

**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

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) MB Docket No. 09-182
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) MB Docket No. 07-294
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**REPLY COMMENTS OF FOX ENTERTAINMENT GROUP, INC.
AND FOX TELEVISION HOLDINGS, INC.**

Dated: April 17, 2012

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	2
II. LOCAL NEWS SERVICE ARRANGEMENTS BEAR NONE OF THE HALLMARKS OF ATTRIBUTION THAT SOME COMMENTERS WOULD ASSOCIATE WITH SHARING AGREEMENTS	6
A. The Advocacy Group Commenters Fail To Distinguish Between LNS Arrangements and Sharing Agreements.....	6
B. The MVPD Commenters Do Not and Cannot Demonstrate Any Relationship Between Retransmission Consent and LNS Agreements	9
III. MVPD ARGUMENTS CONCERNING RETRANSMISSION CONSENT ARE FUNDAMENTALLY FLAWED AND BEYOND THE SCOPE OF THIS PROCEEDING.....	10
A. Requests for the Commission to Encumber Retransmission Consent Negotiations Are Unsupported By Commission Precedent, Illogical, and Regardless Should Be Raised in the Retransmission Consent Docket	10
B. The Network Role in Retransmission Consent Is Fully Consistent With the Free Market Principles of the Communications Act and the Public Interest	12
IV. MULTICASTING DOES NOT IMPLICATE THE DUAL NETWORK RULE	16
V. CONCLUSION	20

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**REPLY COMMENTS OF
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.**

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, “Fox”) respectfully submit their reply to the comments filed in response to the Notice of Proposed Rulemaking (the “*Notice*”),¹ released in December 2011, initiating a review of the Commission’s media ownership rules. The strong majority of the comments submitted in response to the *Notice* confirm that structural media ownership rules are an idea whose time has passed. Several commenters, however, persist in ignoring the deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996, which gives rise to this proceeding.² These commenters would have the Commission ignore its deregulatory obligation and instead pile onerous new media ownership restrictions atop the layers of antiquated regulation that already shackle broadcasting and, consequently, harm the public interest. Specifically, these advocates of ever-more government control ask that the Commission:

¹ See *In re 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 11-186, MB Docket No. 09-182 (rel. Dec. 22, 2011).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(h) (“1996 Act”).

(i) regulate the use of innocuous local news service (“LNS”) arrangements; (ii) allow this media ownership proceeding to be hijacked by a retransmission consent sideshow, despite the separate, still-pending proceeding initiated to provide a forum for addressing that issue; and (iii) stretch the application of the dual network rule beyond all reasonable limits. These positions simply are not supportable as a matter of law or policy.

I. INTRODUCTION AND SUMMARY

As Fox explained in its opening comments, the modern media landscape would be astonishingly foreign to the authors of the structural ownership regulations.³ The Internet, cable and satellite systems, and innumerable other technological innovations have rendered moot any policy justification that may once have existed for the current rules. In light of these transformative changes, the media ownership regulations reviewed in the *Notice* cannot be reconciled with the Constitution and with Fox’s First Amendment rights. Even putting aside the Constitutional infirmities, Section 202(h) of the 1996 Act also requires the FCC to determine whether any of its media ownership rules are “necessary in the public interest as the result of competition” and to repeal or modify those that are not.⁴ Given the ongoing transformation of the media ecosystem, most notably including the burgeoning power of the Internet, the Commission cannot retain these ownership rules consistent with Section 202(h).

Moreover, because the ownership regulations restrict traditional media from banding together to form combinations that would enhance the provision of entertainment and local news, retention of these rules would be profoundly harmful to the public interest. For all of

³ See *In re 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, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 7 (filed Mar. 5, 2012) (“Fox Comments”). For ease of reading, all further references to “[Party Name] Comments” refer to comments filed by the party of that name on that same day in this same docket.

