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 09-182
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket 07-294

To: The Commission

REPLY COMMENTS OF NEXSTAR BROADCASTING, INC.

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SUMMARY

Section 202(h) of the Telecommunications Act directs the Commission to take a fresh look at its broadcast ownership rules every four years to determine whether such rules remain necessary in the public interest as a result of competition. In its comments, Nexstar Broadcasting, Inc. ("Nexstar") supplied the Commission with overwhelming empirical evidence that today's media marketplace is extraordinarily competitive, with news and entertainment programming available from many sources at any time on any platform. Nexstar also documented the significant challenges it (and other broadcasters) faces in providing its local communities with news and entertainment programming in today's hypercompetitive media marketplace. And, Nexstar provided the Commission with the demonstrable benefits that its ownership of two television stations bring to the Little Rock and Champaign-Springfield markets. Nexstar, therefore, urged the Commission to update its local TV ownership rule to allow companies like Nexstar to own two television stations in any market.

Nexstar now urges the Commission to set aside the comments from those who rely on outdated studies from past ownership reviews and ignore their request to preserve an outdated ownership rule that does not advance the Commission's policies of localism and diversity. Nexstar further urges the Commission to ignore broad generalizations regarding television industry profitability and duopoly operations. Allowing duopoly ownership in medium and small markets will not result in television broadcasters that are rolling in profits at the expense of their local communities. Indeed, in today's competitive marketplace, if permitted to own two stations in a market, medium and small market television broadcasters must continue to provide diverse, quality local programming because only with diverse programming can such broadcasters reach the widest possible audience and maximize their revenues.

Nexstar also recommends that the Commission disregard the extensive hyperbole detailing the “insidious” nature of local service agreements. The vast majority of such agreements fully comply with Commission requirements that a licensee maintain full control of its station’s programming, personnel and finances. Further, it is unnecessary to deem such agreements attributable interests when they do not infringe on those core ownership attributes.

For local television broadcasters to survive and continue to provide local news, emergency information and compelling entertainment programming to consumers, it is imperative that the Commission permit common ownership of two TV stations in medium and small markets in today’s hypercompetitive media marketplace. Until then, the Commission should take no action to undermine television broadcasters’ ability to enter into local service agreements.

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Nexstar Broadcasting, Inc. ("Nexstar") respectfully submits these reply comments in the above-captioned proceeding. On March 5, 2012, Nexstar submitted comments in this proceeding providing the Commission with compelling evidence that the Commission should eliminate its local TV ownership rule, Section 73.3555(b) of the Commission's rules (the "Local TV Ownership Rule"), and permit television-only broadcasters that own no other in-market media interests to own two television stations in the same market regardless of station rank or the number of television "voices" in the market. Nexstar urged the Commission to make this change to its rules in order to preserve the ability of medium and small market television broadcasters to provide the local news, vital emergency information and highly-valued entertainment programming that their communities demand in today's ever more competitive media marketplace.

Nexstar also provided the Commission with a wealth of evidence regarding the benefits that flow from its shared services agreements, outsourcing agreements and other service sharing arrangements (collectively, "Local Service Agreements" or "LSAs") in its medium and small market communities. Thus, Nexstar recommended that the Commission ignore unsupported, speculative assertions that these relationships somehow "circumvent" or "evade" the Commission's rules and decline to make Local Service Agreements attributable interests under its ownership rules.

As with comments submitted in the Commission's prior ownership reviews, the comments submitted in this proceeding fall largely into two categories – comments submitted by broadcasters and newspaper owners supplying overwhelming evidence that the media marketplace is competitive and diverse, providing consumers with access to information from a wealth of sources via many platforms at any time; and comments from those who ignore the vibrant information and technology explosion that has occurred and continues to occur in the media marketplace and urge the Commission to maintain a status quo that prevents broadcasters from effectively competing in today's media marketplace.[1] The latter commenters defend outdated rules that the Commission previously has determined do not serve the purpose of increasing localism and diversity in the belief that continuing to handicap local television

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1 A number of commenters object to the Commission's decision to delay proposing specific actions asserting that the Commission cannot take any action to relax its media ownership rules until it addresses the Third Circuit's concerns with respect to women and minority broadcast ownership. *See, e.g.*, *Comments of The Leadership Conference on Civil and Human Rights*; *Comments of Communications Workers of America, The Newspaper Guild-CWA, National Association of Broadcast Employees and Technicians-CWA* ("CWA"); *Comments of National Hispanic Coalition, Center for Rural Strategies, Center for Media Justice; 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 and Media Council Hawi'i* ("UCC"); *Comments of Free Press* ("Free Press"). (Unless otherwise noted, all references to "Comments" herein are to the respective parties' submissions to the Commission in this proceeding as filed on March 5, 2012.) Although Nexstar concurs that diversity of ownership is important, the Commission cannot and should not delay revising rules that harm current broadcasters until such time as it develops a satisfactory record to support implementation of measures to assist women and minorities that will survive court scrutiny. The record herein demonstrates an urgent need for the Commission to modify its rules such that existing broadcasters are able to survive in today's competitive multi-media marketplace.

broadcasters talismanically will lead to more or "better quality" news programming, rather than less.

