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

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294

REPLY COMMENTS

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Executive Summary

The record demonstrates that the Commission must expand its broadcast attribution rules to cover agreements among non-commonly owned same-market television stations to coordinate their retransmission consent negotiations with multichannel video programming distributors in order for its local television ownership rule to continue to achieve its policy goal of promoting competition. Covering this practice under the attribution rules is necessitated by significant changes in broadcast television markets, including the increasing importance industry-wide of retransmission consent fees as a source of revenue to local television stations and the widespread and increasing practice of separately owned same-market television stations coordinating retransmission consent negotiations.

Harm to competition in local broadcast markets. Ample evidence shows that coordinated negotiations reduce competition in local markets by replacing competition with collusion and price fixing, evidenced by data that shows cable operators pay at least 22 percent higher retransmission consent fees to separately owned same-market broadcasters that use a single representative to negotiate than to broadcasters who negotiate separately. This practice lessens competition in local broadcast markets, and harms broadcast stations that do not coordinate their retransmission consent negotiations. The anticompetitive effects are not speculative, but have been recognized by the U.S. Department of Justice.

Broadcasters commenting in the record have not contested the importance of retransmission consent to their operations, the substantial numbers of separately owned stations in the same market engaging in coordinated negotiations, or the economic theory of harm to or the empirical evidence of its impact on local competition in broadcast markets. The only rebuttal lodged by broadcasters is a challenge to the evidence of harm based on the fact that it is self-reported, and therefore should be given little weight, an argument that itself should receive little weight by the Commission.

Negotiation of retransmission consent is a core station function. The Commission should not be swayed by broadcaster objections that attribution is inappropriate because negotiation of

retransmission consent has not been recognized as a “core station function.” The record and relevant precedent fully supports expansion of the Commission’s attribution rules to cover agreements among non-commonly owned same-market broadcasters to coordinate retransmission consent negotiations.

Agreements to coordinate retransmission consent negotiations among separately owned, same-market broadcasters convey sufficient influence and control over the core station operations with respect to station finances and therefore are appropriate to be deemed attributable under the Commission’s traditionally applied attribution standard. The record evidence submitted by ACA and others demonstrates that retransmission consent revenues are importance to stations’ finances by providing broadcast stations with their second single largest revenue source, and are acknowledged to provide broadcasters with a “meaningful second revenue stream.” Making decisions that impact broadcast station finances in general, but revenues in particular, and specifically significant sources of such revenue, such as retransmission consent, is appropriately treated as a core station function consistent with the manner in which the Commission has applied this concept in the past in decisions concerning joint sales of advertising by non-commonly owned radio stations.

Significantly, the Commission has previously attributed agreements for the joint sales of another key product – radio advertising time – to prevent harms to local competition. The Commission’s decision to attribute radio joints sales agreements was based on the implicit recognition that sale of an important product that contributes to station revenues and is used to fund station operations, including the purchase of programming, is a core operating function, and that decisions concerning the sale of that product are core operational decisions. Based on this precedent, agreements among separately owned television stations that facilitate the coordination of retransmission consent, which is similarly an important product, should be deemed attributable for the same reasons. Thus, even if retransmission consent has not in the past been considered a “core operating function” of a broadcast licensee, it should be recognized as such today in view of the growing importance to stations revenues of retransmission consent fees.

Beyond traditional demonstrations of influence or control over core station functions, the Commission has the authority to restrict other relationships between non-commonly owned stations that permit the exercise of market power and harm local competition under its attribution rules. Agreements among separately owned same-market stations to coordinate their retransmission consent negotiations warrant attribution because they detrimentally affect competition and should therefore be restricted in order to promote the public interest, consistent with the Commission's longstanding media ownership policies. The Commission's broadcast ownership and attribution rules are broad in scope, and have expanded and contracted over time in response to changing marketplace conditions. The Commission in the past has addressed joint sales practices by non-commonly owned stations that, similar to the coordination of retransmission consent negotiations, were found to lessen competition in local television markets, and there is no statutory or regulatory limitation preventing the Commission from addressing them again as concerns retransmission consent. The whole purpose of this media ownership review is to update the Commission's rules in response to changing marketplace conditions.

The Commission has taken account of various forms of business relationships between non-commonly owned stations that raise significant competition concerns for nearly as long as it has had place limits on the number of stations a single entity may own, operate or control in local media markets. In particular, the Commission repeatedly has been concerned with joint ventures that require a cooperative relationship between otherwise competing stations that would impair competition in local markets. Over time, many of these interests have been deemed to give rise to cognizable ownership interests for purposes of applying the multiple ownership rules as a means of effectively prohibiting them.

For this reason, the broadcasters' unduly narrow reading of the attribution rules as concerned only with influence or control over station programming, personnel and financing decisions proffered by must be rejected. To the contrary, the Commission has explicitly recognized that attribution may be appropriate in instances beyond the traditional focus on the potential for influence or control over station finances, programming and personnel decisions where arrangements for coordinated activity by separately owned same-market stations could "lead to the exercise of market power" and "raise related competition concerns." Accordingly, the Commission has not failed to attribute business arrangements that would impair economic competition in local markets.

The record shows how non-commonly owned same-market stations coordinating their retransmission consent negotiations are able to lessen competition in the market, and command significantly higher fees for carriage solely through the exercise of increased market power and regardless of other factors such as audience share, leaving them with less incentive to maintain or attain significant competitive standing in the market.

Thus, even if the Commission does not agree that negotiation of retransmission consent is a core station function or is squarely covered by its attribution rule as it has traditionally been given meaning, it may nonetheless attribute agreements among non-commonly owned stations to coordinate these negotiations (i) to put an end to collusive sales practices that replace competition with cooperation among separately owned same-market stations and (ii) because the unattributable nature of such agreements could lead to the exercise of market power by the participating stations and raise related competition concerns. The Commission has a long history of taking action to prohibit, through operation of its local ownership and attribution rules, business ventures and relationships among separately owned broadcast stations in single market, and it should not hesitate to do so with respect to agreements to coordinate retransmission consent negotiations.

<u>The *de minimis* efficiency benefits of coordinated negotiations are outweighed by their significant competitive harms</u>. The extensive comments filed by broadcasters concerning the efficiency benefits of various forms of sharing agreements also miss the mark. ACA has not disputed that various forms of operational or resource sharing agreements can be beneficial to broadcast stations. ACA raises no objections to other forms of resource sharing arrangements among separately owned stations, and takes no position on whether or not such sharing agreements should be attributable on a *per se* basis. ACA's sole concern is with the lessening of local competition

through agreements to coordinate retransmission consent negotiations. The record demonstrates that the harm to competition and the degree of influence over another station conveyed by these agreements outweighs the *de minimis* benefit to non-commonly owned local broadcasters of coordinating their retransmission consent negotiations.

The Commission should give little credence to other broadcaster arguments against action in this docket to address coordinated negotiations. It is appropriate for the Commission to take action in this proceeding as part of its responsibility to promote competition in local broadcast markets. The Commission should not be distracted by broadcasters' perpetual claims that this is a matter for the antitrust authorities. The local television ownership rules were designed to promote competition in local television markets and behavior that threatens to harm competition through agreements to coordinate is properly addressed by the Commission. The fact that the issue is also pending in a separate retransmission consent rulemaking creates no barrier. No credible case for delay in addressing these collusive practices has been presented in the record of this proceeding.

Nor should the Commission be distracted by broadcasters' suggestions that they be permitted to coordinate their retransmission consent negotiations at the expense of MVPDs with smaller presences in markets to have a more equal footing against cable operators who have grown in markets through system clustering, or MVPD motives in asking the Commission to address behaviors that impact retransmission consent in this proceeding, none of which are relevant to the question of whether coordinated negotiations harm the public interest by lessening competition in local television markets.

ACA reiterates its call for the Commission to put a decisive end to these competitive and public interest harms in this proceeding. Attribution of agreements to coordinate the negotiation of retransmission consent among separately owned same-market broadcasters will put an end to a practice that lessens competition in local television markets, in accordance with the Commission's television ownership limits. The time has come for the Commission to recognize these "artifices" to end-run its local television ownership limits for what they are, and bring them under its attribution rules so that the multiple ownership rules can continue to protect the public interest in free market competition among same-market broadcast stations.

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REPLY COMMENTS

I. INTRODUCTION

The American Cable Association files these reply comments in response to comments filed concerning the Notice of Proposed Rulemaking in the above-referenced docket.[1] The record fully supports ACA's call for the Commission to take account of the lessening of local broadcast competition by agreements among separately owned same-market television stations to coordinate their retransmission consent negotiations with multichannel video programming distributors ("MVPDs") through its attribution rules. The lessening of local competition is a longstanding and core

[1] *In the Matter of 2010 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011)("NPRM").

media ownership concern of the Commission[2] and its broadcast ownership and attribution rules are the means by which the Commission's goal of promoting local competition is achieved within the television broadcasting industry.[3] As the Commission has explained, "[o]ur competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences."[4] In the instant NPRM, the Commission appropriately asks whether it should adopt a broader attribution regulatory scheme that encompasses all agreements, however styled, that relate to the programming and/or operation of broadcast stations, and specifically whether it should consider the impact of these agreements on retransmission consent negotiations.[5] ACA submits once again that the answer is unquestionably yes.

The attribution rules give effect to the Commission's local television ownership rules, are necessarily intended to prevent circumvention of these limits, and have evolved over time to capture whatever new form that circumvention takes. Today, many non-commonly owned television stations in the same market are effectively operating as if commonly owned with respect to negotiating

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[2] *See* NPRM ¶ 10; *National Broadcasting Co., Inc. et al v. United States*, 318 U.S. 190, 193 (1943)("*NBC v. US*") (Commission's "chain broadcasting" rules grew out of inquiry initiated in 1938 to determine "whether special regulations applicable to radio stations engaged in chain broadcasting were required in the 'public interest, convenience or necessity,'" including examination of whether "practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership or other means."); *In the Matter of Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC2d 1046, ¶¶ 10, 11 (1975) ("*1975 Broadcast-Newspaper Cross-Ownership Order*")("Our diversification policy is derived from both First Amendment and anti-trust policy sources; "Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the marketplace of ideas is, in theory, the best way to assure a multiplicity of voices."); *In the matter of 2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, ¶ 87 (2008) ("*2006 Quadrennial Review Order*").

[3] *In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees; Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations; Amendment of 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems; Re-examination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Report and Order, 97 FCC 2d 997 (1984) ("*1984 Attribution Order*").

[4] *In the Matter of 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 150 (2003) ("*2002 Biennial Review Order*").

[5] NPRM ¶ 207.

retransmission consent by agreeing to coordinate their negotiations with MVPDs. The record shows that retransmission consent fees are an important and growing revenue source for broadcasters, and the practice of coordinating retransmission consent negotiations is widespread and increasing and directly lessens local television competition, as evidenced by cable operators paying higher retransmission consent fees to broadcasters who coordinate than to broadcasters who negotiate separately.[6] Taking account of the negotiation of retransmission consent through the Commission's multiple ownership and attribution rules is fully justified by precedent and the record of this proceeding.