⁴ 1996 Act, at § 202(h).

these Constitutional, statutory and policy reasons, Fox continues to believe that the Commission should dismantle the moribund structural ownership rules once and for all. And as the record now makes clear, Fox is hardly alone in pointing out that the time has come for the FCC to jettison these archaic and counterproductive regulations.⁵

Nevertheless, there remain some who mistakenly believe that ownership limits continue to have a role to play in the Internet age. For example, several commenters request that the Commission regulate an amorphous class of sharing arrangements defined to include everything from shared services agreements (“SSAs”) to joint sales agreements (“JSAs”) to LNS agreements. These parties generally fall into two groups: one that is concerned with sharing arrangements that purportedly allow broadcasters to consolidate their news operations (the “Advocacy Group Commenters”),⁶ and one that suggests that sharing agreements should be regulated because they somehow implicate retransmission consent negotiations with multichannel video programming distributors (the “MVPD Commenters”).⁷

Both groups simply lump LNS arrangements together with station sharing agreements, even though LNS deals contain none of the indicia of actual station-to-station collaboration present in sharing contracts. Indeed, LNS agreements do not involve any

⁵ See, e.g., A.H. Belo Corporation Comments, at 3-8; Belo Corp. Comments, at 3-9; CBS Corporation Comments, at 2-6 & 10-18; Cedar Rapids Television Company Comments, at 3-14; Cox Media Group Comments, at 8-19; Grant Group, Inc. Comments, at 3-7; Gray Television, Inc. Comments, at 6-8; Morris Communications Company, LLC Comments, at 4-8 & 11-13; National Association of Broadcasters Comments, at 11-29 & 39-49; Newspaper Association of America Comments, at 20-27; Nexstar Broadcasting, Inc. Comments, at 10-27; Sinclair Broadcast Group, Inc. Comments, at 4-12.

⁶ See Communications Workers of America, *et al.* (“CWA”) Comments, at 5-7; Free Press Comments, at 43-61; Office of Communications of United Church of Christ, Inc., *et al.* (“UCC”) Comments, at 1-23.

⁷ See American Cable Association (“ACA”) Comments, at 13-27; Independent Telephone & Telecommunications Alliance (“ITTA”) Comments, at 5-7; Mediacom Communications Corporation, *et al.* (“Mediacom”) Comments, at 11-12 & 16-17; Time Warner Cable, Inc. (“Time Warner Cable”) Comments, at 4-17.

consolidation at all between independent stations. An LNS agreement does not even result in shared news reporting or production, let alone any exchanges of advertising, financial or other business information. Thus, the Commission should not consider LNS agreements to be “sharing arrangements” at all and should dismiss any suggestion that LNS deals be regulated.

In addition, to the extent that the MVPD Commenters attempt more broadly to haul the contentious issue of retransmission consent negotiation into this media ownership proceeding,⁸ the FCC easily can dismiss their arguments as sleight-of-hand. A review of the media ownership rules pursuant to Section 202(h) quite clearly is not the appropriate venue for evaluating commenters’ assertions about retransmission consent. This is especially true given the existence of an ongoing proceeding devoted specifically to these very MVPDs’ concerns.⁹

Even if that parallel proceeding did not exist, the MVPD Commenters’ attempts to tie retransmission consent to the media ownership rules are wholly unpersuasive. As Fox previously has explained,¹⁰ the Commission has no statutory authority to interfere with a broadcast station’s decision to assign or delegate its retransmission consent rights, whether to another station or to its network partner. In particular, the FCC cannot “interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate

⁸ See ACA Comments, at 3-29; DIRECTV, LLC (“DIRECTV”) Comments, at 1-10; ITTA Comments, at 5-12; Mediacom Comments, at 3-22; Time Warner Cable Comments, at 7-17 & 20-21.

⁹ See *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, Public Notice, MB Docket No. 10-71, 25 FCC Rcd 2731 (2010) (“*Retransmission Consent Proceeding*”).

¹⁰ See generally *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (filed June 27, 2011) (“Fox Retransmission Reply Comments”).

agreements”¹¹ This policy helps to ensure an effective network-affiliate partnership, which in turn promotes development and investment in over-the-air television programming.

Finally, a handful of parties suggest that the dual network rule should be applied to prohibit commonly-owned broadcast stations from affiliating with two major networks in a market, and to prevent any network affiliate from affiliating with a second network on a multicast subchannel.¹² These proposals find no support in the plain text of the dual network rule and, equally important, are wholly disconnected from the stated purpose of the rule. The dual network rule was promulgated to protect affiliates, not to promote the economic self-interest of MVPDs. If the rule is retained at all, the FCC should not permit it to be twisted to serve some new purpose utterly unrelated to its origins.