In addition, for the first time, numerous multichannel video programming distributors ("MVPDs") have joined with those seeking to maintain the status quo, bringing the unrelated matter of retransmission consent negotiations to this proceeding.

Nexstar submits these reply comments to reiterate that today's media marketplace is extraordinarily competitive and to address: (i) objections raised with respect to modification of the Local TV Ownership Rule and (ii) demands for attribution of Local Service Agreements.

I. THE MEDIA MARKETPLACE HAS UNDERGONE A FUNDAMENTAL TRANSFORMATION AND IS HIGHLY COMPETITIVE.

Before addressing the various objections raised with respect to eliminating or modifying the Local TV Ownership Rule, Nexstar reminds the Commission that the point of this proceeding is for the Commission to take a fresh look at its regulations to determine whether competitive changes in the media marketplace obviate the public necessity for its ownership rules.[2] It is therefore incumbent upon the Commission to consider fully the vibrant competitiveness of today's media marketplace during this review. For example, the Commission must consider that today's media marketplace includes:

- Vertically and horizontally integrated multimedia companies whose properties include MVPDs, major broadcast networks, local radio or television stations, production studios, major cable networks, Internet websites, magazines, publishing houses, record companies, and numerous non-media properties (e.g., Comcast/NBCU, Time Warner, Inc., Disney, News Corp., National Amusements, etc.);

- Multimedia companies that own multiple cable networks and websites with international reach (e.g., Discovery Communications and National Geographic);

2 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3rd Cir. 2004).

- Independent cable network channels (e.g., Independent Film Channel (IFC), WealthTV and Hallmark Channel);

- MVPDs (large and small) operating as part of local market advertising interconnects;

- Major social networking sites (e.g., Facebook, Twitter and Pinterest[3]);

- Content aggregator search engines (e.g., Google, Yahoo and Topix);

- Content aggregators (e.g., YouTube, Hulu, iTunes, Amazon, Project Free TV, Chooseandwatch.com, funnyordie.com and numerous others);

- Thousands of blogs on virtually any and all topics ranging from *The Huffington Post* to *The Sublime Palate* to *Etalkinghead.com*, and the many millions of blogs available via a quick search of the Internet;[4] and

- "Traditional" media like radio, television and newspapers.

In addition to the above, new entrants are joining today's media marketplace on an almost daily basis. For instance, Ora.tv[5] and tape.tv[6] both hope to join the media marketplace in the near

[3] Pinterest, an online pinboard (www.pinterest.com), is a perfect example of the rapid change occurring in the media marketplace. According to comScore, Pinterest became the fastest independent website ever to hit 10 million unique monthly visitors, drawing 11.7 million unique monthly visitors in January 2012. *See Pinterest's fast growth driven by women*, Benny Evangelista, SFGate, Feb. 28, 2012, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/28/BU2D1NBP0J.DTL&tsp=1 (last visited Apr. 16, 2012).

[4] As examples of the assortment of blogs available to address virtually any issue or topic of interest, these are a few blogs related to raising a child with autism: Autism for Parents available at http://autismforparents.wordpress.com/blogs-by-parents/ (which contains a compilation of available blogs on this topic); From Inside the Puzzle: Raising a Child with Autism available at http://community.advanceweb.com/blogs/ot_9/default.aspx; Autism's Edges available at http://autismsedges.blogspot.com/;and these are a few blogs related to the Catholic faith: Faith and Family, the Magazine and Daily Blog of Catholic Living available at http://www.faithandfamilylive.com/; Words from cana available at http://wordsfromcana.wordpress.com/; Betty Beguiles – Beauty, Romance and Style …With a Vintage Twist available at http://www.bettybeguiles.com/; and the Catholic Post Book Group available at http://catholicbookgroup.blogspot.com/. (All last visited Apr. 16, 2012.)

[5] Ora.tv is described as a new digital television venture that will launch in 2012 and will create high-quality video programming for digital distribution via a variety of platforms, such that it is seamlessly available on phones, laptops, tablets, connected televisions, and other devices. It will be an on-demand network, producing a wide range of stand-alone content that transcends traditional format distinctions. The company will produce shows that resemble traditional TV in terms of production quality and content but which will be available in a variety of formats. *See* http://ora.tv/about/ (last visited Apr. 16, 2012).

[6] Billed as Pandora for video and only available in Germany, Switzerland and Austria today, the company is targeting other countries for launch in the near future. *Tape.tv, a Pandora for video, targets British launch*, David Meyer, Gigaom, Mar. 13, 2012 available at http://gigaom.com/2012/03/13/tape-tv-a-pandora-for-video-targets-british-launch/ (last visited Apr. 16, 2012).

future and Intel is seeking to launch a virtual cable operator over the Internet by year end.[7] Simply put, today's technology gives consumers more ways to find information on specific topics and access to more targeted information and programming whenever and wherever they want.

