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
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets	)	MB Docket No. 04-256

Ex Parte Submission of the National Association of Broadcasters

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I. Introduction and Summary

The National Association of Broadcasters (NAB)[1] again addresses the misguided arguments of parties that want to retain – or even make more restrictive – regulations from the last century imposing limits on local television stations alone.[2] Ironically, although these parties often claim they want to promote local stations' provision of

[1] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *See, e.g., Ex Parte* Letter from Matthew Wood, Free Press, MB Docket Nos. 09-182, 10-71, 13-189 (Jan. 24, 2014) at 3-4 (January 24th *Ex Parte*). NAB notes the highly suspect motivation of large cable and satellite companies, including Time Warner Cable, DIRECTV, DISH and Charter Communications, which also advocate for restrictions on broadcast stations' ownership structures. *See, e.g.,* January 24th *Ex Parte* at 1*;* Notice of *Ex Parte* Communication of Time Warner Cable, MB Docket No. 09-182 (Jan. 30, 2014) at 2.

important services, including local news, they nonetheless advocate for restrictions that make provision of those services economically unviable.[3]

In a nutshell, these parties' arguments are erroneously based on views about broadcasters, competition and the video marketplace that are at best unrealistic, if not willfully blind. We specifically detail the economic necessity, due to dramatic marketplace changes, for joint arrangements between television stations. In particular, we explain the importance of stations achieving at least some scale and scope economies to support local news production, especially in smaller markets with significantly restricted revenue opportunities. NAB further demonstrates that complaints about joint arrangements are based on wholly unrealistic assumptions about the economics of local newsrooms and by a failure to examine basic facts about the stations involved in many joint agreements.

For the reasons discussed in detail below, we urge the Commission not to adopt its 10-year old proposal to attribute television joint sales agreements (JSAs).[4] We also again stress that the Commission should not look at the regulatory treatment of joint agreements as somehow separate from its local television ownership restriction, which now has operated to prohibit the formation of duopolies in most markets for nearly three-quarters of a century.[5]

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[3] *See, e.g., Ex Parte* Letter from Angela Campbell, Institute for Public Representation, MB Docket Nos. 09-182, 07-294 (Feb. 5, 2014); *Ex Parte* Letter from Andrew Jay Schwartzman, MB Docket Nos. 09-182, 07-294, 04-256 (Mar. 12, 2014); *Ex Parte* Letter from Andrew Jay Schwartzman, MB Docket Nos. 09-182, 07-294, 04-256 (Mar. 13, 2014).

[4] Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004).

[5] In 1940, the FCC prohibited the common ownership of TV stations broadcasting in substantially the same service area, and in 1964 revised this duopoly prohibition to one preventing the common ownership of two TV stations with overlapping Grade B contours. *See* Report and Order, 45 FCC 1476, 1480 (1964). In 1999, the Commission eliminated this contour overlap standard and adopted the current "8 voices/top 4" restriction, which permitted television

Particularly in the absence of a realistic or timely reexamination of the TV duopoly rule, it would be arbitrary and capricious for the Commission to adopt a *per se* rule attributing all television JSAs involving more than 15 percent of a station's advertising time. There is simply no need to attribute – and thus effectively ban – television JSAs across the board to address potential Commission concerns when more targeted approaches, utilizing standards that the Commission has long employed, are available.

II. Joint Arrangements Are a Direct and Necessary Response to the Transformed Media Marketplace

Competition in today's media marketplace is the key focus of the Commission's quadrennial ownership reviews.[6] The record in this proceeding unequivocally shows that local TV stations fiercely compete with other video providers for audience share and advertising dollars, both local and national.[7] As BIA/Kelsey recently reported, the "competitive landscape facing local television stations is drastically different than just five years ago, much less than what it was ten or twenty years ago," as stations face increasing competition on two fronts – "for audiences and selling those audiences to national and local advertisers."[8]

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duopolies for the first time but only among non-top 4 rated stations and only in large markets. *See* Report and Order, 14 FCC Rcd 12903, 12924, 12932-33 (1999). As a practical matter, this "new" standard still prevents the formation of duopolies in medium and small markets. *See* Notice of Proposed Rulemaking, 7 FCC Rcd 4111, 4114 & n. 27 (1992) (setting forth the now nearly 75 year-long history of local TV ownership limits).

[6] Section 202(h) of the 1996 Telecommunications Act directs the FCC to "repeal or modify" ownership regulations no longer "necessary in the public interest as the result of competition."