As described in detail below, consistent with Commission precedent concerning attribution of certain station sharing arrangements, agreements to coordinate retransmission consent negotiations should be recognized to give rise to cognizable ownership interests. Agreements by separately owned same-market stations to coordinate retransmission consent negotiations convey sufficient control or influence over core operations of a station to be deemed attributable, such as when one television station grants another competing station in the same market the right to negotiate for the sale of retransmission consent rights to an MVPD. The negotiation of the prices, terms and conditions of retransmission agreements are "giving many broadcasters a meaningful second revenue stream," as recently observed by Chairman Genachowski,[7] which indisputably directly affects station finances, and therefore comes within the core functions that give rise to attributable interests, similar to agreements for the joint sales of radio advertising time, which the Commission

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[6] *In the Matter of 2010 Quadrennial Regulatory Review*, Comments of the American Cable Association, MB Docket No. 09-182, MB Docket No. 07-294, at 13-25 (filed Mar. 5, 2012) ("ACA Comments"); *In the Matter of 2010 Quadrennial Regulatory Review*, Comments of the American Cable Association, MB Docket No. 09-182, MB Docket No. 07-294, at 1-3 (filed Mar. 5, 2012) ("DirecTV Comments"); *In the Matter of 2010 Quadrennial Regulatory Review*, Comments of Time Warner Cable, MB Docket No. 09-182, MB Docket No. 07-294, at 4-16 (filed Mar. 5, 2012) ("Time Warner Comments"); *In the Matter of 2010 Quadrennial Regulatory Review*, Comments of the Independent Telephone and Telecommunications Alliance, MB Docket No. 09-182, MB Docket No. 07-294 , at 3-11 (filed Mar. 5, 2012) ("ITTA Comments").

[7] Prepared Remarks by Julius Genachowski, Chairman, FCC, at the 2012 NAB Show, Las Vegas, Nev. (Apr. 16, 2012).

has deemed attributable in the past. The Commission also has explicitly recognized that attribution may be appropriate in instances beyond the issue of potential for influence where arrangements for coordinated activity by separately owned same-market stations could “lead to the exercise of market power” and “raise related competition concerns.” For this reason, attribution is appropriate for forms of coordination where rather than delegate control over negotiations to a competitor same-market stations coordinate their negotiations by directly communicating with one another and agree to follow a collective course with regard to the negotiation of retransmission that maximizes their joint profits as an ownership interest would.

Despite the protestations of the broadcasters, the Commission has the authority to restrict new types of relationships between non-commonly owned stations that permit the exercise of market power and harm local competition under its attribution rules even if these arrangements are beyond the attribution rules’ traditional demonstrations of influence or control over core station functions. The Commission in the past has addressed joint sales practices by non-commonly owned stations under its attributions rules that, similar to the coordination of retransmission consent negotiations, were found to lessen competition in local television markets, and there is no statutory or regulatory limitation preventing the Commission from addressing similar arrangements that concern retransmission consent under its same rules. The whole purpose of this media ownership review is to update the Commission’s rules in response to changing marketplace conditions, and the attribution rules is where the Commission would address practices between separately owned, same market broadcasters that lessen competition Broadcasters have presented no evidence to dispute the data and information in the record demonstrating the harms to competition of coordinated negotiations, or credible case against addressing these collusive practices under the attribution rules.

Accordingly, the Commission should take immediate action to reform its attribution rules to take appropriate account of all forms of agreements among separately owned television stations that lessen competition and raise prices by permitting competing sellers to coordinate their retransmission consent negotiations with purchasing MVPDs in a particular designated market area ("DMA").

II. THE RECORD SUPPORTS THE COMMISSION TAKING THE IMPACT OF AGREEMENTS TO COORDINATE RETRANSMISSION CONSENT INTO CONSIDERATION IN THIS REVIEW OF ITS MEDIA OWERSHIP RULES

ACA submits that the Commission cannot fulfill its statutory obligations to ensure that its broadcast licensees operate consistent with the public interest and that its media ownership rules continue to promote local competition unless it takes account of the adverse impact on competition of the widespread and increasing practice of separately owned same-market television stations coordinating their retransmission consent negotiations. Taken together, these developments demonstrate the need for the Commission to expand its attribution rules to prohibit the anticompetitive practice of separately owned stations in the same market coordinating their retransmission consent negotiations.

A. The Record Evidence Strongly Demonstrates Harms to Local Competition Flowing from the Widespread and Increasing Practice of Separately Owned Same-Market Television Stations Coordinating Retransmission Consent Negotiations.

As ACA has demonstrated, an assessment of whether the Commission's broadcast ownership rules adequately protect local television station competition must include consideration of two important marketplace developments: (1) the substantial growth in importance industry-wide of retransmission consent fees as a source of revenue to local television stations; and (2) the widespread and increasing practice of separately owned same-market television stations coordinating their retransmission consent negotiations. The Commission must also take into account the ample evidence that this practice reduces competition in local television markets.[8]

<u>The importance of retransmission consent revenues to broadcast stations</u>. In its Comments, ACA demonstrated that retransmission consent revenues are increasingly important to local station

[8] ACA Comments at 3-11.

finances, and have grown to be the second most important single source of station revenues next to advertising revenues.[9] Consistent with ACA's observation, recent press reports continue to confirm the importance to broadcast station finances of retransmission consent revenues. An SNL Kagan study reported in March, 2012 estimates that the retransmission consent revenues of 14 publicly traded station owners in the fourth quarter of 2011 were up 31.4 percent from 2010.[10] As a percentage of total station revenues, SNL Kagan reported that retransmission consent has risen from 4.5 percent in 2008 to 14.2 percent in 2011. Projections for 2012, which will include the results of the recently concluded round of negotiations, according to Kagan, are expected to continue this "explosive growth rate."[11]

In its Comments, DirecTV has similarly pointed out that:

> Retransmission consent fees have become an increasingly important component of such finances. According to SNL Kagan, retransmission consent fees have increased nearly 50 percent in just the last two years. Moreover, based on an analysis of public companies, SNL Kagan estimates that retransmission consent accounted for 52 percent of television station cash flow on average in 2010, and as much as 76 percent in some cases.[12]

DirecTV has also demonstrated that broadcasters themselves have been "quick to emphasize the extent to which station finances are increasingly dependent upon this revenue stream," both before the Commission and in statements reported in the media.[13]

The importance of retransmission consent revenues to station finances is cited as an important factor in a recent article describing the decision of E.W. Scripps Co.'s to separate its

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[9] *Id.* at 4-5.

[10] Tony Lenoir, SNL Kagan, Broadcast Investor, "*Retrans for public stations group grows 31.4% in '11, reaches 14.2% of total TV revenues,"* (Mar. 22, 2012).

[11] *Id.*

[12] DirecTV Comments at 2-3.

[13] *Id.* at 3.

television broadcasting and cable programming networks into separate entities.[14] The article explains how Scripps was able to grow a highly successful stable of cable programming networks by using its broadcast station group "as a handy, efficient bootstrap, leveraging its retransmission consent rights to boost distribution of the cable nets instead of negotiating for fees." The decision to spin off the cable networks in 2007 was intended, in part, to "free the station from being the financial nursery for cable operations" and permit the broadcast stations to pursue cash compensation for retransmission consent, rather than compensation-in-kind in the form of carriage of the cable nets. As described by Barry Lucas, senior vice president of Gabelli & Co., the Scripps' television business has "been a powerhouse for a good long time," "but they haven't brought it home on the margins." According to Lucas, the missing piece on the broadcasters' balance sheet is retransmission consent revenues.[15] Clearly, retransmission consent has now taken on outsized financial importance for local television stations, and in at least one case, driving a corporate restructuring to maximize the level of cash compensation to be extracted from MVPDs.

<u>The widespread and increasing practice of coordinated negotiations</u>. ACA has placed extensive evidence in the record demonstrating the prevalence of instances of separately owned Big 4 network affiliates operating within the same designed market area ("DMA") coordinating their retransmission consent negotiations.[16] Of 62 instances of sharing arrangements in 55 DMAs between non-commonly owned Big 4 affiliates in the same market,[17] ACA was able to confirm through a member survey 46 instances in 41 DMAs where the broadcasters used the same

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[14] Price Coleman, TVNewsCheck, "*Scripps Co.: Old Media Dog Full of New Tricks*," (Mar. 27, 2012).

[15] *Id.*

[16] ACA Comments at 5-8; Appendix A, Tables 1 and 2 (Table 1, 62 Instances of Separately Owned Same-Market Broadcasters Affiliated with a Big 4 Network Operating Under Some Form of Sharing Agreement; Table 2, 46 Instances of Separately Owned Same-Market Broadcasters Affiliated with a Big 4 Network Simultaneously Negotiating Retransmission Consent with an MVPD Using a Single Representative). This data was based on publicly available documents and records, together with the results of a member survey.

[17] *Id.* at 6, Appendix A, Table 1.

negotiator to conduct their retransmission consent negotiations.[18] After reviewing comments in the record submitted by broadcasters in response to the NPRM, ACA was able to identify three additional instances of Big 4 affiliated broadcaster stations operating under a sharing agreements that it had not previously reported, bringing the total to 65 instances in 58 DMAs.[19] ACA then queried its members operating in the DMAs of these three newly identified instances, and discovered that at least one of its members negotiated with a single representative for these stations in two of the instances.[20] Therefore, ACA can now confirm 48 instances in 43 DMAs where separately owned, same market broadcasters coordinated their retransmission consent negotiations. This evidence demonstrates that negotiating with a single representative for two separately owned Big 4 affiliates in the same market is not an uncommon occurrence and rapidly becoming as frequent as one-to-one negotiations between operators and stations.[21]

<u>The reduction in competition when separately owned same-market broadcasters coordinate their negotiations</u>. Moreover, ACA has demonstrated in several filings with the Commission that coordinated retransmission consent negotiations by separately owned, same market broadcasters lessen competition in local broadcast markets. By engaging in this practice, broadcasters choose not to compete against one another for retransmission consent fees based on the quality of their

[18] *Id.* at 7, Appendix A, Table 2.

[19] *See In the Matter of 2010 Quadrennial Regulatory Review* , Comments of Coalition to Preserve Local TV, MB Docket No. 09-182, MB Docket No. 07-294, at Appendix A (filed Mar. 5, 2012) ("Local TV Coalition Comments")(describing sharing agreements in DMA 119, Montgomery-Selma, Bahakel Communications, WAKA-CBS and Sagamore-Hill Broadcasting, WNCF-ABC; DMA 131, Chico-Redding, Catamount Holdings, KHSL-CBS and Evans Broadcasting, KNVN-NBC, and DMA 163, CP Media, WGFL-CBS and MPS Media, WNBW-NBC).

[20] In DMA 131, Chico-Redding, Catamount Holdings, KHSL-CBS and Evans Broadcasting, KNVN-NBC and DMA 163, CP Media, WGFL-CBS and MPS Media, WNBW-NBC, ACA members serving these markets report that the broadcasting pairs negotiated their retransmission consent negotiations using the same representative.