Moreover, nothing in Section 202(h) requires that each media alternative be, in and of itself, a perfect substitute for more traditional media like local television.[8] Therefore, the Commission's contention that "competition between local television stations and cable networks may be of limited relevance, because national cable networks do not alter their programming decisions based on the actions of individual local television stations" is misguided.[9] Nexstar is certain that TNT, USA and the other "national" cable networks counterprogram in prime time against the network programming broadcast on local television stations. But more importantly, what does the question of whether a national cable network counterprograms against a single local television station have to do with the fact that that national cable network is in fact providing competing programming for the viewer to watch? Nor is each media alternative

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7 *The New Cable-TV Guy: Intel*. Sam Schechner and Don Clark, The Wall Street Journal, Mar. 13, 2012, available at http://online.wsj.com/article/SB1000142405270230445000457727732222512596.html?KEYWORDS=intel&mod=dist_smartbrief (last visited Apr. 16, 2012).

8 Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (requiring the Commission to review its media ownership rules every four years to determine whether they are necessary in the public interest as a result of competition.).

9 *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 Nos. 09-182, 07-294, Notice of Proposed Rulemaking (rel. Dec. 22, 2011) ("NPRM"), p. 12 (internal citations omitted). *See also, Comments of American Federation of Television and Radio Artists* ("AFTRA"), Section II, p.1 ("[N]ew media sources have not adequately substituted for declining legacy media sources."); *Comments of Free Press*, p. 24 ("[the Internet] has not significantly increased the number of independent outlets engaged in regular, reliable and sustainable local journalism").

required to be available to the entire country as a whole.[10] Rather, all that is required is that **collectively** this abundance of media sources be available to offer consumers alternative ways and means to obtain the news and information they are seeking.

To address the mandate of Section 202(h), the questions that the Commission should be asking with respect to whether its Local TV Ownership Rule remains necessary in the public interest as a result of competition are: (i) is today's media marketplace competitive and (ii) if the rule is modified to permit television-only broadcasters to own two stations in a market, will those broadcasters continue to serve the public interest? The answers are an unequivocal **yes** and **yes**. The Local TV Ownership Rule is content-neutral; it imposes no duty or obligation on a television broadcaster to serve its community. Therefore, it has no impact on whether a station provides local programming.[11] Rather, as Nexstar and other local television broadcasters have documented repeatedly and often over the past 15 years, what makes local television broadcasters unique in today's media marketplace is **their commitment** to serving their local communities with local news, emergency information and compelling entertainment programming. In today's fragmenting media marketplace, this commitment remains the key to local broadcasters building the viewer loyalty which is necessary to maximize their profitability. That fundamental fact will not change if the Commission moves its Local TV Ownership Rule into the 21st century to allow the local market duopolies that will ensure local television broadcasters have the resources necessary to continue serving the public interest with vital emergency information, local news and quality programming.

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10 The Commission acknowledges that the media marketplace is being fundamentally impacted by broadband Internet, but then states it must ignore this fact because approximately 14 million Americans do not have broadband access. NPRM at p. 3. Although certainly broadband increases the speed of access to content, Americans without broadband (by choice or by unavailability) still have access to the Internet and its content, just at "slower" speeds.

11 In fact, the Local TV Ownership Rule prevents stations from operating efficiently thereby handicapping their ability to provide expensive local programming.

II. THERE IS NO JUSTIFICATION FOR RETAINING THE LOCAL TV OWNERSHIP RULE.

Notwithstanding the wealth of information in this proceeding documenting (i) the competitiveness of the media marketplace, (ii) the frequency with which consumers (especially those under 40) are turning to alternative sources for local information, (iii) the shrinking revenues of local television stations, (iv) the high cost of producing local news, and (v) the extensive public interest benefits that flow from duopoly ownership, a number of commenters insist that the Commission preserve a decades-old restriction that the Commission previously has determined **does not support its policy goals of localism and diversity**. Many of these commenters rely on outdated data and unsupported generalizations. In addition, a few commenters seek to retain the current rule to preserve employment of their members. And several commenters suggest multicasting as the panacea that enables broadcasters to compete effectively in today's medial marketplace. The Commission must not make the mistake of using stale and irrelevant information in its decision-making to retain an ownership regime for which it has no current empirical support and that is not sustainable in today's competitive media marketplace.

A. Outdated Sources Cannot Be Used to Maintain an Outdated Rule.

Citing to studies more than two years old, Free Press maintains that "the public overwhelmingly depends on local television stations," claiming that 78 percent of Americans get their news from television.[12] Contrary to Free Press's out-of-date statistics, the most recent Pew Research Center study found that 64% of Americans use at least three different types of media every week to get news and information about their local community, with 15% using at least six

[12] *Comments of Free Press* at p. 45. CWA also refers to outdated studies in support of its assertion that "newspapers, television news and public affairs programming still generate the lion's share of stories for communities." *Comments of CWA* at p. 8

different kinds of media weekly.[13] The survey further found that, for the 79% of Americans who are online, the Internet (not television) is the first or second source for local news and information for 15 of the 16 local topics examined, with those under 40 using the Internet for local community information even more.[14] This study further found that many of these Internet sources are unrelated to legacy media such as television and newspapers. Another recent study, conducted by Innerscope Research, found that digital natives (consumers in their 20s) switch media 27 times an hour, a fact that clearly establishes that television is no longer the "dominant" medium of this day and age.[15]

