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December 6, 2012

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket No. 09-182

Dear Ms. Dortch:

On December 4, 2012, Barry Faber, Executive Vice President and General Counsel of Sinclair Broadcast Group, Inc. ("Sinclair"), and Clifford Harrington and Paul Cicelski of Pillsbury Winthrop Shaw Pittman LLP, met with Erin McGrath, Media Legal Advisor to Commissioner McDowell.

Mr. Faber discussed with staff recent reports indicating that the FCC may modify its rules to make Joint Sales Agreements ("JSAs") between television stations in the same market attributable interests. Consistent with comments Sinclair has previously filed with the FCC, Mr. Faber reiterated the point that even though television stations have utilized JSAs for at least ten years,[1] to his knowledge, not a single example of harm to program diversity or competition for viewers resulting from JSAs has been documented in the record of this proceeding. Consequently, Mr. Faber urged the Commission to refrain from treating television JSAs as attributable interests.

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[1] *See, e.g.*, Comments of Sinclair Broadcast Group, Inc., dated October 27, 2004, on the Commission's Notice of Proposed Rule Making in MB Docket No. 04-256, *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 19 FCC Rcd 15238 (2004).

Mr. Faber also urged the Commission not to base any decision to attribute JSAs on a record that is more than eight years old.[2] Since the FCC issued its 2004 Notice of Proposed Rulemaking on the proposed attribution of television JSAs in local markets, there have been numerous changes in the marketplace. The FCC should open the proceeding for further comment in order to refresh the now stale record before the FCC. Foremost among these changes has been the dramatic increase in the use of JSAs in the television broadcast industry, which not only points out the increased need for joint operations in light of continuing economic pressure on television broadcasters, but also provides the FCC with the opportunity to base any decision made with respect to JSAs less on conjecture and more on a substantially larger sample of real world experience.

Mr. Faber pointed out that since 2004, the broadcast industry has seen significant decreases in advertising revenue. Not only was the industry severely impacted by the recession, it has also been under tremendous pressure from lower ratings and increased alternative advertising platforms, including the Internet, and substantial increases in advertising sales by cable systems in local markets. There have been several factors which have led to dramatic increases in the local television advertising shares of the major cable MSOs: (1) increased viewing of cable channel programming, (2) increased multi-channel video distributor subscriber penetration, (3) further consolidation and market swaps, giving large cable operators substantially increased shares of subscribers in particular markets; (4) use of cable "interconnects" where cable operators in a market sell their advertising jointly, permitting an advertiser to obtain access to all cable households in a market, or to particular "zones" within a market; and (5) arrangements whereby major MSOs sell all local advertising for new market entrants, such as national telephone and broadband service providers providing video distribution services.

Mr. Faber observed that the Commission's relied, in 2004, on the FCC's *Ackerley* case,[3] where the Commission found a television JSA to be substantially equivalent to an attributable Local Marketing Agreement ("LMA"). The stations at issue in *Ackerley* entered into both a JSA for 100 percent of the brokered station's commercial inventory and an LMA for 15 percent of the brokered station's programming time. Because the agreements were based on a flat fee arrangement and gave the brokering station the right to collect all advertising revenues, the Commission concluded at the time that the brokered station lacked a financial incentive to control its programming.

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[2] *See 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 (2004).

[3] *See Shareholders of the Ackerley Group, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Transfer of Control of the Ackerley Group, Inc., and Certain Subsidiaries*, 17 FCC Rcd 10828 (2002) ("*Ackerley*").

Mr. Faber observed that, since that time, Sinclair's JSAs have been structured in such a way as to comply with the FCC's *Ackerley* decision. To meet the Commision's concerns, as expressed in the *Ackerley* decision, Sinclair's JSAs, and other JSAs of which Sinclair is aware, do not adopt a "flat fee" concept. Rather, the station licensee shares in the revenue and cash flow of the station, ensuring an incentive for station licensees to program their stations so as to maximize viewership, and thereby advertising revenues. Mr. Faber underscored that current JSAs do not implicate the concerns the FCC had in 2004, and that this would be made clear if the record was reopened to permit all parties to supply evidence of current contractual arrangements.