[21] *See In the Matter of Rulemaking to Amend The Commission's Rules Governing Retransmission Consent; MB Docket No. 10-71; In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; MB Docket No. 09-182*, Ex Parte Letter from Barbara S. Esbin, Cinnamon Mueller, to Marlene Dortch, Secretary, Federal Communications Commission at 6 (filed Mar. 19, 2012).

programming to attract viewers, but instead to secure higher retransmission consent through collusion and price fixing.[22] The scheme works. Available empirical evidence demonstrates that when cable operators are forced to negotiate with a single representative for more than one Big 4 affiliate in the same market, the average retransmission consent fees paid are at least 22% higher than the average fees paid to station owners who negotiated separately.[23] The adverse impact on competition among broadcasters due to this practice is no different than the impact made possible through merger, which is not countenanced for top four rated television stations in the same market under the Commission's local television station ownership limits.[24] Moreover, the empirical evidence showing the harm to local competition from such coordinated negotiations of retransmission consent fees is predicted by economic theory, and has been recognized by the U.S. Department of Justice.

Specifically, as ACA and others have noted, DOJ found that agreements to coordinate retransmission consent negotiations among non-commonly owned same-market broadcast stations have the anticompetitive effect of "restraining, suppressing and eliminating competition [among broadcasters] for cable services;" "increasing the cost of retransmission rights to the cable companies;" and "depriving cable companies and consumers of the benefits of free and open competition."[25] DOJ has recognized that the "broadcasters' collusion succeeded in extracting more

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[22] *See* In *the matter of 2010 Quadrennial Regulatory Review, MB Docket No. 09-182*, Comments of the American Cable Association, at 5-10, 19-20 (filed July 12, 2010) ("ACA Media Ownership NOI Comments") at; *In the matter of Amendment to the Commission's Rules Related to Retransmission Consent* , Comments of the American Cable Association, at 21-22 (filed May 27, 2011) ("ACA Retransmission Consent Comments"); *In the Matter of Amendment to the Commission's Rules Related to Retransmission Consent*, Reply Comments of the American Cable Association, at 33-37 (filed June 27, 2011) ("ACA Retransmission Consent Reply Comments").

[23] ACA Comments at 9; ACA Retransmission Consent Comments at 10-11.

[24] 47 C.F.R. § 73.3335(b).

[25] ACA Comments at 10-11; *In the Matter of 2010 Quadrennial Regulatory Review* , Comments of Mediacom Communications Corp. and Cequel Communications LLC d/b/a Suddenlink, MB Docket No. 09-182, MB Docket No. 07-294 , at 9-10 (filed Mar. 5, 2012) ("Joint MVPD Comments"); Time Warner Cable Comments at 9. *U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Complaint, Section V, Effects, ¶ 20 (Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/f0700/0745.pdf (last visited Apr. 17, 2012) ("Corpus Christi Complaint"). *See also U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Competitive Impact Statement, *available at* http://www.justice.gov/atr/cases/f0700/0746.pdf (last visited Apr. 17, 2012) ("Corpus Christi Competitive CIS").

favorable terms from the cable companies than they would have otherwise obtained" and that "the antitrust laws require that such rights be exercised individually and independently by broadcasters."[26] According to DOJ, "[t]he effect of this combination and conspiracy was to increase the price of retransmission consent and to restrain competition among defendants in the sale of retransmission rights."[27]

It is noteworthy that no broadcaster in this proceeding has contested the fact that substantial numbers of separately owned same-market stations are engaging in coordinated negotiations. Moreover, the broadcasters neither challenge the substance of the economic theory of harm presented by ACA nor the empirical evidence that has been presented showing that the results of the reported coordinated negotiations have led to higher retransmission consent fees in those cases as compared to separate negotiations.[28] Instead, their principal argument is that the evidence is not reliable because it is self-reported.[29]

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[26] Corpus Christi Competitive CIS at 8.

[27] *Id.* at 2.

[28] The Coalition of Smaller Market Television Stations has filed one ex parte letter in this docket, indicating that during a series of meetings stations operating under SSAs "questioned the claim that joint negotiations result in increased retransmission consent fees" because broadcasters will seek fair value for each station, whether conducting negotiating jointly or separately, and therefore "they have not encountered any situations that would support the assertion by some MVPDs that joint broadcaster negotiations in SSA situations have pushed up retransmission consent fees or resulted in higher consumer costs." Ex Parte Letter on behalf of the Coalition of Smaller Market Television Stations from Jonathan D. Blake to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 10-71 and 09-182, at 5 (filed Dec. 21, 2011) ("Blake Ex Parte"). Similarly, in the retransmission consent reform rulemaking, Nexstar affirmed that it "offers the same rates for stations in single station markets and for its stations in shared services markets and that the negotiated rate for its stations would not change if Nexstar is not permitted to negotiate on behalf of the stations under a shared services agreement." *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71, at 21 (filed May 27, 2011) ("Nexstar Retransmission Consent Comments").

[29] *See, e.g.*, *In the Matter of 2010 Quadrennial Regulatory Review* , Comments of the National Association of Broadcasters, MB Docket No. 09-182, MB Docket No. 07-294 , at 68-69 (filed Mar. 5, 2012) ("NAB Comments"); *In the matter of 2010 Quadrennial Regulatory Review* , Comments of Entravision, MB Docket No. 09-182, MB Docket No. 07-294 , at 14-19 (filed Mar. 5, 2012) ("Entravision Comments"); *In the matter of 2010 Quadrennial Regulatory Review* , Comments of Sinclair, MB Docket No. 09-182, MB Docket No. 07-294 , at 19-20 (filed Mar. 5, 2012) ("Sinclair Comments"). Ironically, the only broadcasters to directly contest the value of ACA's empirical evidence on the grounds that it is self-reported, themselves rely on self-reported claims that they either have not encountered higher prices in coordinated negotiation situations or that the station group

The fact that ACA's evidence is self-reported by the MVPDs who faced coordinated negotiations should not detract from its significance. The operators who reported the data cited by ACA signed letters attesting to the facts and were specific in describing the methodology they utilized in drawing their conclusions concerning the price differentials they experienced when engaging in coordinated as opposed to one-on-one negotiations with Big 4 affiliates.[30] It is disingenuous for broadcasters to suggest that only data provided by non-MVPDs would be probative in this proceeding, given that the broadcasters contractually forbid MVPDs from disclosing the prices, terms and conditions of retransmission consent, thus making third-party reporting of this price data impossible.

B. The Record Supports Expansion of the Commission's Attribution Rules to Cover the Agreements to Coordinate Retransmission Consent Among Non-Commonly Owned Same-Market Stations.

In its Comments, ACA demonstrated that attribution is appropriate for three principal reasons: (i) agreements to coordinate retransmission consent among separately owned same-market broadcasters convey sufficient influence and control over core operations of a station to be deemed attributable ownership interests; (ii) beyond the issue of potential influence, the coordination of retransmission consent negotiations permits the exercise of market power and raises related competition concerns; and (iii) the harm to competition and the degree of influence over another

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does not vary prices for stations in single vs. coordinated markets. *See* Blake Ex Parte at 5; Nexstar Retransmission Consent Comments at 21.

[30] Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR No 8233-C, 8234-M, at 5 (filed Dec. 14, 2009); *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of Cable America Missouri LLC (filed May 28, 2010); *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of USA Companies (filed May 28, 2010); *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*¸ MB Docket No. 10-71, Comments of the Pioneer Telephone Cooperative, at 2 (filed June 4, 2010).

station conveyed by sharing agreements outweighs the *de minimis* benefit to local broadcasters of agreements that facilitate the coordination of retransmission consent.[31]

The record clearly shows that coordinated negotiation of retransmission consent where one separately owned broadcaster has the authority to negotiate for or bind another station in the same market conveys sufficient influence over the core operations of a station to warrant attribution. This sort of agreement results in one television station having control (or influence) over another competing station's negotiations for the sale of retransmission consent to an MVPD, or the authority to bind that station to the resulting agreement.[32] As noted above, retransmission consent revenues are an increasingly important and "meaningful" revenue source for broadcast stations, second only to advertising revenues as a measure of a station's financial performance. For the same reason that the Commission decided to attribute radio JSAs, agreements among separately owned television stations that gave one station the right to negotiate the sale of a substantial amount of a key broadcast station product (advertising, in the case of JSAs; retransmission consent, in the present case) to a second separately owned station in the same market should be deemed attributable for purposes of the multiple ownership rules.[33]

Nonetheless, influence or control is not the sole justification for deeming certain broadcaster arrangements attributable for purposes of the Commission's attribution and local television ownership rules.[34] The Commission has explicitly recognized that attribution may be appropriate in instances

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[31] ACA Comments at 15-26.

[32] ACA Comments at 17-18; DirecTV Comments at 4-5; Joint MVPD Comments at 16-17. *See also* Nexstar Retransmission Consents Comments at 21 (through coordinated negotiations "one entity, with the consent of the other, has authority to negotiate and bind multiple stations").

[33] ACA Comments at 18; 2002 Biennial Review Order ¶¶ 316-324.

[34] ACA Comments at 18-22; 2002 Biennial Review Order ¶ 321; *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238, ¶ 15 (2004) ("2004 TV JSA Attribution NPRM"). *See also* 2002 Biennial Review Order ¶ 319 n. 695 (discussing decision in 1999 Attribution Order to address the possibility that JSAs "could threaten competition" by retaining the "discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns."); Shareholders of the

beyond the issue of potential for influence where arrangements for coordinated activity by separately owned same-market stations could "lead to the exercise of market power" and "raise related competition concerns."[35] As ACA has demonstrated, the coordination of retransmission consent among separately owned same-market broadcasters could take various forms. Not only may instances of coordinated negotiations occur by which one broadcaster negotiates on behalf of another broadcaster, but it may also occur in other ways, such as where broadcasters directly communicate with one another and agree to follow a collective course of action, although each broadcaster negotiates on its own.[36] While "influence or control" might be less obvious in such situations, the Commission has recognized that the capturing relationships and business arrangements that go "[b]eyond the issue of potential influence" under its attribution rules is necessary to prevent the lessening of competition through private agreements in local television markets.

The licensees that are engaged in coordinated negotiations have less incentive to maintain or attain significant competitive standing in the market, reducing the level of local competition. The end result of non-commonly owned same-market stations coordinating their retransmission consent negotiations is the lessening of competition in a local market, which enables the participating stations to command significantly higher fees for carriage solely through the exercise of increased market power and regardless of other factors such as audience share.[37]

For these reasons, as ACA argued in its Comments, the revised attribution rule must encompass both agreements where one broadcaster delegates its authority to negotiate or approve

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Ackerly Group, Inc., (Transferor) and Clear Channel Corp. (Transferee), Memorandum Opinion and Order, 17 FCC Rcd 10828 (2002).

[35] 2004 TV JSA Attribution NPRM, ¶15.

[36] ACA Comments at 21; ACA Retransmission Consent Comments at 20-21; ACA Retransmission Consent Reply Comments at 21-46; William P. Rogerson, Professor of Economics, Northwestern University, "Coordinated Negotiation of Retransmission Consent Agreements by Separately-Owned Broadcasters in the Same Market", at 11-12 ("Rogerson II").