Put simply, none of these proposed modifications and additions to the media ownership rules can bear the weight of careful scrutiny. In light of the deregulatory mandate of Section 202(h), these schemes are especially inapt. Accordingly, Fox respectfully submits that the Commission is obligated to reject these proposed alterations to the rules. Instead, as Fox and numerous others have made clear, the FCC should focus its efforts on repealing the media ownership regulations in their entirety.

¹¹ *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10354 (2005) (“*Reciprocal Bargaining Order*”).

¹² *See* Time Warner Cable Comments, at 21; ITTA Comments, at 8.

II. LOCAL NEWS SERVICE ARRANGEMENTS BEAR NONE OF THE HALLMARKS OF ATTRIBUTION THAT SOME COMMENTERS WOULD ASSOCIATE WITH SHARING AGREEMENTS

A. The Advocacy Group Commenters Fail To Distinguish Between LNS Arrangements and Sharing Agreements

The Advocacy Group Commenters premise their arguments on the notion that the provision of local news has been harmed by some nebulous collection of station cooperation arrangements. Free Press, for example, says that “news and resource sharing agreements” are a “covert and insidious form of consolidation” that creates “a TV dial where most of the news is essentially a duplicate of what is aired on another local broadcast channel.”¹³ The Office of Communication of the United Church of Christ, et al. (“UCC”) states that sharing agreements “reduce competition, result in duplicative local news programming, and diminish opportunities for minorities and women”¹⁴ These groups assert that sharing agreements allow one station in a market to affect the programming decisions of other stations.¹⁵ They claim that these concerns justify the Commission’s application of its broadcast attribution rules to these types of arrangements.¹⁶

LNS arrangements, though, are merely an innocuous attempt to bring the traditional media pool forward into the modern era. In conflating a wide array of sharing agreements with LNS arrangements, these groups are committing a classic category error – linking together subjects as if they belonged with one another. Free Press says that the agreements

¹³ Free Press Comments, at 49.

¹⁴ UCC Comments, at 2.

¹⁵ See UCC Comments, at 15. See also Free Press Comments, at 59 (stating that such agreements create an entity that “walks like a duopoly and talks like a duopoly”).

¹⁶ See Free Press Comments, at 58-61; UCC Comments, at 15-23.

that concern it are “shared services agreements” and an undefined set of “other sharing arrangements.”¹⁷ UCC, meanwhile, defines “sharing arrangements” to include a grab bag of broadcast station collaborative activities, among them SSAs, JSAs, local marketing agreements and LNS agreements.¹⁸ Each group then argues that its preferred assortment of arbitrarily defined “sharing arrangements” possesses nefarious qualities.¹⁹

When it comes to pinning any harms directly on LNS agreements, however, these advocates become more circumspect. UCC musters only a lukewarm citation to the Commission’s report on the information needs of communities, weakly protesting that “enhanced service to local communities is not always the result [of an LNS agreement].”²⁰ Free Press does not even go that far, mentioning the words “local news service” or “LNS” only once in its comments, and then only in quoting UCC’s proposed new attribution regime.²¹ In other words, these commenters link LNS agreements to precisely zero negative consequences and demonstrate no way in which LNS agreements confer upon one station influence or control over any other. Notwithstanding this absence of evidence, Free Press and UCC ask the FCC to regulate a station’s participation in an LNS agreement simply

¹⁷ Free Press Comments, at 49.

¹⁸ See UCC Comments, at 1 n.2.

¹⁹ See Free Press Comments, at 50-52 (arguing that a sharing arrangement has caused one station to produce local newscasts for several others in the same market); UCC Comments, at 12 (arguing that a sharing arrangement has caused another station to outsource its local news coverage to a team in an entirely different metro area).

²⁰ See UCC Comments, at 9 (citing STEVEN WALDMAN AND THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE, at 97-98 (2011)).