Free Press also cites to its 2007 comments as evidence that television duopolies do not increase news hours.[16] Even if Free Press's 2007 study was an accurate snapshot in time in 2007, Free Press has not established that the study remains accurate today. Indeed, Nexstar's own duopoly operations directly contradict Free Press's outdated study. In Little Rock, Arkansas, Nexstar added 7.5 hours of local news to the market on its duopoly station KARZ-TV; and in Springfield, Illinois, Nexstar added 12.5 hours of local news to the market on its station WCIX. Duopoly ownership in these markets also has permitted Nexstar to expand non-news local programming to include coverage of local sporting events and community telethons on its stations. For example, Nexstar's duopoly stations in Illinois – WCIA and WCIX – are able to carry high school state championships for football and boys and girls basketball, as well as

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13 *How People Learn About Their Local Community, Tom Rosenstiel, Amy Mitchell, Kristen Purcell and Lee Rainie, September 26, 2011, available at* http://www.journalism.org/analysis_report/local_news (last visited Apr. 16, 2012) (hereinafter "Pew Local News Study").

14 *Id.*, available at http://www.journalism.org/analysis_report/role_internet (last visited Apr. 16, 2012).

15 *See Young Consumers Switch Media 27 Times an Hour*, Brian Steinberg, Advertising Age Apr. 9 2012 available at http://adage.com/article/news/study-young-consumers-switch-media-27-times-hour/234008/ (last visited Apr. 16, 2012).

16 *Comments of Free Press* at p. 46.

Chicago Bulls, Cubs and White Sox games. The stations are also providing more than two hours of live coverage from this year's Illinois Marathon in Champaign. In Little Rock, Nexstar produces two additional 30 minute programs for broadcast on its stations (one weekly and one biweekly), as well as the additional local sporting events the stations cover.

Finally, Free Press ignores the current operating environment and asserts that all is financially rosy for television stations.[17] Like most of the objectors do, Free Press paints with an overly broad brush in its claim that the industry is healthy. As noted below, a number of broadcasters in recent years incurred financial difficulties severe enough to result in bankruptcies. In addition, advertising revenues remain below the levels earned prior to the 2009 recession with a significant drop in pre-tax revenues since 2000.[18] Further, although 2012 is predicted to be a solid year for broadcasters, the higher predicted revenues in 2012 are due to political revenues; local core revenues in fact are expected to be slightly down for the year.[19] Finally, neither revenue nor cash flow statistics accurately reflect the financial health of the television industry now or in the future. Indeed, even though 2011 was a record non-political revenue year for Nexstar, the company still ended the year with a nearly $12 million loss due to interest payments and other expenses associated with its debt.[20] Accordingly, it is imperative

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17 *Comments of Free Press* at pp. 46-48 (citing to an abundance of meaningless statistics on cash flow margins, increased revenues in 2010 and a predicted political bonanza in 2012).

18 *Comments of The National Association of Broadcasters* ("NAB"), pp 16-17.

19 TVNewsCheck Focus on Business, Janet Stillson, TVNewsCheck, March 21, 2012 http://www.tvnewscheck.com/article/2012/03/21/58207/2012-reforecast-total-up-core-down-lightly?utm_source=&utm_medium=Email&utm_term=2012+Reforecast%3a+Total+Up%2c+Core+Down+Slightly&utm_campaign=2012+Reforecast%3a+Total+Up%2c+Core+Down+Slightly (last visited Apr. 16, 2012).

20 Nexstar Broadcasting Group, Inc. Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2011, as filed with the Securities and Exchange Commission on March 15, 2012.

that the Commission not rely on gross industry generalizations to support retention of an outdated rule.

The evidence is clear: local television stations no longer dominate the local news environment and no amount of outdated data can obscure that fact. For local television stations to survive (and continue providing local news and critical emergency information to those consumers not hardwired into the information age), it is imperative that the Commission look at the media marketplace as it exists today and adopt an ownership rule that comports with today's media marketplace by permitting television only broadcasters like Nexstar to own two stations in a market.

B. Preserving Employment Opportunities Is Not A Valid Reason to Retain An Outdated Rule.

CWA, WGA and AFTRA maintain that the Local TV Ownership Rule must be retained because "more ownership concentration leads to fewer jobs for media professionals," "consolidation [has] eliminated a competitive marketplace for their creative works" and their members "[have] witnessed too many job losses." [21] According to these unions, their member job losses have ipso facto resulted in "fewer independent news sources and editorial perspectives in news coverage" and, therefore, require the Commission to retain the Local TV Ownership Rule in its current form.