[37] ACA Comments at 21.

retransmission consent to another separately owned broadcaster in the same market, and other types of coordination, such as where non-commonly owned broadcasters in the same DMA directly communicate with one another and agree to follow a collective course with regard to the negotiation of retransmission consent that maximizes their joint profits as an ownership interest would, because the harm to competition is the same.[38] To this end, the Commission should explicitly recognize as creating an attributable interest a broadcaster engaging in any of the following practices:

- Delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
- Delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;
- Any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and
- Any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.[39]

Finally, ACA has demonstrated that attribution is warranted because the harm to competition and the degree of influence over another station conveyed by agreements to coordinate retransmission consent outweighs the *de minimis* benefit to local broadcasters of agreements that facilitate the coordination of retransmission consent.[40] For this reason, arguments against attribution of sharing agreements in general advanced by CBS, Grey, Sinclair and New Vision/TTBG on the

[38] *Id.* at 26-27.

[39] *Id.* at 27; *see also* ITTA Comments at 7 (the Commission should conclude "that an attributable interest exists when separately owned stations in the same market engage in the coordinated negotiation of retransmission consent, whether formally or informally, because such practices result in the same harms to competition, localism, and diversity as a merger between two top-four stations"); Time Warner Cable Comments at 15-16 (at a minimum, the Commission "should find that an attributable interest exists when a sharing agreement between two stations allows for the joint negotiation of retransmission consent"); OPATSCO Reply Comments at 5 (concurring with ACA recommendations concerning the coordinated negotiation practices to be attributed); *In the matter of 2010 Quadrennial Regulatory Review*, Comments of Free Press, MB Docket No. 09-182, MB Docket No. 07-294 , at 59-60 (filed Mar. 5, 2012) ("Free Press Comments") (a sharing agreement should be automatically attributed if the parties to the agreement jointly negotiate retransmission consent).

[40] ACA Comments at 22-26.

grounds that they provide needed efficiencies to participating stations should not stand in the way of the attribution of agreements specifically to coordinate retransmission consent.[41] ACA has never disputed that various forms of operational or resource sharing agreements can be beneficial to broadcast stations.[42]

The sole impact of the prohibition sought by ACA would be the requirement for each station to negotiate its own retransmission consent agreement, and the relative cost savings from combined retransmission consent negotiations is insignificant compared to the cost savings from combined marketing or programming functions.[43] Significantly, and not surprisingly, not a single broadcaster citing the operational efficiencies afforded by sharing agreements in this proceeding cites an

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[41] *In the Matter of 2010 Quadrennial Regulatory Review*, Comments of Belo Corp., MB Docket No. 09-182, MB Docket No. 07-294 , at 16 (filed Mar. 5, 2012) ("Belo Comments")(cost sharing agreements are necessary to achieve greater operating efficiencies, which in turn allow for quality news that appeals to the public interest); CBS Comments at 15 (the Commission should not expand the reach of the attribution rules to cover cooperative agreements because their efficiencies allow broadcasters to provide more local news and public service programming, thereby serving the public interest); Entravision Comments at 12-14 (SSAs are more often than not economic necessities in order for stations to be able to provide news programming in tough economic times); *In the Matter of 2010 Quadrennial Regulatory Review* , Comments of Gray Television, Inc., MB Docket No. 09-182, MB Docket No. 07-294 , at 9-10 (filed Mar. 5, 2012) ("Gray Comments")(unless TV duopoly restrictions are eliminated, LMAs, SSAs, and JSAs must be allowed, as those arrangements allow for greater efficiency and thus more local news and public service programming); NAB Comments at 58-65 (SSAs create operational efficiencies, enhance localism by facilitating provision of new and better news and other programming, and allow small market broadcasters to operate when it would otherwise be inefficient to do so); Local TV Coalition Comments at 3-15 ("local service agreements" provide efficiencies and flexibility to stations, thus helping to preserve and strengthen local news, local programming, and local jobs); LIN Comments at 8-14 (The FCC should not adopt a new rule that would effectively prohibit service contracts between stations that cannot be commonly owned under its existing ownership rules; sharing agreements serve the public interest by creating operational efficiencies, serve localism and increase competition by shoring up failing stations, and promote diversity by facilitating programming launches); New Vision/TTBG Joint Comments at 9-13 (sharing agreements are an "essential outlet for broadcasters in small and mid-sized markets, benefitting views and broadcasters by allowing broadcasters to obtain efficiencies that enable them to deliver innovative services to their communities while still maintaining ultimate control of their stations).

[42] ACA Comments at 22-24; *see also* ACA Retransmission Consent Comments at 24 n.46; DirecTV Comments at 5 ("To be clear, DirecTV has no objection to [station resource sharing agreements] as they relate to operating efficiencies and other benefits from cooperative activity, such as improved news and informational programming. . . However, to the extent an arrangement includes one station handing over its retransmission consent rights to another station in its market, it should be deemed to create a cognizable interest. Thus, attributing the delegation of this outward-facing function would maintain the integrity of core licensee functions without precluding stations from pursuing a variety of strategies for capturing internal efficiencies that might be available.").

[43] ACA Comments at 23-25; ACA Retransmission Consent Comments at 22-25; Rogerson II at 18.

efficiency benefit gained through the coordination of retransmission consent negotiations.[44] Yet, even to the extent that there are any operating efficiencies gained from the coordination of retransmission consent negotiations, they are quite modest and are likely limited to the cost of hiring a negotiator and related administrative expenses.[45] Such efficiencies pale in comparison to the efficiencies of other types of arrangements that the Commission's attribution rules permit, such as the production of programming or the sale of advertising. As such the FCC should reject any assertion by the broadcasters that the efficiencies of the coordination of retransmission consent by separately owned same-market broadcasters should prevent attribution of such agreements.

Further, the relatively modest savings of coordinating negotiations through the use of a single negotiator are entirely outweighed by the significant public interest harms of promoting competition in the local broadcast market.[46] In making its attribution decisions, the Commission uses a balancing test, attributing agreements only upon a finding that the harms to competition outweigh the potential benefits of the various combinations of interests.[47] It bears repeating that collusion among competing sellers is always going to be more efficient than non-collusion, but the savings are not likely to be substantial and sound antitrust principles and competition law prohibit this practice in furtherance of the far more important public policy goal of engendering robust competition in local media markets. In view of the negligible efficiency benefits derived through coordinated negotiations and the

[44] Only one broadcast station group, Nexstar, has claimed that operational efficiencies are gained through coordinated negotiations because in such cases, "one entity, with the consent of the other, has authority to negotiate and bind multiple stations" in comments filed in the retransmission consent reform proceeding. Nexstar Retransmission Consent Comments at 21. Nexstar asserts that if it could not negotiate retransmission consent on behalf of stations under a shared services agreements, those stations would have to hire someone to handle their negotiations, and that as a result, it is likely that their rates would increase to cover the cost.

[45] ACA Retransmission Consent Comments at 8; ACA Retransmission Consent Reply Comment at 35-36; Joint MVPD Comments at 12 ("[T]here is no evidence that consolidating authority to negotiate retransmission consent agreements produces benefits for the public that offset the higher fees that have been shown to result when two or more stations negotiate as one.").

[46] ACA Comments at 24; ACA Retransmission Consent Reply Comments at 35-36.

[47] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order*, 14 FCC Rcd 12559, ¶ 123 (1999) ("1999 Attribution Order"); 2002 Biennial Review ¶ 321.

significant competitive harms that result through the lessening of competition among broadcasters in local markets, attribution is fully justified.[48]

III. THE FCC MUST REJECT THE BROADCASTERS' ARGUMENT THAT RESPONSIBILITY TO NEGOTIATE OR APPROVE A RETRANSMISSION CONSENT AGREEMENT IS NOT A CORE OPERATING FUNCTION GIVING RISE TO AN ATTRIBUTABLE OWNERSHIP INTEREST

Consistent with the foregoing, and contrary to broadcaster protestations, ACA submits that there exists no barrier to the Commission determining that the responsibility to negotiate or approve retransmission consent is a core operating function of a broadcast licensee for purposes of its attribution rules, and it would be proper for Commission to reach this conclusion as it is well supported as well as Commission precedent and the record in this proceeding.

The principal argument advanced by broadcasters against attribution of agreements that facilitate coordinated retransmission consent negotiations among separately owned same-market stations is that the negotiation of retransmission consent is not a "core operating function" of a broadcast station because it does not relate to programming decisions, personnel issues or financial control. With respect to retransmission consent, NAB argues that "the ability of a station to negotiate retransmission consent on behalf of another station under separate ownership or control—whether pursuant to a sharing agreement or otherwise—is simply irrelevant from an attribution perspective," because the terms of MVPD retransmission of broadcast signals do not impact "core operating functions," [a licensee's programming decisions, personnel decisions, or financial control].[49] As a consequence, according to NAB, "joint retransmission consent negotiations do not affect control, or otherwise provide, a station with undue influence over the core operating functions of another station."[50]

[48] ACA Comments at 22-25.

[49] NAB Comments at 68-69.

[50] *Id.* at 69.

Contrary to the suggestion of the broadcasters, the Commission is not so limited in judging the negotiation of retransmission consent to be a core operating function for purposes of its attribution rules, and reaching this conclusion is both sensible and supported by the record as well as Commission precedents. The Commissions' attribution decisions over the past two decades have not been as narrowly focused as NAB suggests, and, as discussed below, its actions deeming attributable time brokerage agreements (LMAs) and certain radio joint sales agreements ("JSAs") demonstrate that there is no impediment to deeming the negotiation of retransmission consent to be a core operating function. In fact, the best reading of the term "core operating functions" would lead the Commission to conclude that the negotiation of retransmission consent is a core operating function because the revenues generated as a result of the negotiation of a retransmission consent agreement directly affect station financing. This is particularly true among big 4-affiliated local broadcast stations where retransmission consent revenues are these stations' second largest revenue stream, and represent an increasingly large and important complement to advertising revenues.

It is notable that in its decisions attributing radio and television LMAs, and radio JSAs, the Commission failed to provide any specificity on what "core operating functions" were implicated.[51] Rather, the Commission's decisions very clearly focused on attribution of the various business arrangements that raise significant competition concerns to prevent their use "to circumvent our ownership limits."[52] To the extent the Commission's decision to attribute radio JSAs in 2002 speaks to the question of "core operations" it simply states that "JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns

[51] *See In re Revision of the Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755 (1992) ("*1992 Radio Ownership Order*"); 1999 Attribution Order ¶¶ 83-89; 2002 Biennial Review Order ¶ 323.

[52] 1999 Attribution Order ¶ 83-87.

warranting attribution."[53] Implicit in this decision is the view that effective influence or control over the sale of a station's primary source of revenue is a "core operation."