[7] *See, e.g.*, NAB Comments in MB Docket No. 09-182 (July 12, 2010) at 6-15 (NAB NOI Comments); NAB Comments in MB Docket No. 09-182 (Mar. 5, 2012) at 5-8, 12-16 (NAB Ownership Comments); NAB Reply Comments in MB Docket No. 09-182 (Apr. 17, 2012) at 2-10 (NAB Ownership Replies).

[8] *State of the Industry Report: Local Television Stations Profiles and Trends for 2014 and Beyond*, BIA/Kelsey (Dec. 2013) at iv, 1 (BIA State of Industry Report).

The use of sharing arrangements, especially in smaller markets, is a direct and necessary response to "remarkable changes" in the advertising marketplace[9] and the consequent fundamental alteration of local stations' competitive environment.[10] JSAs and shared services agreements (SSAs) permit local stations to take advantage of at least some economies of scale, which are important to local stations' continued financial viability and ability to offer costly local services, including news.

"By definition, economies of scale and scope are associated with falling unit costs of production – that is, with the production of more output at lower average cost – and hence are *prima facie* welfare enhancing."[11] As NAB has explained previously, JSAs and SSAs are vital to local station operations because television broadcasting generally and local news production specifically are "subject to strong economies of both scale and scope."[12] Placing limitations on broadcasters' ability to achieve economies of scale and scope accordingly "result[s] in higher costs, lower revenues, reduced returns on invested capital, lower output and, potentially, fewer firms."[13] As demonstrated in economic analyses in the record, joint arrangements "allow broadcasters, especially in small markets, to reduce their fixed costs – i.e., to realize of

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[9] Derek Baine, SNL Kagan, *Economics of Advertising: Ad market decelerates in 2013, projected to be up 1.4% to $223B* (Dec. 17, 2013).

[10] NAB most recently discussed these far-reaching competitive changes in its March 18, 2014 *ex parte* submission, MB Docket Nos. 09-182, 07-294 and 04-256. The FCC cannot simply ignore this evidence when considering rules further restricting broadcasters' ability to compete for vital ad dollars.

[11] J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (2011) at 1 (Economies of Scale Report), Attachment A to Reply Decl. of J.A. Eisenach and K.W. Caves (June 27, 2011) (Reply Decl.) in NAB Reply Comments in MB Docket No. 10-71, at Appendix A (June 27, 2011), incorporated in MB Docket 09-182 by reference in NAB Ownership Comments at 5.

[12] Economies of Scale Report at 2.

[13] *Id*.

economies of scale and scope – and thus continue to operate where it would otherwise be uneconomic to do so."[14] "[D]epriving stations, especially smaller ones, of the ability to engage in [joint arrangements] could have a significant impact on both the production of local news and on the stations' ultimate financial viability."[15]

Such Commission action also would exacerbate the current unfair and anticompetitive regulatory asymmetry, as there are no horizontal or vertical ownership restrictions, or restrictions on joint advertising arrangements, that limit the ability of MVPDs to achieve economies of scale and scope nationally, regionally or locally. NAB again observes that all major pay TV providers – large cable operators, both satellite TV companies and the telcos – have joined forces to create a single platform for local and national television advertisers.[16] The participants regard this "arrangement" as "crown[ing] a decade-long effort by NCC and its [cable] owners to *consolidate the advertising reach of all US MVPDs*" for local and national television advertisers.[17]

Local stations, including those in JSAs, directly compete with these MVPD interconnects for sales and frequently lose sales to jointly sold interconnect advertising.[18] Broadcasters have explained that television station JSAs in part serve as

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[14] Reply Decl. at para. 26.

[15] *Id*.

[16] In a recent filing, NAB discussed the "alliances" between NCC Media (which itself is owned by large cable operators), "cable operators and satellite and telco programming distributors, including DIRECTV, AT&T U-verse and VERIZON FiOS" to "offer advertisers a local market ad platform." *The Essential Guide to NCC Media: Planning & Buying Local Market Cable Television & Digital Media* (Sept. 2011) at 2. *See Ex Parte* Submission of the National Association of Broadcasters, MB Docket Nos. 09-182, 07-294, 04-256 (Mar. 18, 2014) at 5-6.

[17] NCC Media News, *DISH and NCC Media Join Forces, Greatly Extending Consumer Reach and Targeting for National and Local Television Advertisers* (Aug. 26, 2013) (emphasis added).