²¹ See Free Press Comments, at 60.

because these advocates have arbitrarily chosen to place LNS agreements within the category of “sharing arrangements.”²²

Whether motivated by an affirmative desire to portray all cooperation as problematic or driven by a set of overbroad assumptions, the Advocacy Group Commenters’ decision to paint all broadcast collaboration with a single broad brush reflects a fundamental misunderstanding of LNS agreements. As Fox explained in its initial comments, LNS agreements are merely the equivalent of a traditional media pool operated on a standing basis. Each member station contributes personnel to an LNS team, which obtains raw video footage from events of collective interest, leaving each individual station to fashion its news coverage while conserving resources to enable pursuit of additional stories. The end-product of an LNS agreement is video footage from the LNS team. The ultimate decision as to how or even whether to use that footage belongs to each station alone. LNS agreements do not permit any participant to exercise any editorial discretion or control whatsoever over the newscast of any other station.

At the same time, LNS agreements actively provide important benefits to diversity and localism. By sending a single video photographer to common events, instead of sending three, four or more to the same event, each station can expand the number of stories that it is capable of covering in its local market. Likewise, an LNS agreement enables local stations to preserve resources that they can invest in newsgathering and investigatory journalism. This ultimately expands both the aggregate amount of unique news and the overall diversity of coverage within a market.

²² See UCC Comments at 19-20, Free Press Comments at 60.

B. The MVPD Commenters Do Not and Cannot Demonstrate Any Relationship Between Retransmission Consent and LNS Agreements

The MVPD Commenters suggest that sharing deals should be regulated not because of any inherent problems associated with those agreements, but because they purportedly indicate that the participants will conspire together in retransmission consent negotiations. The American Cable Association (“ACA”), for instance, states broadly that sharing agreements should result in attribution because of “[t]he competitive harm to competition and the degree of influence over another station conveyed by sharing agreements that facilitate the coordination of retransmission consent”²³ The Independent Telephone & Telecommunications Alliance (“ITTA”) argues that “[i]t is becoming increasingly common for broadcasters to rely on [sharing] arrangements, either formally or informally, for purposes of allowing multiple competing broadcast stations in a single market to collude in the negotiation of retransmission consent”²⁴ Time Warner Cable goes as far as to suggest that the Commission “adopt rules that pertain to *all* sharing agreements, regardless of label, that facilitate coordinated conduct among broadcasters”²⁵

As a threshold matter, it is quite clear that LNS agreements have nothing to do with stations’ external business dealings. As noted above, they are exclusively the province of broadcasters’ news departments, which work together on a limited basis to avoid wasteful and duplicative use of news resources. That at least some types of sharing agreements are innocuous is conceded by at least one MVPD commenter: “ACA recognizes that some forms of operational sharing agreements among separately owned stations may create efficiencies

²³ ACA Comments, at ii-iii.

²⁴ ITTA Comments, at 5.

²⁵ Time Warner Cable Comments, at 16.

that benefit both licensees and the viewing public.”²⁶ LNS agreements are precisely that – contracts that address internal efficiencies, not external business dealings – and as such do not belong within any category of “sharing arrangements” that concerns the MVPD Commenters.

To the extent that the MVPD Commenters suggest that LNS agreements should be regulated because they somehow signal intent by one participant to cede control to another in some *future* action or negotiation, the Commission can and should easily dispatch that argument. Even if the underlying fear were valid, and it is not, there is an inherent and obvious causal flaw in any proposal that would have the Commission ban the use of canaries in order to prevent mine explosions.

The bottom line is that no commenter has provided the Commission any basis to regulate LNS agreements. If the FCC says anything at all about LNS agreements in this proceeding, it should explicitly recognize that these pool arrangements support the Commission’s ultimate goal of ensuring better, more diverse local news coverage.

III. MVPD ARGUMENTS CONCERNING RETRANSMISSION CONSENT ARE FUNDAMENTALLY FLAWED AND BEYOND THE SCOPE OF THIS PROCEEDING

A. Requests for the Commission to Encumber Retransmission Consent Negotiations Are Unsupported By Commission Precedent, Illogical, and Regardless Should Be Raised in the Retransmission Consent Docket

Separate and apart from their groundless attacks on LNS agreements, the MVPD Commenters attempt at several points to draw a broader connection between the media ownership proceeding initiated in the *Notice* and questions about retransmission consent

²⁶ ACA Comments, at 22-23.

negotiations. Although the MVPDs employ various tenuous theories in an attempt to connect distant dots,²⁷ none of their arguments is new and none warrants analysis in this proceeding.²⁸