The record evidence submitted by ACA and others demonstrates the importance of retransmission consent fees to stations' finances, and how coordination of negotiations allows non-commonly owned stations to act as a unit, thereby lessening local competition, as evidenced by their ability to drive up of the prices paid by MVPDs to retransmit the stations' signals. Simply put, making decisions that impact broadcast station finances in general, but revenues in particular, is appropriately treated as a core station operation consistent with the manner in which the Commission has applied this concept in the past. Therefore, the Commission should reject NAB's argument that that the terms of agreements for MVPD retransmission of broadcast signals are irrelevant to the question of attribution because they do not impact "core operating functions." NAB is incorrect to focus solely on financial control and the payment of significant station expenses rather than the question of station finances more broadly, and certainly negotiation for the sale of the second single largest source of station revenues must be considered a core component of station finances.

Because the sale of retransmission consent now represents an increasingly important secondary revenue stream to advertising, it is no different from the sale of advertising time, their other important source of station revenues, which is already apparently considered a core operating function. Accordingly, and consistent with its decision to attribute radio joint sales agreements ("JSAs") conferring control over just 15% of advertising sales for the brokered stations, the Commission should explicitly recognize that one licensee exercising control over another's negotiations for the sale of the product that contributes the second highest source of station revenues

[53] 2002 Biennial Review Order ¶ 320.

conveys sufficient influence and control over the second licensee's core station functions to create an attributable ownership interest.[54]

The decision to attribute radio JSAs was based on the Commission's recognition that arrangements that replace competition among stations in a market with coordination would lessen local broadcast competition and that attribution was necessary if its attribution rules were to achieve their purpose by "function[ing] effectively and accurately to identify all interests that are relevant to the underlying purposes of the multiple ownership rules and that should therefore be counted in applying those rules."[55] It was also based on the Commission's implicit recognition that sale of an important product that contributes to station revenues and is used to fund station operations, including to the purchase of programming, is a core operating function, and that decisions concerning the sale of that product are core operational decisions.[56] Accordingly, agreements to coordinate retransmission consent negotiations should be counted as cognizable ownership interests for purposes of the Commission's multiple ownership rules.

IV. BEYOND TRADITIONAL DEMONSTRATIONS OF INFLUENCE OR CONTROL OVER CORE STATION FUNCTIONS, THE COMMISSION HAS THE AUTHORITY TO RESTRICT OTHER RELATIONSHIPS THAT PERMIT THE EXERCISE OF MARKET POWER AND HARM LOCAL COMPETITION UNDER ITS ATTRIBUTION RULES

The Commission need not feel constrained in barring agreements to coordinate retransmission consent by operation of its local television ownership rule, despite the protestations of broadcasters that the coordination of retransmission consent negotiations by separately owned

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[54] ACA Comments at 14-18. The Commission has found that the coordinated sale of a key broadcast station product by non-commonly owned radio broadcasters – advertising time – gave rise to cognizable ownership interest on the part of the brokering station for purposes of applying the multiple ownership rules. 2002 Biennial Review Order ¶ 320 & 47 C.F.R. § 73.3555(k)(1) attribute radio JSAs giving the brokering station control over more than a mere 15% of the advertising sales of the brokered station. The Commission later proposed attributing TV JSAs on the same basis as its radio JSA decision. 2004 TV JSA Attribution NPRM ¶ 15.

[55] 1999 Attribution Order ¶ 85. As ACA noted in its Comments, similar concerns had earlier animated the U.S. Department of Justice to file comments advocating attribution of same-market radio JSAs to avoid circumvention of any of the competition purposes of the multiple ownership limits of the 1996 Act. ACA Comments 20-21 (discussing 1997 DOJ Letter).

[56] 2002 Biennial Review Order ¶ 318.

same-market broadcasters is not a practice that the language of the attribution rules would seem to capture -- that is, a conveyance by one licensee to another of a degree of influence or control over programming decisions or other core operating functions. The Commission's broadcast ownership and attribution rules are broad in scope, and have expanded and contracted over time in response to changing marketplace conditions. The Commission in the past has addressed joint sales practices by non-commonly owned stations that, similar to the coordination of retransmission consent negotiations, were found to lessen competition in local television markets, and there is no statutory or regulatory limitation preventing the Commission from addressing them again. The Commission has broad authority over its radio licensees under the Act, and has exercised it where necessary to ensure that its multiple ownership and attribution rules promote local broadcast competition and prevent broadcasters from obtaining and exercising market power.[57] Periodic updating of its rules to ensure that they continue to further the public interest in response to changing marketplace conditions is precisely the reason Congress mandated that the Commission undertake periodic media ownership reviews.[58]

The multiple ownership rules have from the outset been concerned with undue concentration of economic power in national, regional and local broadcast markets.[59] As the Commission has

[57] *See* 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . .there is created" the FCC.); 47 U.S.C. §§ 303, 307-09 (granting Commission broad general powers over broadcast licensees to act as "the public convenience, interest or necessity requires" and specifically to determine whether "public interest, convenience and necessity will be served by" granting broadcast license applications).

[58] *See* NPRM ¶ 1; Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996)("1996 Act"); Consolidated Appropriations Act, 2004, Pub. L. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act); 47 C.F.R. §§ 73.3555(a)-(d) and 73.658(g)(media ownership rules subject to 2010 quadrennial review).

[59] *See, e.g., NBC v. US*, at 193*; In the Matter of the Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Docket No. 8967*, Report and Order 1953 FCC LEXIS 34, ¶¶ 4, 12, 16 (1953)("in order to guard against monopolistic tendencies and to preserve competition in the broadcasting industry the Commission can and should, in the exercise of its licensing functions, give consideration to the multiple ownership of stations;" policy of "maximum diversification of ownership" to avoid undue concentration of economic power achieved by limiting in each service the number of stations in which one person may hold an interest and taking account of certain fractional

explained, its concerns with potential abuses of multiple ownership date back as far as 1938, when it initiated a multi-year investigation concerning the effects of concentration of control in the same or affiliated stations locally, regionally, and nationally by means, *inter alia*, of "management contracts or agreements, common ownership or other means and devices, particularly insofar as the same trends toward or results in restraint of trade or monopoly."[60]

> To encourage competition, the Commission's structural ownership rules and policies have been aimed at precluding broadcasters from obtaining and exercising market power. We have concluded that local ownership rules serve the public interest by preventing broadcasters from "dominating television and radio markets and wielding power to the detriment of small owners, advertisers, and the public interest."[61]

Consistent with its pro-competitive local media policy, the Commission has acted to address the economic harm of duopoly ownership of Big 4-affiiliated stations by flatly prohibiting the ownership, operation or control by any entity of more than one "top four rated" ("top-four prohibition") station in any market.[62]

The attribution rules, in turn, "represent the Commissions' judgment regarding what interest in or relation to a licensee will convey on its holder that degree of influence or control over the licensee

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and positional interests in view of ability of such interest holders to exert influence over station operations.) ("1953 Order); *United States v. Storer Broadcasting Co*., 351 U.S. 192, 203 (1956)(upholding Commission authority to adopt broadcast multiple ownership rules limiting "the number of stations consistent with a permissible "concentration of control" to protect the public against such concentration); *In the Matter of Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, ¶¶ 10, 11 (1975) ("*1975 Broadcast-Newspaper Cross-Ownership Order"*) ("Our diversification policy is derived from both First Amendment and anti-trust policy sources; "Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the marketplace of ideas is, in theory, the best way to assure a multiplicity of voices."); 2006 Quadrennial Review Order ¶ 87.

[60] *NBC v. US*, 318 U.S. at 193; *Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, First Report and Order, 63 FCC 2d 824, ¶ 4 (1977).

[61] *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, ¶ 25 (1999)("*1999 Local Television Ownership Order*").

[62] 47 C.F.R. § 73.3555(b).

and its facilities as should subject it to limitation by the multiple ownership rules."[63] The attribution tests the Commission has devised are based on the Commission's "best judgment, after a review of the record, as to what relationships should count in terms of administering the ownership rules,"[64] and its attribution decisions reflect the Commission's "informed policy judgment on the types of relationships which would detrimentally affect diversity and competition and should, therefore, be restricted in order to promote the public interest."[65] Put simply, with respect to economic competition, the primary and appropriate focus is on relationships among separately owned stations in a single market that harm competition and should therefore be restricted through the attribution rules.

The question of what constitutes a "cognizable interest" for purposes of operation of the Commission's multiple ownership proscriptions has occupied the Commission from the start.[66] Initially, the Commission construed the "owns, operates, or controls" language of the duopoly rule to be applicable only where a stockholder holds a majority voting interest in the licensee or otherwise exercises actual control over the licensee.[67] This narrow interpretation, therefore, did not encompass minority stock interests or other positional interests such as being an officer, director, or a manager. In 1953, the attribution rules were revised, as they applied to the national ownership limit, to include

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[63] 1984 Attribution Order, ¶ 2.

[64] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, 16 FCC Rcd 1097 ¶ 55 (2000)("*2000 Attribution Reconsideration Order*").

[65] *See In re Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154, Policy Statement*, 4 FCC Rcd 2208, ¶ 33 (1988) ("*1988 Cross-Interest Policy Statement*"),

[66] *In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees; Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations; Amendment of 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems; Re-examination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Notice of Proposed Rulemaking, 48 FR 10082, ¶ 2 (1983) ("*1983 Attribution NPRM*").

[67] 1984 Attribution Order ¶ 3 n.4. Although the Commission had developed percentage attribution benchmarks in connection with the national multiple ownership rules, these were not considered "literally germane" to the local television ownership rule. *Id.*

all minority interests, partners, and officers and directors.[68] By the 1960s, the Commission recognized the need to adjust its basic attribution rule in light of "[w]idespread non-compliance with the rules by investment companies (mutual funds)" revealed in adjudication of the transfer of control of a station.[69] Eventually, ownership benchmarks in the attribution rules were raised to encourage capital investment in local stations; however an eligible entity utilizing this higher attribution standard was required to file a disclaimer of any intent to control or influence the licensee.[70] By 1984, the attribution rules also encompassed various forms of passive investments and non-voting positional interests held by corporate management in recognition of the ability of the holders of such positions to exercise influence or control over the licensee and its operations.[71]

During this same time period, relationships that the Commission identified as important to consider in applying the duopoly rule because they raised significant competition concerns, but which were then excluded under its interpretation of the duopoly rule's "own, operate or control" requirement, were addressed through its supplemental cross-interest policy.[72] The cross-interest policy developed in the 1940s through case-by-case adjudication as a supplement to the duopoly rule at a time when the duopoly rule required either actual working control or ownership of 50 percent or more of the stock.[73] Its purpose was to prevent anticompetitive abuses through certain relationships involving "key employees, consulting positions, advertising agency representative

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[68] 1988 Cross-Interest Policy Statement ¶ 13*; The Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Report and Order, 18 FCC 288 (1953).

[69] 1984 Attribution Order ¶ 4.

[70] 1984 Attribution Order ¶ 4. At the same time, the Commission indicated its recognition that "the relationship itself between cognizable ownership and actual influence over programming is at best indirect." *Id.* ¶ 7.

[71] 1984 Attribution Order ¶ 4. Other investment interests were later recognized as attributable, including equity/debt combinations. 1999 Attribution Order ¶¶ 7-22; 23-25; 26-65 (shareholder benchmarks; passive investments; Equity/Debt Plus).

[72] 1988 Cross-Interest Policy Statement ¶ 9. Although the cross-interest policy was originally developed to as an intra-service supplement to the duopoly rule, it was subsequently extended to the Commission's other local ownership rules. *Id.* ¶ 12.