Each union provides data about job losses its members have experienced as a result of a duopoly or LSA and each asserts that duopoly efficiencies merely result in the repurposing of news stories across platforms. WGA complains that KCBS selects the stories that are broadcast on KCAL. Although Nexstar cannot speak to the internal operations of KCBS and KCAL, with

[21] *See*, *Comments of AFTRA* at p. 1; *Comments of the Writers Guild of America West, Inc.* (WGA") at p.1; *Comments of CWA* at p. 5.

respect to WGA's observation that KCBS selects the stories that are broadcast on KCAL, Nexstar assumes that WGA's actual objection is that one management team (news director, assignments editor, etc.) oversees both operations and selects the news that is reported on both stations.[22] However, having one manager (or management team) overseeing a news department is one of the standard efficiencies of duopoly ownership and has no bearing on whether the stations provide "diverse" newscasts.

Nexstar also notes that WGA complains of a smaller, more consolidated newsroom with fewer writers (i.e., fewer union members employed) at the stations. Again, while Nexstar does not operate KCBS or KCAL, Nexstar is amazed that any station today has dedicated writer-only positions. Perhaps because Los Angeles is the second largest market it can support that type of position, but in Nexstar's markets there are no dedicated "story writers;" there are producers who write news stories, reporters who write news stories, and anchors who write news stories, but no employee whose sole function is to write for its news programs. That is a luxury no medium or small market station can afford.

CWA, apparently out of touch with reality, ignores the Tribune bankruptcy, the Freedom Broadcasting bankruptcy, the New Vision and Parkin Broadcasting bankruptcies, the Roberts Broadcasting bankruptcy, the Pappas bankruptcy, the Young bankruptcy, the Granite bankruptcy and the Communications Corp. of America and White Knight bankruptcies, among others, to unbelievably claim that "the fears of television sinking into bankruptcy . . . never came to pass."[23] CWA further ignores today's reality by relying on outdated studies to claim that today's landscape "calls for leaving the old rules in place."

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[22] *Comments of WGA* at p. 3. CWA also complains of a duopoly station unit with one general manager, one news director and one assignments editor for both stations. *Comments of CWA* at p. 6.

[23] *Comments of CWA* at p. 1.

Although Nexstar does not disagree that it takes "adequate competition from diverse voices" to address the information needs of communities,[24] or that the television market remains an important source for local news and information[25] the facts remain that (1) more and more Americans are turning to Internet sources for local information, (2) an increasing number of these websites are not associated with a legacy media source, (3) there is an extensive and ever growing choice in entertainment programming, and (4) more and more Americans are watching entertainment programming through available Internet websites (whether owned by the content owners or third parties). Accordingly, the Commission must ignore the apparent request of CWA, WGA and AFTRA to retain the existing rule in order to preserve jobs and, instead, rely solely on an analysis of the competitive state of today's media marketplace to determine whether the Local TV Ownership Rule remains "necessary in the public interest as a result of competition."

C. Multicasting Is Not A Substitute For Duopoly Ownership.

Free Press deems that multicasting eliminates the need for duopolies (or LSAs) and also serves to encourage a more efficient use of spectrum.[26] UCC similarly claims that stations that fail to multicast are making "remarkably inefficient use of spectrum at a time when there are many competing demands for that spectrum" and, accordingly, should not be permitted to own a second station in the market.[27]

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[24] *Comments of CWA* at p. 2.

[25] *Comments of WGA* at p. 2.

[26] *Comments of Free Press* at pp. 44.

[27] *Comments of UCC* at p. 24.

Multicasting is not a substitute for duopoly ownership and will not provide the same relief to medium and small market broadcasters that elimination of the Local TV Ownership Rule will. For example, multicast streams are not required to be carried by MVPDs, and as Nexstar learned in its most recent retransmission consent negotiations, even if it is successful in obtaining MVPD carriage for a secondary digital stream, such carriage is generally without payment.

Further, in many instances secondary digital streams are used to broadcast either more focused local programming (which adds additional expenses to the station's operations) or more niche programming, which does not appeal to the same broad spectrum of the community that the primary programming stream does. Several of Nexstar's stations use their secondary streams to broadcast local sporting events or other local programming while several others have entered into affiliation agreements with Bounce TV. Although Nexstar's secondary streams contribute to the diversity of programming available to viewers in its markets, they do not generate the same ratings and revenues as Nexstar's primary digital streams.

Moreover, multicasting does not allow a broadcast to provide two robust, full HD programming streams to its viewers and it does not permit a broadcaster to provide mobile DTV services. Thus, while multicasting is one possible way for broadcasters to compete more effectively in today's media marketplace, it does not eliminate the need for the Commission to revise its Local TV Ownership Rule to allow broadcasters such as Nexstar to own two television stations in its markets.

III. LOCAL SERVICE AGREEMENTS ARE LEGAL AND SERVE THE PUBLIC INTEREST.

A. Local Service Agreements Comport with the Commission's Requirement that a Licensee Retain Control Over its Programming, Personnel and Finances.