The MVPD Commenters begin inauspiciously by failing even to address the Commission's long-standing position that there is nothing wrong with broadcasters bargaining away some or all of their retransmission consent rights. While Congress initially may have given the retransmission consent right to "stations," Congress intended that the right "may be freely bargained away in future programming contracts,"²⁹ or for that matter assigned however a broadcaster sees fit.³⁰ Moreover, the Commission already has made clear that it will not "interject" itself into specific arguments concerning private agreements between broadcast stations and networks.³¹

Nevertheless, the MVPD Commenters press on, claiming that regulatory expansion is warranted "by recent developments in broadcast television markets, including the increasing importance industry-wide of retransmission consent fees as a source of revenue to local

²⁷ See ACA Comments, at 26-27; Mediacom Comments, at iv (suggesting that news sharing arrangements may indicate an abdication of control over a participating station's financial decision-making); ITTA Comments, at 3 (suggesting that news sharing arrangements amount to a non-compete agreement); Time Warner Cable Comments, at 17-21 (suggesting that dual affiliation is used as a ploy to gain an advantage in retransmission consent negotiations).

²⁸ One MVPD Commenter is bold enough to openly admit that all of its arguments retrace well-worn ground. See DIRECTV Comments, at 9 ("None of this is new.").

²⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6746 (1994) (the "Retransmission MO&O") (footnote omitted).

³⁰ See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005 (1993) ("We interpret Section 325 as meaning that the new right [to retransmission consent] may be bargained away by broadcasters in future contracts and conceivably could have been bargained away in some existing contracts").

³¹ See *In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13977, 13981 (2004).

television stations.”³² Of course, it is precisely because retransmission consent revenues are so important to local broadcasters that it would be folly for the Commission to interfere in a manner that inhibits flexibility in bargaining. If the FCC were to intercede, it would limit broadcasters’ ability to negotiate for this increasingly important second revenue stream, which is crucial to the future of over-the-air television.

Regardless, the Commission has heard all of the MVPD Commenters’ arguments before. The FCC established a proceeding in 2011 to give MVPDs an opportunity to make their case for increased regulatory oversight of retransmission consent.³³ As Section 325 of the Communications Act makes clear, the FCC has no authority to interfere in retransmission consent negotiations, the terms of which Congress intended be governed by the marketplace – not regulation.³⁴ Thus, there is no merit to the MVPDs’ arguments and no reason for any FCC action. Nevertheless, that proceeding remains pending and it remains the appropriate venue should anyone wish to extend this tiresome debate.

B. The Network Role in Retransmission Consent Is Fully Consistent With the Free Market Principles of the Communications Act and the Public Interest

Because some of the MVPD Commenters repeat here discredited allegations about network participation in retransmission consent negotiations,³⁵ Fox wishes to briefly reiterate

³² ACA Comments, at i. *See also* DIRECTV Comments, at 2 (“Retransmission consent fees have become an increasingly important component of [local stations’] finances.”); Mediacom Comments, at 7-8 (suggesting that the Commission should step in because retransmission consent revenues are “skyrocketing”).

³³ *See generally* *Retransmission Consent Proceeding*.

³⁴ *See Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., at 4-7 (filed May 27, 2011).

³⁵ *See* ITTA Comments, at 11; DIRECTV Comments, at 6-9.

the points that it has made in previous filings with the Commission on this subject.³⁶ First, the Commission has stated that Congress granted broadcast stations a freely alienable retransmission consent right. Affiliates are thus well within their rights to engage in retransmission consent negotiations however they choose. Second, when networks seek to play a limited role in retransmission consent, they advance legitimate public interest goals by working to cultivate a second revenue stream to supplement cyclical advertising in support of over-the-air television. Third, there is no basis for the claim that a network role in retransmission consent implicates an affiliate's control of its license under Section 310(d) of the Communications Act.³⁷

As the record in the retransmission consent proceeding makes abundantly clear, the Commission long has acknowledged that Congress granted stations a right that “may be freely bargained away in future programming contracts.”³⁸ As the Commission also consistently has recognized, Congress did not intend for the retransmission consent regime “to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate’s right to redistribute affiliated programming.”³⁹ Network-affiliate agreements are the products of fair bargaining between two independent parties, who are free to accept or reject proposed deal terms and who enter a contract only when there is mutual agreement.

³⁶ See, e.g., Fox Retransmission Reply Comments, at 2-10.