[73] *Id.* ¶ 9.

relationships, time brokerage arrangements, sales representative relationships, nonattributable equity interests, and joint ventures."[74] It was generally focused on media outlets located in the same community or substantially the same market, and was designed to address instances in which an individual or entity has a "meaningful" relationship in two competing media outlets serving substantially the same area such that the policies served by the duopoly rule were implicated.[75]

In a forerunner to its later decisions to attribute time brokerage and radio joint sales agreements, the Commission applied the cross-interest policy in 1969 to prohibit a national or regional sales representative company that was wholly or partially owned by a licensee of a broadcast station from representing and soliciting advertising for competing stations in the same service in the same area.[76] This policy, known as "Golden West," was based on the concern that such a "sales rep" could potentially impair competition by colluding or price fixing in the sale of advertising time, or placing a station that it did not own at a competitive disadvantage.[77] The Commission's stated concern at the time was with the potential impairment of competition, and not a record of existing abuses.[78] The cross-interest policy also prohibited two local broadcast licensees from entering into joint associations to buy or build, inter alia, a new broadcast station in the same market.[79] These joint ventures "triggered cross-interest scrutiny because the successful operation of

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[74] *Id.* ¶ 3, 9.

[75] *Id.* ¶ 3 n.4.

[76] *In re Applications of Golden West Broadcasters,* Memorandum Opinion and Order, 16 FCC 2d 918 (1969) ("*Golden West Broadcasters*").

[77] 1988 Cross-Interest Policy Statement ¶ 9.

[78] *See Golden West Broadcasters* ¶8, n.4.

[79] *Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, Notice of Proposed Rulemaking, 10 FCC Rcd 3606 ¶ 84 (1995).

the joint venture was thought to require a cooperative relationship between otherwise competing stations, and this would impair competition in the local market."[80]

In 1986 the Commission, during an era of unprecedented deregulation in the broadcast industry, eliminated many regulations,[81] including its prohibition on joint ventures and combination advertising rates and joint sales by separately owned broadcast stations in the same area in recognition of the fact that the practices were not *per se* prohibited by the antitrust laws and that it could address the practice on a case-by-case rather than *per se* basis.[82] As the Commission later explained in its cross-interest policy statement, "any relationship covered by the cross-interest policy that is deemed to pose a serious threat to viewpoint diversity or competition, should be treated, if possible, as an attributable interest under the local ownership rules rather than subjecting it to ad hoc review as is our current practice."[83]

Interestingly, at the time NAB argued *against* elimination of the combination advertising rate and joint sales prohibition on non-commonly owned stations. "NAB responds to the question posed in the Second Notice as to whether the Commission should continue to forbid activity not prohibited by the antitrust laws, asserting that the Commission has the responsibility to take into account the policies underlying the antitrust laws and to apply them [not] administering the antitrust laws but rather exercising its own powers under the Act, and that the Commission policies thus need not fully parallel the antitrust laws. NAB further believes that permitting combination advertising rates might lead licensees to inadvertently engage in price fixing or 'tying' violations. NAB also disputes the

[80] *Id.*

[81] *In the Matter of Elimination of Unnecessary Broadcast Regulation*, Second Report and Order, 1986 FCC LEXIS 3758 (1986) ("*1986 Joint Sales Representative Order*") (eliminating anti-trust regulation related to forbidding all joint advertising rates and joint sales except by commonly-owned AM-FM station because the regulation extended beyond what was prohibited under antitrust law).

[82] *In the Matter of Elimination of Unnecessary Broadcast Regulation*, Second Report and Order, 55 Rad. Reg. 2d (P&F) 1500, ¶ 48 (1986) ("1986 Broadcast Deregulation Order").

[83] 1988 Cross-Interest Policy Statement ¶ 33 n. 57.

adequacy of private remedies for those injured by such activities, arguing that they take too long and are too expensive."[84] Apparently, NAB was for Commission regulation via the attribution rules of certain sharing agreements to prevent anticompetitive price fixing by non-commonly owned competitors before it was against it such regulation.[85]

Not long after its decision to eliminate its prohibitions on joint ventures and combination advertising rates, and citing a preference for bright-line tests rather than ad hoc determinations, the Commission eliminated direct reliance on the cross-interest policy altogether, while subsuming what remained of the policy into the attribution rules, particularly with respect to ownership benchmarks and positional interests.[86]

Although it had discarded its flat prohibition of joint ventures, the Commission never abandoned its concern with the harmful effects on competition of joint sales of advertising among non-commonly owned same-market stations. Just five years after eliminating the cross-interest policy, the Commission re-focused its attention on the competitive problems caused by various forms of business arrangements among separately owned same-market stations that, similar to those prohibited under the former cross-interest policy, gave rise to the realistic potential for harm by replacing competition with coordination among separately owned local broadcast stations.[87] In 1991, the Commission reviewed agreements under the attribution rules that previously had been addressed through its cross-interest policy. The Commission initiated a radio ownership rulemaking, citing "a proliferation of programming agreements in common service areas, or 'time brokerage' agreements

[84] *Id.* ¶ 43.

[85] *See* NAB Comments at 57-58 (attribution of sharing arrangements—which would effectively preclude such arrangements in most television markets—is unwarranted because such arrangements do not provide third parties the ability to exert undue influence over a licensee's programming or other core operating decisions. Nor do SSAs raise attribution concerns in the context of retransmission consent negotiations.").

[86] 1999 Attribution Order ¶¶ 112-116.

[87] 1999 Attribution Order ¶¶ 83-87; 1992 Radio Ownership Order; Attribution of Ownership Interests, Further Notice of Proposed Rulemaking, MM Docket Nos. 94-150, et al., 11 FCC Rcd 19895 (1996) ("*1996 Attribution Further Notice*").

has raised a number of concerns" that warranted examination under its attribution rules to determine whether they would cause "significant competitive damage" that could not be sufficiently addressed via antitrust enforcement.[88] In the course of that proceeding, the Commission found that "widespread and substantial time brokerage agreements among stations serving the same market" could undermine the Commission's continuing interest in broadcast competition and diversity.[89] Accordingly, "to prevent the use of time brokerage to circumvent" its new radio ownership limits, the Commission profoundly expanded the previously more limited scope of its attribution rules, and deemed as an attributable ownership interest time brokerage agreements giving one local broadcaster the ability to market more than 15 percent of the brokered station's broadcast hours per week.[90]

The radio attribution decision shows plainly that the Commission may deem attributable joint ventures between non-commonly owned same-market broadcasters upon a finding that such business arrangements impair local competition in violation of its multiple ownership rules by permitting stations to cooperate rather than compete, regardless of whether these business arrangements necessarily fit precisely within the concept of agreements that convey sufficient influence or control over core station functions such as programming, personnel and finances.

In the years since, the Commission's concern with the problems of certain types of business arrangements among non-commonly owned broadcasters in the same market has continued and other types of sharing arrangements, which formally had been dealt with under its cross-interest policy, were also brought under the attribution rules. The Commission initiated a rulemaking in 1995 to address the question whether to attribute two specific forms of broadcast sharing agreements,

[88] *In re Revision of the Radio Rules and Policies*, Notice of Proposed Rulemaking, 6 FCC Rcd 3275, ¶¶ 30-31 (1991).

[89] 1992 Radio Ownership Order, ¶ 64.

[90] *Id.* ¶ 65.

LMAs (now with respect to television) and JSAs (with respect to both radio and television).[91] In its initial notice, although it stated that it did not intend to reopen its earlier decisions permitting joint sales practices in radio and television, the Commission had sought comment on "whether, through multiple cooperative arrangements or contractual agreements, broadcasters could so merge their operations as to implicate our diversity and competition concerns."[92] In the 1996 further notice, the Commission explained that new evidence involving joint sales agreements – "non-ownership based mechanisms" – potentially conveying influence or over advertising shares raised the question whether they should be considered attributable.[93]

In 1999, the Commission continued to expand the scope of its attribution rules to deal with joint ventures among non-commonly owned same-market broadcasters when it determined to attribute television LMAs (time brokerage agreements), for more than fifteen percent of the brokered stations' broadcast hours per week. At the time, it declined to change its earlier decision permitting radio and television JSAs.[94] Shortly thereafter, however, the Commission reversed course with regard to radio JSAs, and deemed them attributable.

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[91] ACA Comments at 16; *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Notice of Proposed Rulemaking, 10 FCC Rcd 3606 ¶¶ 94-95 (1995) ("*1995 Attribution Notice*"); *see* 1996 Attribution Further Notice;1999 Attribution Order ¶¶ 66, 83-87 (addressing attribution of television LMAs, defined as a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertising to support the programming, for the first time under its broadcast ownership rules); *id.* ¶¶ 117-123 (addressing decision to continue to decline attributing radio and television JSAs on a per se basis, subject to compliance with the antitrust laws).

[92] 1995 Attribution Notice, ¶¶ 94-95 (1995) ("*1995 Attribution Notice*").

[93] 1996 Attribution Further Notice ¶¶ 7, 36.

[94] 1999 Attribution Order ¶¶ 83, 85 & n.183. FCC Chairman Kennard succinctly explained the basis for attribution on reconsideration: "In our *Attribution Report and Order*, we acknowledged the very real influence that the brokering party to a Local Marketing Agreement (LMA) exercises over the brokered station and concluded that certain LMAs should be attributable in order to reduce incentives to use LMAs to circumvent our ownership rules." *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable / MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (2000)(Statement of Chairman William E. Kennard).

In explaining its 2002 attribution decision, the Commission stated that "where one station owner controls a large percentage of the advertising time in a particular market, it has the ability to potentially exercise market power," and that "'[c]ontrol over the spot sales by one station affords significant power over the other.'"[95] The Commission therefore found that JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution.[96] JSAs were also found to "raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally."[97] Attribution of such agreements was appropriate, despite the Commission's recognition that JSAs "might produce public interest benefits," because on balance they nonetheless "may convey sufficient influence or control over advertising to be considered attributable."[98] The Commission's later proposal to attribute television JSAs on similar grounds explicitly recognized that "[b]eyond the issue of potential influence by a JSA broker over a brokered station's operations, which alone may warrant attribution, the unattributable nature of JSAs could lead to the exercise of market power by brokering stations and raise related competition concerns."[99]

The foregoing review of the history of the Commission's multiple ownership rules, cross-interest policy and attribution rules demonstrates that the Commission has the general authority to

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[95] 1999 Attribution Order ¶ 123; *Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp. (Transferee),* 17 FCC Rcd 10828 (2002). In the case of radio JSAs, an agreement will be per se attributable to the brokering station if it conveys control over more than 15% of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station. 47 C.F.R. § 73.3555(k)(1).

[96] 2002 Biennial Review Order ¶ 320.

[97] *Id.* ¶ 319.