[18] *Ex Parte* Communication of LIN Television, MB Docket Nos. 09-182, 07-294, 10-71 (Feb. 26, 2014) at 2. *Accord Ex Parte* Letter of Gregory L. Masters, Wiley Rein, MB Docket Nos. 09-182, 04-256, 10-17 (Feb. 26, 2014) at 2 & Attachments A, B; *Ex Parte* Letter of Joshua N. Pila, MB

a market response to these MVPD interconnection agreements and that those interconnects have "enormous advantages over stand-alone broadcast stations in the sale of local advertising" – and even "dwarf broadcast JSAs in size and scale."[19] Interconnects allow "MVPDs, working together, to compete directly with broadcasters for local television advertising buys" that previously would have been earned by local stations.[20] A broadcaster in the small market of Chico, CA (DMA #132) estimates that the cable interconnect there takes "some $3 to $4 million in local advertising" that formerly would have been likely to go to local TV stations.[21]

Given this ability of other – and larger – video programming distributors to "consolidate" their "advertising reach" locally and nationally, it would be both anticompetitive and fundamentally unfair – not to mention arbitrary and capricious – to prevent two broadcast TV stations from selling advertising time jointly in local markets.[22]

III. Critics of Joint Arrangements Ignore the Economics of Smaller Market TV Stations and Local News Production

It is clear that those calling for restrictions on JSAs and SSAs do not understand station economics and the provision of local news programming and the extent to which station revenues, market size and local news production are all interrelated. Maintaining

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Docket Nos. 09-182, 07-294, 10-71 and GN Docket No. 12-268 (Jan. 15, 2014); *Ex Parte* Letter of Jack N. Goodman, MB Docket No. 09-182 (Dec. 19, 2012) at 3.

[19] *Ex Parte* Letter of John Hane, Pillsbury Winthrop Shaw Pittman LLP, MB Docket No. 09-182 (Jan. 16, 2013) at 1.

[20] *Id*.

[21] *Ex Parte* Communication of National Association of Broadcasters, MB Docket Nos. 09-182, 04-256, 10-71 (Mar. 14, 2014), at 2.

[22] *See, e.g., Fresno Mobile Radio, Inc. v. FCC,* 165 F.3d 965, 969 (D.C. Cir. 1999) (court found that FCC acted arbitrarily and capriciously by failing to justify its disparate treatment of incumbent and new licensees based on their supposedly different economic incentives, observing that the FCC's rationale proceeded from "a foolish notion that should not be entertained by anyone who has had even a single undergraduate course in economics"); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (agency must justify "treat[ing] similarly situated parties differently").

a competitive local television news operation is costly for stations, both in terms of capital expenditures for equipment as well as yearly operational costs. As shown in the attached charts, annual surveys of commercial television stations have shown consistently that about one quarter of stations' total expenses are news related.[23] A 2010 report on a sampling of television stations with local news operations similarly found that, across all markets, the average station's news operating budget was more than $4 million per year (just over one quarter of stations' total budgets) and the average stations' news capital budgets was over $715,000 per year (nearly 57 percent of stations' total capital budgets).[24]

Clearly, television stations must generate substantial revenues to offer local news services, and many previous studies have established the close link between station revenues and the provision of local news and public affairs programming. For example, one study the Commission conducted in its 2006 quadrennial review found that the "financial strength of the parent" of a television station, "measured by its revenues, is associated with a larger news output."[25] The Economies of Scale Report identified multiple additional empirical studies finding "a positive and statistically significant relationship between revenue and local news production."[26] Yet another

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[23] *See* Attachment A, *News Expense: % of Total Expenses*.

[24] *The Economic Realities of Local Television News – 2010: A Report for the National Association of Broadcasters*, Attachment B to NAB NOI Comments at 12-13 ("Economic Realities of Local TV News"). Large market stations (DMAs 1-25) spend nearly $11 million per year, on average, to produce local news programming and nearly another $1.5 million per year on capital items for local news. "These expenditures exceed by multiples the amounts that smaller market stations can afford to spend." *Id*. at 12.

[25] Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, Section I, FCC Media Ownership Study #4 (2007) at 21.

[26] Economies of Scale Report at 45-46 & Table 8.

study found that public affairs programming "is a function of station revenues,"[27] and also noted that television "[s]tations in larger markets tend to provide more local news programming than stations in smaller markets," likely due to "the greater revenue potential for stations in larger markets."[28] These numerous studies confirm, as the Commission previously recognized, that a broadcaster's "ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[29]

NAB recognizes that successful news operations generate substantial amounts of advertising revenue for many stations. Other stations, however, whose news programming earns lower audience ratings and, thus, less advertising revenue, face challenges sustaining their news operations over the long term. Although some costs of news production are variable, many costs are fixed (e.g., equipment). Stations with lower ratings struggle or are simply unable to generate revenue sufficient to support costly operations such as local news without associating with a stronger station, particularly in smaller markets that have significantly smaller levels of advertising revenue available.