In addition to urging the Commission to retain the Local TV Ownership Rule in its current form, several commenters urge the Commission to make Local Service Agreements attributable interests because such agreements "evade" the rule in a "covert and insidious form of consolidation."[28] These commenters assert, without supporting evidence, that LSAs allow one station to exercise substantial influence over the operation of another because LSAs have a realistic potential for affecting the programming decisions or other core operating functions.[29]

As Nexstar noted in its Comments, its agreements are neither covert nor evasive of the Commission's rules. The vast majority of Nexstar's LSAs have been reviewed by the Commission and deemed not to confer influence over its partner station licensees with respect to programming or other core operating functions. As Mission Broadcasting, Inc. ("Mission"), one of Nexstar's LSA partners, affirms in its reply comments, its employees have extensive broadcast experience and are active in overseeing the operations of the Mission stations – including selection of the stations' programming.[30]

In their quest to make LSAs attributable interests, a few commenters deem the Commission's longstanding precedent of evaluating licensee control over a station's

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28 *Comments of UCC* at p. 1; *Comments of Free Press* at p. 49.

29 *Comments of UCC* at p. 15.

30 *See Reply Comments of Mission Broadcasting, Inc*. submitted in this proceeding on April 17, 2012. Nexstar's other LSA partner is Sinclair Broadcast Group ("Sinclair"). Sinclair is one of the largest television broadcast groups in the country. The assertion that Nexstar is able to provide undue influence over Sinclair's stations in Rochester and Peoria is absurd to the point of being laughable.

programming, personnel and finances to be inadequate.[31] Free Press avers that "[t]he FCC should adopt a set of criteria that identifies aspects of sharing arrangements, which if met, would render the agreement attributable for purpose of the FCC's media ownership limits."[32] UCC agrees and proposes several criteria pursuant to which LSAs automatically should be deemed attributable interests.[33] However, as examined below, none of UCC's proposed criteria gives another broadcaster sufficient control over a station's core functions of programming, finances and personnel to render the LSA attributable.

Specifically, with respect to UCC's proposal that and LSA be deemed an attributable interest if:

➢ *The Servicing Broadcaster Provides All or Substantially All Local News Programming*: UCC states that "local news is often the only locally originated programming on these stations, and revenue from local news programs is substantial." UCC does not explain why the mere fact that local news revenues are "substantial" should cause LSA attribution. Under its LSAs, although Nexstar is producing the news for another station, it does so at the direction and discretion of the station licensee and, therefore, the licensee retains complete control over its news programming. Nexstar does not retain the revenues generated from the sale of advertising in the local news it produces (other than the commissions earned in respect of its sale of all of the advertising on behalf of its LSA partner).

➢ *The Servicing Broadcaster Sells 15% or More of the Licensee's Advertising Time Per Week*: UCC asserts that because the Commission attributes radio JSAs, TV JSAs should also be attributable interests. UCC ignores both the significant differences between the radio and television ownership rules and the differences between radio and television JSAs. Specifically, the Commission's radio ownership rules allow for substantially more consolidation than the

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31 *See, e.g., Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 87 (1981) (a Commission inquiry with respect to the locus of control of a station's operations focuses on programming, personnel, and finances). The Commission conducts a fact-based inquiry into which party exerts control over these core operating functions to assess whether one party may be deemed to have an attributable interest in another licensee's station.

32 *Comments of Free Press* at pp. 59-60. Free Press also complains of a lack of standards governing LSAs. *Id.* at p. 49. Although not codified into regulation, the Commission has established guidelines for LSAs through case precedent. *See, e.g., KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability For Forfeiture, DA 11-1938 (rel. Nov. 25, 2011) and the cases cited therein.

33 *Comments of UCC* at pp. 15-19.

Local TV Ownership Rule (one owner can own up to eight of the radio stations in a market and the rule does not consider the stations' rankings), and under television JSAs, the selling entity receives a commission (generally a 30%) for its services, whereas under radio JSAs, the fees are generally flat monthly fees payable regardless of the amount advertising sold or revenues earned. The mere fact that the Commission treats radio JSAs as attributable is not a sufficient reason to reflexively mandate similar treatment of television JSAs.

- *The Parties Share Management Personnel*: The Commission's attribution rules already require each licensee to maintain responsibility for the management of its station's programming, personnel and finance. There is no need to adopt a further rule regarding management personnel.

- *The Licensee Maintains No Separate Facilities*: UCC claims that if a licensee has no facilities of its own it is somehow unable to operate independently, and axiomatically it therefore has no incentive or ability to compete. Again, UCC provides no evidence to support its theory. Nexstar's LSA partners (Mission and Sinclair) each maintain complete control over their stations' programming, finances and personnel without having separate fully equipped buildings at their disposal.[34] Having separate facilities would simply increase both licensees' expenses without any corresponding benefit.

- *The Servicing Broadcaster Reports to the Securities and Exchange Commission ("SEC") That It Owns or Operates the Licensee's Station*: Nexstar cannot speak for other broadcasters, but Nexstar goes to great lengths in its SEC filings to explain its LSA relationships and the fact that its LSA partners (and their stations) are operated and controlled by entirely independent third parties. More fundamentally, reporting to the SEC is governed by SEC rules and accounting standards that are unrelated to FCC regulations or the objectives that underlay them. UCC has not shown why a public company's reporting to the SEC should have any impact on FCC attribution rules.

