March 14, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication in MB Docket Nos. 09-182, 04-256, 10-71

Dear Ms. Dortch:

On Wednesday, March 12, 2014, Ric Gorman of Gocom Media and the undersigned had meetings on the topic of broadcast ownership regulation and specifically the reported proposals before the FCC to attribute television joint sales agreements (JSAs) for over 15 percent of inventory. We met separately with: Commissioner Rosenworcel and her Policy Director Clint Odom; Commissioner O'Rielly and Senior Legal Advisor Courtney Reinhard; Media Bureau Chief William Lake and Sarah Whitesell, Hillary DeNigro, Brendan Holland and Benjamin Arden; and Maria Kirby, Legal Advisor to Chairman Tom Wheeler. On Thursday, March 13, 2014, we met with Commissioner Clyburn and her Chief of Staff Adonis Hoffman and legal intern Stephanie Frank.

In each of the meetings, Mr. Gorman described the circumstances of his company Gocom Media and in particular his ownership of KNVN, the NBC affiliate in Chico, California. He explained he had previously owned the station in 1997, and had tried to build a competitive local news operation, but was unable to make it profitable in the Chico/Redding market. After he sold the station, the subsequent owner established a JSA/shared services agreement (SSA) with the local CBS affiliate in order to produce local news product. Mr. Gorman reacquired the station in 2012 in a deal approved by the Media Bureau. He has continued and expanded the local news on both stations and hired 15 new employees. GOCOM also invested heavily in converting the local news into High Definition over the initial six months of ownership.

Mr. Gorman stated that but for the JSA/SSA agreement, the stations would not be able to produce the local news that they currently provide to the Chico/Redding market and that it would result in one of the stations not offering any local news. This would eliminate jobs and reduce the amount of local news by several hours daily. He

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300

referenced the reduction in local news service to the market by other media, including print.

In addition, Mr. Gorman emphasized that television stations compete not just against other television stations for local advertising, but against all other media in the market. He specifically mentioned that the cable interconnect in the Chico Redding market was taking some $3 to 4 million in local advertising that formerly would have been likely to go to local television stations. Both Mr. Gorman and I noted that the proposal to make JSAs attributable would have the unintended consequence of creating serious harm to his company and the service he provides in the Chico market.

We explained why suggestions that the Commission could grant waivers to allow clearly beneficial arrangements to continue, and perhaps new ones be formed, is not a viable solution. Waivers are inherently uncertain and likely to create obstacles to the investment needed to purchase or run a television station. Such a waiver plan would place the burden of proof on precisely the wrong parties – the “good operators” that are promoting localism, diversity and competition. These broadcasters operating with JSA/SSA efficiencies can provide more local origination and services to the market.

To the extent that the Commission is concerned that there are some licensees in joint arrangements that are not in control of their stations, the Commission should clearly describe standards for joint arrangements and prohibit only those operations that do not meet those standards. I suggested that such standards are in fact discernable from the large database of transactions that have been reviewed at the Commission. Such standards could, for example, require licensees to (1) retain control over a minimum of 85% of programming; (2) retain at least 70% of revenues from sales of advertising; and (3) maintain at least 20% of station value in the license itself. The Commission could also require licensees to file sharing agreements to ensure transparency. Such an approach could be narrowly tailored to address the perceived problem.

Finally, with regard to various contentions that attributing television JSAs is rational because the agency already attributes radio JSAs, I made the point that the rationale that led the Commission to attribute radio JSAs does not apply to television JSAs. As described in greater detail in the attached document, television JSAs do not rely on flat fees to brokers. Instead, licensees retain 70% or more of net sales revenue and thus, both the market risk and upside potential remain with the licensee. *See* Attachment.

Respectfully submitted,

Jane Mago
Executive Vice President & General Counsel
National Association of Broadcasters

cc: Commissioner Clyburn
Commissioner Rosenworcel
Commissioner O'Rielly
Maria Kirby
Adonis Hoffman
Clint Odom
Courtney Reinhard
William Lake
Sarah Whitesell
Hillary DeNigro
Brendan Holland
Benjamin Arden
Stephanie Frank

Television and Radio JSAs Are Not the Same

The FCC's regulatory rationale for making radio Joint Sales Agreements (JSAs) attributable for purposes of the FCC's ownership rules does not apply to the fundamentally different television JSAs involved in the scores of transactions that the Commission has regularly approved since release of its rulemaking notice on television JSA attribution in 2004.[1]

The rationale for regulating radio JSAs focuses on features that remove the licensee from the economic benefits and burdens of station ownership. In its Report and Order in the 2002 Biennial Regulatory Review, the Commission stated that a "typical radio JSA authorizes a broker to sell advertising time for the brokered station in return for a fee paid to the licensee."[2] The Commission observed that the market risk and upside is with the broker.[3] In this respect, radio JSAs shift the economic incentives of the station business from the licensee to the broker.

In sharp contrast, television JSAs typically adhere to a different framework in which the sales agent is paid a commission and the licensee retains a substantial stake in the economic and ratings performance of its station. Under JSAs generally, a station licensee grants to another in-market broadcaster with an existing sales staff an exclusive right to sell local advertising on the station. The sales agent in a JSA typically controls and manages the conduct of advertising sales, subject to the licensee's ultimate control and authority, including a right to reject advertising.

