's acquisition of an "exclusive license to broadcast programming from the FOX Network" as a multicast signal "will substantially lessen competition in the relevant market and tend to create a monopoly," without achieving any "legitimate efficiency benefit to counterbalance the anticompetitive effects"); Harry A. Jessell, *Fox Affils*

Because these multicasting arrangements are artificially driving up the price of retransmission consent and causing increased risks of programming blackouts, they plainly are harming consumers rather than benefitting them. In order to promote—indeed, to restore—competition among local broadcasters (and the resultant consumer benefits), the Commission should restrict dual affiliations involving a Big Four signal—or worse, *three or four* Big Four signals—in the same manner that it restricts ownership of stations that are Big Four affiliates. TWC therefore urges the Commission to revise its ownership rules to address the harms associated with multicasting—either by revising the duopoly rule, the dual network rule, or both.

Exchange Fire Over Retrans, TVNEWSCHECK (Feb. 9, 2011), *available at* http://www.tvnewscheck.com/article/2011/02/09/48992/fox-affils-exchange-fire-over-retrans/ (reporting on dispute between Fox Networks and Fox Affiliate Board in which Mike Hopkins, President of Sales and Affiliate Marketing for Fox Networks, threatened in a letter to affiliates to pull affiliations from those stations that do not meet Fox's demands for a cut of retransmission consent fees).

CONCLUSION

The opening comments powerfully illustrate how sharing agreements and dual affiliations are causing the very harm to competition, localism, and diversity that the Commission's duopoly, attribution, and dual network rules were designed to prevent. TWC therefore urges the Commission to adopt and implement the reforms discussed above, particularly where current broadcaster practices are being used to drive up retransmission consent fees.

Respectfully submitted,

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