- *Fifty Percent or More of the Licensee's Total Revenues Go To the Servicing Broadcaster*: UCC somehow conflates payments for services rendered into revenue sharing. Further, UCC does not explain the relevancy of its choice of 50% as the permissible or impermissible "revenue sharing" figure. Rather 50% appears to be an arbitrary figure. UCC also ignores the possibility that a station may earn $100,000 in revenues with expenses of $80,000 to earn that revenue in the absence of an LSA, but with an LSA earn $100,000 in revenues with expenses of $50,000 (or 50% of the revenues earned) payable under the LSA. In this example, even though the licensee is paying half of its revenues to the LSA partner for services rendered, it is actually earning a higher net amount which it can then invest back into the station. UCC further complains that "revenue-sharing" reduces the parties' incentive to compete.[35] If in fact the parties are "revenue-sharing" that produces substantially more incentive for both stations to provide the most

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[34] Both Mission and Sinclair personnel located in the shared station facilities have separate and lockable spaces for their employees.

[35] UCC also contends that options to purchase stations somehow translate into the licensee losing incentive to remain independently viable. *Comments of UCC* at p. 20. UCC again provides no substantiation in support of a claim and, indeed, ignores that most options generally incent the licensee to maximize its station revenues in order to increase the amount payable to it upon exercise of the option.

competitive, compelling programming available as that is what will maximize the revenues of both stations.

- *The Licensee Outsources its Retransmission Consent Negotiations*: UCC here adopts the arguments of the MVPDs and their claims of harm to consumers (or more specifically, to the MVPDs). Joint negotiations do not affect control or otherwise provide a station with undue influence – they do not affect a licensee's programming decisions, personnel decisions (hiring, firing and compensation) or give financial control to the negotiating station.

Accordingly, it remains sufficient for the Commission to examine whether a LSA gives another station or party control over a station's programming, personnel or finances under the Commission's already existing "control" precedents. If it does not, the LSA should not be deemed attributable.

B. Local Service Agreements Serve the Public Interest.

Ignoring all evidence that directly contradicts their long-held antagonistic views of LSAs, both Free Press and CWA take aim at Nexstar's operations under its LSA agreements. Free Press claims that Nexstar's and Mission's joint decision to terminate newscasts on Mission's WYOU in Scranton, Pennsylvania was a "plain, old-fashioned layoff."[36] This simplistic contention ignores the years of history behind Nexstar's and Mission's decision, as well as market reality, both of which Free Press is fully aware (having cited to Nexstar's comments that fully explain the parties' decision). However, Nexstar hereby re-explains for Free Press's benefit: WNEP-TV, owned by Local TV, has been for many years the market leader, is among the top-rated stations nationally in terms of local news and earns approximate 43% of the Wilkes-Barre-Scranton market's total revenues.[37] From 1997 until 2007, Nexstar and Mission worked diligently but unsuccessfully to provide an economically sustainable traditional newscast

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36 *Comments of Free Press* at p. 54.

37 *See WNEP newscasts get top national ratings*, Andrew M. Seder, Times Leader, January 25, 2012, available at http://www.timesleader.com/business/WNEP_newscasts_get_top_national_ratings_01-25-2012.html (last visited Mar. 2, 2012); *Investing In Television Market Report 2011, 4th Edition*, BIA/Kelsey 2011, DMA 54 ("BIA Kelsey").

on WYOU. Having failed to make inroads against WNEP, Nexstar and Mission spent two years providing an innovative interactive newscast on WYOU, which also failed to achieve economic sustainability. After trying for more than 12 years to produce a profitable newscast for WYOU, because the costs for producing the news for WYOU far exceeded the revenues brought in for advertising during and adjacent to the newscasts, the parties agreed to terminate this never-profitable news operation. Thus, Free Press's description as a "plain, old-fashioned layoff" could not be further from the truth.

CWA, for its part, funded a study pursuant to which Professor Yanich at the University of Delaware reviewed a "constructed week" of one daily newscast for each station in eight markets, including the Wichita Falls, TX-Lawton, OK market and the Peoria-Bloomington, IL market where Nexstar has LSA agreements with Mission and Sinclair respectively.[38] As the National Association of Broadcasters amply demonstrates in its comments, this study has serious and significant shortcomings, and cannot be used as support (generalized or otherwise) to determine whether LSAs are (or are not) in the public interest.[39] Nonetheless, because this study focuses on two of Nexstar's LSA arrangements, Nexstar provides the following information for the Commission's consideration:

Wichita Falls-Lawton: Wichita Falls-Lawton is DMA 142 and had total market revenues of approximately $18 million in 2010.[40] KJTL, owned by Mission, is the weakest station in the market in terms of revenues and ratings. Nexstar and Mission implemented their LSA relationship in 1998. Prior to implementation of the LSA, pursuant to which Nexstar

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38 *Comments of CWA* at fn. 10 (*Local TV News & Service Agreements: A Critical Look*, Dr. Danilo Yanich, Center for Community Research & Service, University of Delaware, Oct. 2011).