Television JSAs are commission-based. By FCC practice and precedent, the sales agent's commission is not permitted to exceed 30%.[4] As a result, under customary JSAs approved regularly by the Commission, licensees retain 70% or more of the station's net sales revenue.[5] Thus, television JSAs do not have the *sine qua non* of

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[1] *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004) ("*TV JSA Attribution NPRM*").

[2] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13743 (2003) ("*2002 Biennial Review Order*") (making same-market radio JSAs for more than 15% of a station's advertising time attributable).

[3] *Id*. (noting that "the broker normally assumes much of the market risk with respect to the station it brokers").

[4] *See*, *e.g.*, *In re SagamoreHill of Corpus Christi*, Letter, 25 FCC Rcd 2809, 2810 (2010) ("*SagamoreHill*"). We note that in its 2002 *Ackerley* decision, the FCC addressed a television JSA whose structure more closely resembled that of a radio JSA. *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*, Memorandum Opinion and Order, 17 FCC Rcd 10828 (2002) ("*Ackerley*"). By contrast, the practice subsequent to *Acklerly* has featured JSAs – reviewed and approved by the FCC – with commission-based structures.

[5] *SagamoreHill*, 25 FCC Rcd at 2810.

radio JSAs, cited by the Commission as a basis for its attribution treatment. Rather, under television JSAs, *both* market risk and upside potential remains with the licensee.[6]

There is ample evidence in the record to show that the premise for treating radio JSAs as attributable is simply not present in the case of television JSAs.[7] Treating radio and television JSAs alike would be arbitrary and capricious because the rationale for attribution in radio is absent in television.[8]

The Commission can ensure that licensees in television JSAs retain the appropriate competitive interests in their stations by including its established 70% standard in its

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[6] Nor does this fundamental framework change in those cases where a JSA, with its commission-based structure, is paired with a shared services agreement ("SSA"). FCC practice in reviewing SSAs has been to ensure that they are structured so that there is a flat-fee payment *to the service provider*, ensuring that upside potential and downside risk of the station business remains with the licensee. For example, in reviewing such JSA-SSA arrangements in the recent merger of Gannett and Belo, the Commission specifically found that, based on its review of the terms of the JSAs and SSAs in which Gannett is the service provider, the independent licensees' "profits would align with their ownership of the stations." *In re Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, 16878 (2013).

[7] *See* Nexstar Broadcasting, *Ex Parte* Submission, MB Docket No. 09-182 (Jan. 24, 2013) ("Because television JSAs are generally commission-based, stations subject to such agreements maintain the very incentives the FCC found lacking in the radio context, rendering any analysis comparing the two inapposite"); Sinclair Broadcasting Group, Inc., *Ex Parte* Submission, MB Docket No. 09-182 (Dec. 6, 2012) ("To meet the Commission'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"); Comments of Granite Broadcasting, MB Docket No. 04-256, p. 6 (Oct. 27, 2004) ("In many same-market television JSAs, a licensee who is a party to a same-market television JSA receives a percentage of revenues generated from the sale of advertising in the programming it broadcasts (either in addition to or in lieu of a flat monthly fee)"); *NAB Comments* at 3 (noting that the Commissions' "speculative concern [that television JSAs involve flat fees], is not sufficient to warrant a change" to the non-attributable status of television JSAs); Comments of NBC Universal, Inc., MB Docket 04-256, p. 9 (Oct. 27, 2004) (noting that "television JSAs do not mirror radio JSAs" and that "many television JSAs do not involve the joint seller paying the station a flat monthly fee in exchange for all advertising revenues"); Comments of Nexstar Broadcasting, MB Docket No. 04-256, p. 9 (Oct. 27, 2004) (noting that "the payment terms for the Nexstar/Mission JSAs are substantially different, with Mission receiving seventy percent of the monthly revenues collected under the JSA (and not a fixed monthly fee)[, which] provides ample incentive for Mission to obtain and schedule quality programming"); Comments of Paxson Communications Corporation, MB Docket No. 04-256, p. 4 (Oct. 27, 2004) (noting that "radio and television markets operate under very different economic models, and, as a result, JSAs affect radio and television markets differently" and that under its JSAs, Paxson "pays the sales agent commissions in the form of revenue shares rather than a fixed fee"); Comments of Sinclair Broadcasting, MB Docket No. 04-256, p. 7 (Oct. 27, 2004) (noting that "the type of arrangement in *Ackerley* is the exception").

[8] *See, e.g., Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (finding that FCC acted arbitrarily and capriciously by failing "to take account of circumstances that appear to warrant different treatment for different parties"). The record is also singularly lacking in evidence as to why and how the joint sale of more than 15% of a television station's advertising time conveys such control over the station's programming, personnel and finances as to warrant *per se* attribution. The mere reflexive application of the same percentage standard as radio is not sufficient, and again shows the assumption of a false equivalency between radio and television.

rules. There is no need to attribute – and thus effectively ban – television JSAs across the board to address Commission concerns in this regard, particularly when more targeted approaches are available. Application of a blunderbuss when the record clearly demonstrates that a scalpel is much more appropriate would be arbitrary and capricious.[9]

[9] *See, e.g., Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049-50 (7th Cir. 1992) (financial interest and syndication rules found to be arbitrary and capricious because FCC failed to demonstrate that the rules were "a reasonable response to a problem that the agency was charged with solving"); *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (finding that FCC acted arbitrarily and unreasonably by failing to consider all aspects of a problem and by failing to examine a "viable option" for addressing the problem).