[98] *Id.* ¶ 322. Although the logic of the Commission's decision to attribute radio JSAs would appear equally applicable to television JSA, because it had failed to raise the issue of television JSA attribution in the 2002 Biennial Review Notice of Proposed Rulemaking, the Commission determined that it could not, consistent with the Administrative Procedure Act, simultaneously consider the question of whether to deem television JSAs attributable. *Id*. ¶ 316, n. 688. Subsequently, the Commission initiated a Notice of Proposed Rulemaking proposing to deem television JSAs attributable on the grounds that "JSAs have the same effect in local TV markets that they have in local radio markets and should be treated similarly." 2004 TV JSA Attribution NPRM ¶ 2.

[99] 2004 TV JSA Attribution NPRM ¶ 15.

deal with business arrangements that threaten to circumvent the Commission's local television ownership limits, and while the regulations governing this area have evolved over time, so too have the Commission's attribution rules to deal with them. Over time the rules have expanded and contracted, but one constant has remained throughout: the local ownership limits have always been primarily concerned with the promotion of free market competition among station licensees in a designated market area. Whereas some of these matters might have been dealt with through alternative policies in the past, the attribution rules are the Commission's means today of ensuring that non-commonly owned stations do not lessen local competition through business arrangements that permit price fixing or other anticompetitive actions.

Despite broadcaster attempts to force the Commission into an unduly narrow reading of the attribution rules, the Commission has explicitly recognized that attribution may be appropriate in instances beyond the traditional focus on the potential for influence or control over station finances, programming and personnel decisions where arrangements for coordinated activity by separately owned same-market stations could "lead to the exercise of market power" and "raise related competition concerns."[100] Accordingly, the Commission has not failed to attribute business arrangements that would impair economic competition in local markets.[101]

ACA has shown how non-commonly owned same-market stations coordinating their retransmission consent negotiations are able to lessen competition in the market, and command significantly higher fees for carriage solely through the exercise of increased market power and regardless of other factors such as audience share, leaving them with less incentive to maintain or attain significant competitive standing in the market.[102] Thus, even if the Commission may not immediately recognize the negotiation of retransmission consent is a core station function as that

[100] 2002 Biennial Review Order ¶ 320.

[101] 1988 Cross-Interest Policy Statement ¶ 33 (attribution is appropriate for business arrangements that detrimentally affect "competition and should, therefore, be restricted in order to promote the public interest").

[102] ACA Comments at 20-22.

concept has traditionally viewed that concept, it may nonetheless attribute agreements among non-commonly owned stations to coordinate these negotiations (i) to put an end to collusive sales practices that replace competition with cooperation among separately owned same-market stations and (ii) because the unattributable nature of such agreements could lead to the exercise of market power by the participating stations and raise related competition concerns. The Commission has a long history of taking action to prohibit, through operation of its local ownership and attribution rules, business ventures and relationships among separately owned broadcast stations in single market, and it should not hesitate to do so with respect to agreements to coordinate retransmission consent negotiations. The time has come for the Commission to recognize these "artifices" to end-run its local television ownership limits for what they are, and bring them under its attribution rules so that the multiple ownership rules can continue to protect the public interest in free market competition among same-market broadcasters.

V. THE COMMISSION SHOULD DISREGARD BROADCASTERS' IRRELEVANT ARGUMENTS THAT SIMPLY DISTRACT FROM THE ISSUE OF WHETHER ALL FORMS OF AGREEMENTS AMONG SEPARATELY OWNED SAME-MARKET BROADCASTERS TO COORDINATE RETRANSMISSION CONSENT NEED TO BE ATTRIBUTED

Broadcasters raise several issues that are immaterial to the question of whether coordinated retransmission consent negotiations lessen competition among broadcast television stations in local markets, and should therefore be deemed attributable for purposes of the local television ownership rule. The broadcasters' arguments do nothing to refute the ample evidence presented in the record in favor of attributing these agreements, and the Commission must ignore these arguments as simply beside the point.

A. This Media Ownership Review Is the Appropriate Venue for Addressing the Coordination of Retransmission Consent Negotiations by Separately Owned, Same Market Stations.

Several broadcasters raise objections to the Commission addressing in this proceeding the practice of non-commonly owned same-market stations coordinating their retransmission consent negotiations.[103] Sinclair, for example, argues that this proceeding is not the proper forum for the consideration of this issue "considering that the Commission currently has a ongoing proceeding specifically focusing on retransmission consent issues and that such complaints are better considered by the FTC and the Department of Justice's antitrust division."[104] To the contrary, it is incumbent upon the Commission to address the anticompetitive practices of its broadcast licensees in all relevant proceedings, including this quadrennial media ownership review.

<u>Case-by-Case Enforcement by Antitrust Authorities</u>. The Commission must not be distracted by claims that agreements to coordinate retransmission consent negotiations among separately owned same-market broadcasters is a matter best left to the antitrust authorities.[105] First, for the reasons discussed in Sections II, III, and IV, supra, this media ownership review is precisely the correct forum for addressing the practice of non-commonly owned same-market broadcasters lessening local competition and driving up prices beyond levels individually achievable by coordinating their negotiation of retransmission consent with MVPDs. Specifically, as discussed in Section IV, supra, the Commission has addressed similar types of coordinated behavior and joint ventures that affected local competition in broadcast markets throughout the history of its media ownership rulemakings and related enforcement proceedings. Second, although the antitrust

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[103] *See, e.g.,* NAB Comments at 68-69 (no need for FCC to take RTC impact into account in this proceeding; FCC already has a record of the impact of joint sharing agreements on retransmission consent negotiations, and therefore does not need to review the impact again); Local TV Coalition Comments at 16-17 (FCC should reject calls to make RTC policy through ownership attribution decisions); Entravision Comments at 14 (the issue of RTC has little reasonable connection to localism, competition and diversity, and therefore should be addressed in the retransmission consent reform rulemaking).

[104] Sinclair Comments at 20.

[105] *Id.* at 20 n. 28 ("Even if the ACA is correct in its belief, this does not complete the analysis of whether any regulatory action is necessary. It is a well-established principle of antitrust law that the creation of efficiencies can override any price benefit resulting from business combinations."); Entravision Comments at 15-16 ("Anecdotes and speculation from cable operators simply do not provide any legitimate bases for abandoning the case-by-case approach to ferreting out occasional bad actors on display in United States v. Texas Television, Inc. . . . [which] demonstrates that effective enforcement and remedial measures are already in place to combat any retransmission consent-related abuses. The current system works. Cable operators have failed to provide any evidence that new, bright-line rules and sweeping, across-the-board regulation are necessary…").

authorities have similar authority over competitive issues, there is no legal barrier to the Commission acting its Title III authority in this proceeding. For more than 70 years the Commission has rejected broadcaster claims that the Commission's broadcast ownership rules designed to prevent undue consolidation are unnecessary because such matters can safely be entrusted to the antitrust authorities have been heard and rejected by the courts and the Commission.[106] In NBC v. US, the Supreme Court affirmed the fact that the Commission is not restricted from dealing with competitive issues that may resemble antitrust issues through its multiple ownership rules in spite of the fact that the DOJ has similar responsibilities.[107] In rejecting the broadcasters argument, the Supreme Court cited with approval a report of the Commission explaining that although the Commission is not charged with the duty of enforcing the Sherman Act, it "should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve," including by denying licenses on the basis of actions that harm competition by "preventing either himself or another person from making the fullest use of radio facilities."[108]

Moreover, it is practical for the Commission to deal with this behavior in its industry-wide media ownership review. First, ACA submits that where, as in this case, it is possible to easily describe in objective terms a set of practices that clearly constitute an anticompetitive harm concerning a subject matter covered by the Communications Act and Commission regulations, it is efficient to have the regulatory agency simply analyze the situation once in the context of its

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[106] *See, e.g., NBC v. US*, 319 U.S. 190, 209 (1943) (rebuffing broadcaster challenges that the FCC had "misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry"); *Mansfield Journal Co. v. Federal Communications Commission*, 180 F. 2d 28 , 33-34 (1950) (rejecting broadcaster claim that the FCC acted outside its jurisdiction by enforcing the antitrust laws when it denied, as contrary to the public interest, a broadcast license to a newspaper which had attempted to suppress competition in advertising and news dissemination in a local market); 1953 Order (rejecting arguments that multiple ownership rules amount to enforcement of the anti-trust laws, a function Congress had delegated to the Department of Justice); 1975 Broadcast-Newspaper Cross-Ownership Order, Statement of Commissioner Glen O. Robinson Concurring in Part and Dissenting in Part, (reinforcing the Commission's longstanding concern with competition as a communications policy and rebutting broadcaster "Wrong Forum" arguments suggesting that the antitrust authorities, rather than the FCC, address competitive concerns in the radio industry).

[107] 319 U.S. at 217.

[108] *Id.* at 223-224.

examination of whether its local television ownership rule is achieving its intended purposes. Thus, should the Commission agree with ACA and conclude that the practice of coordinated negotiations, particularly by non-commonly owned Big 4-affiliated stations in a local market is anticompetitive and contrary to the public interest obligations of broadcasters, it would be most efficient for the agency to amend its attribution rules to take appropriate account of the practice, rather than to expect antitrust agencies to litigate individual cases. The Commission has adopted this approach in numerous instances.[109] For example, and most recently, the Commission adopted prospective "rules of the road" for broadband Internet service providers in its Open Internet Order, where the existence of a mere handful of verifiable instances of "net neutrality" violations was deemed sufficient to support an administrative rulemaking response.[110] In addition, such an approach can be best for individual parties that are most at risk of case-by-case antitrust enforcement because it can provide clear rules of the road on practices that are either permitted or permitted, as the NAB has argued in the past.[111]

Second, the DOJ and Federal Trade Commission have limited resources and cannot be expected to necessarily identify, investigate, and vigorously prosecute occurrences of antitrust infractions within every business transaction. Third, Congress delegated to the Commission plenary authority over its broadcast licensees under Title III.[112] The Commission monitors and regulates

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[109] *See, e.g. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment Of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988 (1994) (implementing a "spectrum cap" of 45 MHz applicable to all CMRS providers for the purpose of preventing concentration of licenses, promoting dissemination of licenses to a wide variety of applicants and preserving competitive opportunities in the CMRS marketplace*); In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 FCC.2d 420 (1968) (deciding that the Carterfone device or any similar lawful device must be allowed to be connected directly to the AT&T network, as long as the device did not cause harm to the system).

[110] *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶¶ 125-26, 129-32 (2010) ("Open Internet Order"). Indeed, the rationale for the adoption of the rule and the Commission's authority to do so is grounded very much on the <u>potential</u> for broadband ISPs to act anticompetitively against online providers of voice and video services and applications who offer services that compete with the core voice and video services of the ISP.

[111] *See* 1986 Broadcast Deregulation Order ¶ 43.

[112] *See* 47 U.S.C. § 303(a)(classify radio stations), (b)(prescribe the nature of station service), (f)(adopt regulations to prevent interference and carry out the provisions of the Act), (g)(generally encourage the larger and more effective use of radio), (i)(adopt special regulations applicable to radio stations engaged in chain

many aspects of the broadcasting industry, and the DOJ and FTC may rely on the Commission's rules, in the first instance, to address competitive concerns arising between broadcasters and MVPDs under the retransmission consent provisions of the Act.