³⁷ See 47 U.S.C. § 310(d) (requiring a Commission finding that any transfer of control over a station license serves the “public interest, convenience, and necessity”).

³⁸ *Retransmission MO&O*, 9 FCC Rcd at 6746 (footnote omitted).

³⁹ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354. See also *Retransmission MO&O*, 9 FCC Rcd at 6746 (citing S. Rep. No. 102-92, at 36 (1991) (“It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations”)).

Moreover, when networks play a role in retransmission consent they advance the public interest by helping to ensure that all of the players in the broadcast television ecosystem develop sufficient revenues to support over-the-air television. By assisting affiliate stations in obtaining fair compensation for MVPD subscribers' access to broadcast programming, networks ensure that broadcasters retain the ability to invest in the production and acquisition of the most popular news, sports and entertainment content on television. If the Commission were to interfere in this dynamic, it would put over-the-air viewers' access to compelling content at risk, as high-cost programming increasingly would migrate to pay-only outlets. Likewise, affiliates would struggle in bargaining for revenues that are increasingly critical to support production of local news and public interest programming. In any event, despite their protestations, advocates for retransmission consent reform continue to fail to produce a single example of a network ever serving as an impediment to an affiliate's successful negotiation of a retransmission consent agreement.

Finally, there is nothing about the network role in retransmission consent that raises any concern under Section 310(d) of the Act. As Fox previously has explained, in examining control of a broadcast license, the Commission looks to three main areas – programming, personnel and finances – and asks whether an entity has obtained the power to dominate the management or the corporate affairs of the licensee, or the right to determine the manner or means of operating the licensee or the policies that the licensee will pursue.⁴⁰ The MVPD Commenters go through the motions of suggesting that a network right to approve an affiliate's retransmission consent deal might permit the network to influence that station's programming or personnel, but the assertions lack both conviction and merit. At best, the

⁴⁰ See *WHDH, Inc.*, 17 FCC 2d 856, 861 (1969) (*aff'd sub nom Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (*cert. denied*, 403 U.S. 923 (1971))).

MVPD Commenters posit that a network might condition approval on “hiring employees preferred by the network.”⁴¹ This rank speculation – again, unsupported by a single concrete example of a network ever making such a demand – cannot possibly serve as a plausible basis for Commission action.⁴²

Even with respect to finances, the MVPD Commenters offer no rational justification for the FCC to abandon its long-held position that the Act permits the free alienability of retransmission consent rights. Historically, in reviewing financial issues under Section 310(d), the Commission has examined a licensee’s discretion to pay station bills, hire or fire personnel, or upgrade or repair a station’s facilities;⁴³ its right to receive advertising and other revenues;⁴⁴ and its ability to maintain independent financial accounts and take responsibility for independent obligations.⁴⁵ Neither a network’s ability to approve a retransmission consent agreement nor its participation as a bargaining agent has anything to do with these core economic rights.

A few MVPD Commenters shed some crocodile tears on behalf of local broadcasters, suggesting that a network role in transmission consent negotiations could “increase[] the risk

⁴¹ DIRECTV Comments, at 8.

⁴² Likewise, with respect to control over programming, the FCC looks to ensure that a licensee has the ability to air issues of importance to its station’s local community; broadcast educational and informational programming for children; reject or refuse portions of programming that the licensee believes to be contrary to the public interest; and interrupt any other programming for that which, in the licensee’s determination, is of greater local or national public importance. *See In re Paramount Stations Group of Kerrville, Inc.*, 12 FCC Rcd 6135, 6145 (1997). Network participation in retransmission consent fails to touch on any of these key issues.

⁴³ *See, e.g., In re Application of Radio Management Services, Receiver, and Clear Channel Commc’ns, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2959, 2964 (1992).

⁴⁴ *See In re Shareholders of the Ackerley Group Inc. and Clear Channel Commc’ns, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002).

⁴⁵ *See In re WGPR, Inc. and CBS, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8145 (1995), vacated on other grounds by *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

of impasse” or result in local broadcasters receiving a smaller share of retransmission consent fees.⁴⁶ They argue that “[s]uch network involvement in affiliates’ retransmission consent decisions conveys significant rights that touch on core licensee functions,”⁴⁷ and should therefore constitute a “*de facto* transfer of control.”⁴⁸ This is simply illogical.