39 *Comments of NAB* at pp. 60-66.

40 BIA/Kelsey, DMA 142.

produces the news for its station KFDX-TV and Mission's station KJTL, KFDX-TV broadcast 17 hours of local news and KJTL broadcast no local news. Today, without Mission having had to invest more than $1 million to purchase all of the equipment necessary to build a stand-alone news operation, Nexstar produces 22.5 hours of local news per week on KFDX-TV and 2.5 hours of local news per week on KJTL. Thus, regardless of the findings of the Yanich study, the Wichita Falls market has experienced an addition of 8 hours of local news programming that did not exist prior to the LSA, with the 2.5 hours broadcast on KJTL made feasible solely because of the LSA. That is, without the LSA, due to the high initial investment costs and high annual costs associated with producing local news, the 2.5 hours of news per week of local news on KJTL would be unsustainable.

Peoria-Bloomington: Peoria-Bloomington is DMA 116 and had total market revenues of approximately $33.5 million in 2010.[41] WYZZ-TV is the weakest station in the market in terms of revenues and ratings, and there is a dominant in-market station which receives more than 50% of the market revenues. Nexstar and Sinclair implemented their LSA relationship in 2001. Prior to implementation of the LSA, pursuant to which Nexstar produces the news for its station WMBD-TV and Sinclair's station WYZZ-TV, WMDB-TV broadcast 20 hours of local news per week and WYZZ-TV broadcast no local news. Today, without Sinclair having had to invest more than $1 million to purchase all of the equipment necessary to build a stand-alone news operation, Nexstar produces 27 hours of local news per week for broadcast on WMBD-TV and 5 hours of local news per week for broadcast on WYZZ-TV. Thus, regardless of the findings of the Yanich study, the Peoria market has experienced an addition of 12 hours of local news programming that did not exist prior to the LSA, with the 5 hours per week broadcast on

41 BIA/Kelsey, DMA 116.

WYZZ-TV made feasible solely because of the LSA. That is, without the LSA, due to the high initial investment costs and high annual costs associated with producing local news and the presence of a dominant in-market station, the 5 hours of news per week of local news on WYZZ-TV would be unsustainable.

Although not studied by Dr. Yanich, Nexstar notes that in all but the Wilkes-Barre-Scranton and Lubbock, TX markets, in those markets where Nexstar has implemented an LSA, the LSA operations have either increased the amount of local news provided in the market (10 markets) or maintained the same level of local news (4 markets) in the face of ever increasing competition. Thus, notwithstanding the revenue declines that television broadcasters continue to experience, LSAs have enabled Nexstar and its LSA partners to maintain or expand the same commitment to news and local programming that existed at the time the stations entered into the LSAs. Further, due to the increasingly competitive media landscape, without these sharing arrangements, one or both LSA partner stations likely would have reduced or cancelled their local news. Accordingly, LSAs serve the public interest.

IV. RETRANSMISSION CONSENT MATTERS SHOULD BE ADDRESSED IN THE RETRANSMISSION CONSENT PROCEEDING.

Notwithstanding the existence of an entire proceeding dedicated to the question of retransmission consent "reform," American Cable Association, Time Warner Cable, Inc., Mediacom Communications Corp., Cequal Communications (d/b/a Suddenlink Communications), DirecTV and other MVPDs filed comments in this proceeding to once again proclaim their purportedly disadvantaged status and to declare that the Commission must (i) continue to prohibit duopolies, (ii) deem LSAs anticompetitive and attributable, and (iii) contrary to several other commenters' position, determine that multicasting is anticompetitive. All of these issues have been fully briefed, remain pending in the Commission's retransmission consent proceeding and need not be re-addressed here.[42] Nexstar urges the Commission to leave its decision on all matters relating to retransmission consent to that proceeding as the proper forum in which to address the perceived harms to multi-million or multi-billion dollar companies such as Time Warner Cable, DirecTV, Mediacom and Suddenlink.

V. CONCLUSION.

Section 202(h) of the Telecommunications Act requires the Commission to review its media ownership rules with respect to current marketplace competition using up-to-date empirical data to support its decisions. That data reveals that today's media marketplace includes a vast array of news and information sources that are available to the American public at any time upon demand, and collectively, provide significant competition to television broadcasters. For local television broadcasters to survive and continue to serve their communities, it is imperative that the Commission permit common ownership of two TV stations in medium and small markets, regardless of "voices" and "rankings." Otherwise, the Commission's longstanding policy goals of competition, diversity and localism will fall victim to the competitive pressures facing medium and small market broadcasters in today's hypercompetitive media marketplace.

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[42] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, FCC 11-31, rel. March 3, 2011).

WHEREFORE, for the foregoing reasons, Nexstar respectfully urges the Commission to modify the Local TV Multiple Ownership Rule to allow television broadcasters to own two commercial TV stations in any market. Until the Commission provides this relief, the Commission should take no action to undermine television broadcasters' ability to enter into local service agreements.

Respectfully submitted,

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