Mr. Faber stated that a decision to attribute same market television JSAs would be based on a fundamental misunderstanding of how JSAs function in the marketplace today. He noted that, fundamentally, JSAs have nothing to do with the control of television programming. Mr. Faber also pointed out that JSAs are primarily cost-saving arrangements that pertain to administrative functions of the brokered station. There is no real-world evidence in the record that television stations control the programming of stations they "broker" through JSAs or that television JSAs are anticompetitive. Mr. Faber also indicated that in Sinclair's experience as the licensee of both brokering and brokered stations pursuant to JSAs, brokered television stations maintain financial incentives to control programming and to compete.

Mr. Faber further discussed the cost savings associated with combinations of two TV stations in a market. Such cost savings generally result from the efficiencies inherent in combining operations in a single location and from requiring fewer employees to perform combined tasks for two television stations (such as management, engineering, finance, master control, traffic, etc.). Mr. Faber noted that these arrangements have prevented the demise of numerous failing stations and have allowed licensees to take advantage of improved financial situations to bring diverse programming to the video marketplace, which benefits the viewing public.

Mr. Faber also discussed that, with respect to retransmission consent, the FCC should view all comments by cable companies in the retransmission consent proceeding with a healthy degree of skepticism given the clear profit-motivated incentive of these parties to reduce their costs and stifle their competition.[4] He mentioned that few television broadcasters can withstand the pressure of threats of multi-billion dollar cable giants should they chose to remove stations from their lineups absent price capitulation from the broadcaster.

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[4] Sinclair has previously made similar arguments before the Commission. *See, e.g.*, Comments of Sinclair Broadcast Group, Inc., dated May 27, 2011, on the Commission's Notice of Proposed Rule Making in MB Docket No. 10-71, *Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd. 2618 (2011).

According to Mr. Faber, while cable companies claim to have concern for the public interest, even a superficial reading of their arguments makes clear that their interest is in protecting the cable companies themselves. Mr. Faber pointed out that cable companies are the primary source of competition with television broadcasters for advertising revenue in local markets. This provides further motivation for cable companies to oppose the ability of broadcasters to create efficiencies through JSAs that allow broadcasters to compete more effectively with cable companies.[5]

Mr. Faber noted that while broadcasters are collecting larger retransmission rights payments than they did in the past, those rights remain substantially underpriced. If broadcasters actually wielded excess bargaining power in retransmission rights negotiations they would be able to command more than the price imputed by basic cable comparables.[6] The fact that most television broadcasters today receive far less compensation relative to non-broadcast networks, such as ESPN and USA Network, which have lower programming costs and substantially lower ratings than local television stations, and which do not provide the public interest benefits of local broadcast stations (such as news, emergency information, school closings, etc.) conclusively shows that broadcasters do not have market power.[7]

Finally, Mr. Faber indicated that restrictions sought by MVPDs on joint negotiations by JSA parties would not only reduce efficiencies, but would also place undue restrictions on broadcasters as compared to, for example, outside consultants and lawyers who routinely negotiate on behalf of numerous broadcast or MVPD clients. Even when such negotiations may be undertaken on behalf of one client at a time, it is unrealistic to believe that the process and results of one negotiation do not impact another. Mr. Faber specifically noted that a single law firm routinely negotiates on behalf of numerous cable operators. Complaints regarding similar joint negotiations on behalf of JSA television stations similarly are unwarranted.

Should you have any questions, please direct them to the undersigned.

Respectfully submitted,

Paul A. Cicelski

Paul A. Cicelski

cc: Erin McGrath

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[5] *Id.*

[6] *Id.*

[7] *Id.*