MVPDs themselves sit opposite local stations in negotiations for the increasingly-important retransmission consent revenue stream. In this role, they have at least as much, if not more, impact as a network on local stations’ finances and revenues. If an affiliate were deemed to cede “control” over its core functions to a network solely by virtue of the network playing a role in retransmission consent, then just as surely each and every MVPD that negotiates for retransmission consent would have to be deemed to exercise the same “control” over affiliates’ finances (as would other program suppliers and even advertisers). Of course, neither networks nor MVPDs exercise “control” over licensees’ core functions as contemplated by Section 310(d) of the Act.

The MVPD Commenters have offered no substantive reason to bog down the media ownership proceedings with their well-worn complaints about broadcasters’ lawful exercise of their retransmission consent rights.

IV. MULTICASTING DOES NOT IMPLICATE THE DUAL NETWORK RULE

The dual network rule, which prohibits stations from affiliating with entities that own more than one of the Big Four networks,⁴⁹ is a sterling example of a rule that makes little sense in the modern media environment. When hundreds of channels and millions of

⁴⁶ Time Warner Cable Comments, at 17. *See also* DIRECTV Comments, at 6-9.

⁴⁷ DIRECTV Comments, at 6.

⁴⁸ Time Warner Cable Comments, at 17.

⁴⁹ *See* 47 C.F.R. § 73.658(g). The Big Four networks include ABC, CBS, FOX and NBC.

Internet properties compete for the right to provide users news and entertainment,⁵⁰ a merger between any two media outlets, even two networks, would not and could not have a harmful impact on localism, diversity, or, absent a violation of the antitrust laws, competition. The only two comments filed in this proceeding that even attempt to support the dual network rule as it currently stands provide no evidence for their contention that it remains necessary in the public interest as the result of competition.⁵¹ Fox maintains that the dual network rule, like the rest of the media ownership rules, is unnecessary and counterproductive and should be eliminated.⁵²

By its plain text, the dual network rule is about the affiliation of a “television broadcast station[.]” with a single “entity that maintains two or more networks.”⁵³ Two additional commenters, Time Warner Cable and ITTA, attempt to drag the rule in an entirely different direction. They do not argue that it is appropriate in its current incarnation, but rather inexplicably suggest that it should be applied any time one station affiliates with two of the Big Four networks, even when (as now) the networks are not commonly owned. Time Warner Cable and ITTA thus assert that a station that affiliates with two independently-owned networks somehow violates the “spirit” of a rule aimed entirely at preventing

⁵⁰ See Fox Comments, at 7-12.

⁵¹ See Comments of ABC Television Affiliates Association, CBS Television Affiliates Association, and NBC Television Affiliates, at 2 (asserting that “the dual network rule continues to serve as an important reinforcing mechanism for maintaining a proper balance in the network-affiliate relationship,” but providing no support for this contention); Comments of Writers Guild of America, West, at 6-7 (expressing commenters’ “belie[f that] the industry at present is already too consolidated and eliminating this essential rule would be detrimental to competition”).

⁵² See Fox Comments, at 2-7.

⁵³ 47 C.F.R. § 73.658(g).

common ownership of networks.⁵⁴ As a result, they say, the Commission should apply the dual network rule to target stations that affiliate with more than one network, whether by multicasting programming from a second network alongside their primary signal, or by affiliating with more than one Big Four network via two commonly-owned stations in a market.⁵⁵ Even if the Commission ignores the evidence commanding it to eliminate the dual network rule, this perplexing proposed expansion of the rule to a different set of parties for an unrelated purpose should be summarily dismissed as irrational.

The Commission has explained that the concern underlying the dual network rule was that “permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations.”⁵⁶ The rule, the FCC said, “may be viewed as an anti-merger rule that constrains the current organization of the network broadcasting industry.”⁵⁷ According to the Commission, this helps new networks find affiliates,⁵⁸ serves diversity and competition,⁵⁹ and protects affiliates by maintaining an appropriate balance of power between those affiliates and incumbent networks.⁶⁰

⁵⁴ See Time Warner Cable Comments, at 21 (“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.”); ITTA Comments, at 8 (“ITTA . . . urges the Commission to ensure that broadcasters cannot evade the purpose of the dual network rule by affiliating with two or more Big Four networks in a single market.”).