ACA has demonstrated that coordinated negotiations allow non-commonly owned stations in the same market to act in concert, thereby lessening competition among local broadcasters, evidenced by their ability to raise retransmission consent prices above levels otherwise obtainable through separate negotiations. Moreover, ACA has shown the practice to be prevalent. The Commission has broad delegated authority over its broadcast licensees, and the Commission has already determined that "proposals that result from agreements not to compete or fix prices" are inconsistent with competitive marketplace considerations in the context of its retransmission consent authority.[113] It is therefore completely appropriate for the Commission to take the lead and address this practice through a prophylactic ownership attribution rule that will provide clear industry-wide guidance on agreements among separately owned stations in a local market that will be deemed, as a per se matter, attributable with regard to the Commission's local television ownership limits.

<u>Retransmission Consent Rulemaking</u>. The Commission should reject the broadcasters' suggestions that it is not appropriate to deal with the practice of separately owned, same market broadcasters coordinating their negotiations for retransmission consent in this proceeding because it

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broadcasting), (r)("Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ");47 U.S.C. §§ 307(a) and (d), 309(a), 310 and 312 (establishing that the criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity"). In addition, Section 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *See also In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, ¶ 62 (2011) (discussing breadth of Commission's Title III powers over its licensees, and observing that "[s]pectrum is a public resource, and Title III of the Act provides the Commission with broad authority to manage spectrum, including allocating and assigning radio spectrum for spectrum based services and modifying spectrum usage conditions in the public interest).

[113] *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, ¶ 58 (2000) ("*2000 Good Faith Order*").

is also considering the matter in its retransmission consent rulemaking. The Commission must take note that the broadcasters do not show why the media ownership proceeding is not the right forum by submitting record evidence consisting of data, information, and legal arguments that refutes the ample evidence presented by ACA showing coordinated negotiations harm competition in local markets.[114] The fact is that a broadcast practice may implicate more than one set of Commission policies and rules and it is both the Commission's statutory obligation and good administrative practice to address behaviors that the Commission deems contrary to the public interest in each relevant rulemaking.

The issue in this proceeding is whether coordinated negotiations among separately owned same-market stations lessen competition among broadcasters in a market and whether the matter should be attributable with regard to local broadcast ownership limits, and this issue is separate and apart from the issue of whether coordinating negotiations is a violation of the good faith rules. The Commission has an obligation to review its broadcast ownership rule every four years to ensure that they continue to promote competition among broadcasters in local markets, and it is completely appropriate for the Commission to evaluate whether coordinated negotiations are undermining local broadcast competition in this proceeding. Furthermore, the Commission would be remiss in carrying out its statutory responsibilities if it failed to address the evidence produced in the record of this proceeding showing harm to local broadcast competition simply because the same practices may also violate other provisions of the Act or the Commission's rules. For these reasons, the Commission should reject broadcaster arguments that this is not the proper time or venue to address coordinated retransmission consent negotiations by separately owned same-market broadcast licensees.

[114] NAB Comments at 68-69 (no need for FCC to take RTC impact into account in this proceeding; FCC already has a record of the impact of joint sharing agreements on retransmission consent negotiations, and therefore does not need to review the impact again); Coalition to Preserve Local TV Broadcasting (Local TV Coalition) Comments at 16-17 (FCC should reject calls to make RTC policy through ownership attribution decisions); Entravision Comments at 14 (the issue of RTC has little reasonable connection to localism, competition and diversity, and therefore should be addressed in the retransmission consent reform rulemaking).

B. The Commission Should Flatly Reject Arguments that Separately Owned Same-Market Broadcasters be Permitted to Coordinate their Retransmission Consent Negotiations in Response to Clustering by Some Cable Systems.

Several broadcasters argue that coordinated negotiations should be permitted given the increase in clustering and negotiating leverage among cable operators.[115] In addition, NAB claims that Congress intended for the parties "to choose how to negotiate" retransmission consent.[116] First, the Commission should not be swayed by NAB's suggestion that "permitting joint negotiations pursuant to an SSA is especially important given the increase in clustering and negotiating leverage among cable operators." As ACA noted in its Retransmission Consent Comments and Reply Comments, the suggestion of broadcasters that it would be socially desirable to allow stations in all markets to increase their bargaining power with respect to all MVPDs through coordinated retransmission consent negotiations because some MVPDs serve relatively large shares of some DMAs giving those MVPDs a relatively large amount of bargaining power, is flawed.[117] ACA's economic expert offers two reasons why such reasoning should be rejected:

> (i) even if one were to accept the idea that collusion between sellers should be permitted when they negotiate prices with a large buyer, it would be a 'huge leap to conclude that the fact that there are some local markets that have a single buyer implies that sellers in ALL markets should be allowed to collude in negotiations with ALL buyers;" and (ii) the idea that it would be good public policy to let separately owned sellers collude in negotiations with a large buyer is itself "highly problematic to say the least," and not widely accepted among competition policy scholars.[118]

[115] NAB Comments at 69 n. 263; Sinclair Comments at 20 n. 28 ("This is particularly true where, as here, grossly unequal bargaining power that exists in the hands of monopolistic and oligopolistic cable companies has conspired to keep retransmission consent fees artificially low, considering the prices paid for inferior programming streams."); Entravision Comments at 16-18; Local TV Coalition Comments at 16-17.

[116] NAB Comments at 69 n. 263.

[117] ACA Retransmission Consent Comments at 21 n. 44; ACA Retransmission Consent Reply Comments at 36-37;.

[118] ACA Retransmission Consent Comments at 21 n. 44; Rogerson II at 17.

Second, NAB fails to explain how its observation that Congress intended for parties to choose how to negotiate retransmission consent agreements relates to the practice of competing stations in a market deciding not to compete in, but rather to coordinate, the sale of their products, a practice that is treated as a per se violation of the antitrust statutes. It is beyond reason to suggest that the Commission cannot take action to prevent an anticompetitive practice such as collusion through its local television ownership rules, or that Congress intended to permit collusion among separately owned same-market broadcasters under the retransmission consent provisions of the Act.[119]

C. The Commission Should Disregard Arguments Against Attribution of Broadcaster Agreements to Coordinate Negotiations Based on Allegations of MVPD Self-Interest.

Finally, the Commission should disregard broadcaster arguments that MVPDs in raising the issue of coordinated negotiations are concerned solely with their own profit levels.[120] The broadcasters' assertions about ACA's motives are not only wrong, but more importantly, they are utterly irrelevant as they do nothing to refute the ample evidence presented by the ACA and others that coordinated retransmission consent negotiations lessen competition in local markets, and should therefore be considered attributable for purposes of the Commission's multiple ownership rules. If the shoe were on the other foot, and any party suggested that the broadcasters' objection to having coordinated negotiations deemed attributable is based on a desire to maintain their own profit levels,

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[119] *See, e.g.,* 47 U.S.C. § 313 (declaring all antitrust laws fully applicable to broadcast licensees and specifically authorizing the Commission to revoke broadcast licenses of licensees found guilty of violating the antitrust laws); Section 325 (b)(3)(C)(iii) (finding a not a violation of good faith obligation where retransmission consent agreements are consistent with competitive marketplace conditions); Good Faith Order at ¶ 58 (finding a violation of good faith where agreements fixes prices).

[120] Entravision Comments at 15-16 ("Cable operators' complaints in the instant proceeding evidence only an industry eager to permanently fix retransmission consent negotiations in its favor by imposing unnecessary regulatory constraints on the bargaining power of broadcasters, who supply the cable operators with the program content that makes their service attractive to the public."); LIN Comments at 14-15 (FCC should not place MVPDs' interests in greater profits ahead of consumer interests in greater local programming or broadcasters' interests in lower costs and raising local output); Local TV Coalition Comments at 16-17 ("Rather than crafting media ownership rules to ensure higher profits for members of ACA, the Commission must instead consider the public interest.").

ACA would contend that assertions concerning broadcaster motives in raising such objections are similarly irrelevant.

VI. CONCLUSION

ACA and others in the record, including local broadcasters, have shown the importance today to broadcast station finances bottom lines of retransmission consent revenues. This significant change in the local television market has even been acknowledged by Chairman Genachowski, who acknowledged that retransmission consent revenues provide broadcasters with a "meaningful second revenue stream," and cited retransmission consent revenues as the second of three principal reasons why broadcasters today are experiencing "positive revenue trends."[121] As the record fully demonstrates, the negotiation of retransmission consent should be treated as much as a core operating function as the sale of advertising time because retransmission consent, like advertising, provides an important source of station revenues, and thus operating funds, that in turn are used to support programming decisions.

Broadcaster arguments against attribution on the grounds that negotiation of retransmission consent is not a "core operating function" of a broadcast station licensee are unavailing in all respects. None have disputed the core underlying data demonstrating (i) the importance to station finances of retransmission consent revenues; (ii) the fact that the practice of non-commonly owned stations coordinating their negotiations is widespread and increasing, and (iii) the necessary conclusion that it lessens competition in local broadcast markets, as evidenced by the fact that cable operators pay higher retransmission consent fees to broadcasters who coordinate their negotiations compared to those who negotiate separately. Nor have any broadcasters articulated a convincing basis to exclude from attribution agreements among separately owned same-market stations to coordinate their retransmission consent negotiations with MVPDs, beyond the fact that the Commission has not previously taken retransmission consent into account in its media ownership

[121] Prepared Remarks by Julius Genachowski, Chairman, FCC, at the 2012 NAB Show, Las Vegas, Nev. (Apr. 16, 2012).

rules. Such agreements convey actual control or influence over the prices, terms and conditions of agreements to grant retransmission consent to MVPDs, and the revenue derived from retransmission consent, in turn, is an increasingly important component of overall station finances, which fund station operations, including programming purchases. Thus, a station that has been delegated the responsibility to negotiate retransmission consent for another separately owned station in the same market has gained control of one of that station's most basic business operations. Therefore, such arrangements should explicitly be recognized as giving rise to an attributable interest with respect to negotiation of retransmission consent.

Moreover, beyond the question of influence or control over traditional core station operating functions, the record shows that agreements to coordinate retransmission consent among non-commonly owned same-market broadcasters affiliated with the Big 4 networks detrimentally affect local broadcast competition. Agreements among separately owned same-market stations to coordinate their retransmission consent negotiations warrant attribution because they detrimentally affect competition and should therefore be restricted in order to promote the public interest, consistent with the Commission's longstanding media ownership policies. The Commission in the past has addressed joint sales practices by non-commonly owned stations that, similar to the coordination of retransmission consent negotiations, were found to lessen competition in local television markets, and there is no statutory or regulatory limitation preventing the Commission from addressing them again as concerns retransmission consent. Consistent with longstanding precedent such agreements should therefore be restricted through the attribution rules in order to promote the public interest in competitive markets.

Finally, broadcasters have simply failed to articulate a single compelling reason why the Commission should not take action to prohibit collusion among broadcasters in the sale of retransmission consent rights to MVPDs at this time in this proceeding. Accordingly the time has come for the Commission to take decisive action to put an end to this anticompetitive practice and restore free market competition to affected markets through operation of its media ownership and attribution rules.

Respectfully submitted,

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