⁵⁵ See Time Warner Cable Comments, at 21; ITTA Comments, at 8.

⁵⁶ *In re Amendment of Section 73.658(g) of Commission’s Rules-The Dual Network Rule*, Notice of Proposed Rulemaking, 15 FCC Rcd 11253, 11254 (2000).

⁵⁷ *Id.* at 11255.

⁵⁸ See *id.* at 11254 (“The dual network prohibition, therefore, was intended to remove barriers that would inhibit the development of new networks, as well to serve the Commission’s more general diversity and competition goals.”).

⁵⁹ See *id.*

⁶⁰ See Notice, at 51 (citing *In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the*

Time Warner Cable and ITTA say nothing about the text of the rule and do not even attempt to address its underlying purposes. Instead, they apparently want the Commission to stretch the dual network so far beyond its boundaries that it would essentially become a brand new media ownership regulation. Whereas the existing rule is at least nominally aimed at *protecting* affiliates, Time Warner Cable and ITTA would have the Commission enforce a new rule that actually *restrains* affiliates. Likewise, whereas the existing rule is intended to prevent network consolidation, this ersatz new regulation instead would affect affiliates without any regard whatsoever for the ownership of the networks.

In fact, the Time Warner Cable/ITTA proposals would in no way serve the policies underlying the existing dual network rule. When a multicast affiliation agreement is concluded, the same number of stations remains in the market, owned by the same number of entities. When a single owner is lawfully the licensee of two stations in a market, each station's affiliation with a Big Four Network also leaves the same number of stations and owners in the market. Moreover, in either case, the same number of networks (and network owners) exists both before and after the signing of the agreement. Not only are the Time Warner Cable/ITTA proposals disconnected from the existing dual network rule, they also would reduce the bargaining power of local stations, thereby enriching MVPDs at the expense of broadcasters, networks and the programming that they provide. Stations that have the opportunity to affiliate with multiple networks at least have a chance to level the playing field with often-dominant MVPDs when it comes to retransmission consent bargaining.⁶¹

Telecommunications Act of 1996, Report and Order, 18 FCC Rcd 13620, 13855 (2003)) (concluding that mergers of the top four networks “would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates’ influence on network programming, and thus harming the ability of the affiliates to serve their communities”).

⁶¹ To the extent that there are any residual concerns with multiple affiliations unduly impacting competition, the antitrust laws are perfectly adequate to address the issue.

The Time Warner Cable/ITTA proposals not only would fail to serve the purposes of the dual network rule, they also would severely complicate FCC plans for an incentive auction of television broadcast spectrum. Later this month, the Commission plans to “consider a Report and Order establishing a regulatory framework for channel sharing among television licensees in connection with an incentive auction of spectrum.”⁶² To the extent that Time Warner Cable and ITTA would have the FCC interpret the dual network rule to prevent a single channel from affiliating with multiple networks, it could create a serious disincentive for any network affiliate to consider the voluntary relinquishment of its existing broadcast spectrum.

V. CONCLUSION

In sum, Fox maintains that the Commission should eliminate entirely the legacy structural ownership regulations that tie the hands of broadcasters. For the many reasons laid out in Fox’s opening comments, it is long past time to remove these rules, which serve not as a spur but as an impediment to competition, localism and diversity. If the Commission nonetheless believes that it should extend the lifespan of the existing regulations, it at least should avoid stacking burdensome new requirements on top of the already shaky foundation of ownership restrictions.

In particular, the Commission should ensure that LNS arrangements are properly distinguished from any sharing agreements that may be attributable under the Commission’s rules. The FCC also should avoid becoming bogged down here in discussions about retransmission consent, especially because there exists a stand-alone proceeding addressing that issue. Finally, the Commission should quash any proposal to expand the scope of the

⁶² Press Release, FCC News, FCC Announces Tentative Agenda for April Open Meeting (Apr. 6, 2012), <http://www.fcc.gov/document/fcc-announces-tentative-agenda-april-open-meeting>

dual network rule. Fox urges the Commission to recognize the new media environment for the vibrant competitive landscape that it is, and to allow networks and their affiliates the flexibility to continue to provide the best possible over-the-air programming to American consumers.

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