The record here demonstrates that lower earning TV stations (e.g., the third and fourth ranked stations) in numerous smaller markets earn very substantially lower

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[27] Philip Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data,* 6 Info: The Journal of Policy, Regulation, and Strategy for Telecommunications, Information, and Media 112, 119 (2004) (concluding that "[t]hose stations in better financial standing are more inclined to incur the expense of providing local public affairs programming").

[28] *Id*. The survey of local news economics conducted for NAB confirms that the "amount of local news programming does appear correlated to the larger revenue base related to market size," with stations in larger markets airing more local news than stations in smaller markets. Economic Realities of Local TV News at 12.

[29] Report and Order, 7 FCC Rcd 2755, 2760 (1992).

revenues than higher performing stations – and, indeed, could combine and still earn lower revenues than the top performing station. Specifically, in 82 of the 159 markets with four or more commercial TV stations, the combination of the revenues of the third and fourth ranked stations is less, often very substantially less, than the revenue of the top earning station in those markets. The vast majority of these 82 markets are mid-sized or small markets – only six markets of the 82 are among the 50 largest.[30] A joint arrangement between such lower ranked stations would not endanger competition in local markets.

The Commission in fact has recognized that television stations in smaller markets face greater financial hardships and difficulties in competing effectively, largely due to their more restricted revenue opportunities.[31] Empirical data already in the record show that total revenues in smaller television markets are substantially lower than in large markets, both in absolute terms and when viewed as revenues per television household.[32] Updated data on market revenues confirm these previous studies, showing that in 2012 average television station advertising revenues on a per household basis fell from about $202 in the top ten markets to $110 in markets 151-210.[33] Overall, stations in the smallest 110 DMAs (ranked 101-210) received only ten

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[30] Mark R. Fratrik, BIA Kelsey, *Reforming Local Ownership Rules: Station and Market Analyses,* at i, 7-9, attached to NAB Ownership Replies.

[31] *See, e.g.*, Third Report and Order, 22 FCC Rcd 21064, 21091-92 & n.192 (2007); Report and Order, 18 FCC Rcd 13620, 13697-99 (2003).

[32] *Reforming Local Ownership Rules: Station and Market Analyses*, at i, 10-12. *Accord* NAB Ownership Comments at Attachment D. NAB has also demonstrated that in small markets like Davenport, IA (DMA 100), relatively numerous local TV stations must compete for a very significantly smaller television advertising "pie." *Id*. (showing that New York market has only three times the number of commercial TV stations as Davenport but over 26 times the total broadcast TV market revenues).

[33] Attachment B, *2012 Television Market Revenues*.

percent of total broadcast television advertising dollars across all DMAs, while stations just in the top ten DMAs received 35 percent of all television market ad dollars.[34] Unsurprisingly, stations in small and medium sized markets, particularly lower performing ones, have formed sharing arrangements to respond to these financial realities and take advantage of scale and scope economies in station operation and news production.[35]

Given the uncontroverted importance of economies of scale and scope in television broadcasting, it would be arbitrary and capricious for the Commission to prevent local stations from achieving any meaningful, and "*prima facie* welfare enhancing,"[36] scale and scope economies by restricting joint arrangements, especially without reforming its woefully outdated duopoly rule.[37] Prohibiting joint arrangements would specifically hurt local news production by making it economically unviable for many stations and would fly in the face of the FCC's recognition (strongly supported by the record in this proceeding) that smaller markets are less able to support multiple local TV news operations.[38]

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[34] *Id*. at 2.

[35] *See* Economics of Scale Report at 2-4, 39-48.

[36] *Id*. at 1.

[37] Even apart from the FCC's obligations under Section 202(h) to undertake and complete timely "regulatory reform reviews" and "repeal or modify" rules no longer needed due to competition, the Commission, as a matter of general administrative law, has an obligation to reexamine existing rules and policies to determine if they remain valid in light of changed circumstances. *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979).

[38] In nearly 90% of the markets with seven or more television stations, four or more stations each provide at least 30 minutes of local news per day. But four or more stations provide 30 minutes or more local news per day in only 22.5% of smaller markets with six or fewer television stations. *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 53 & n.117 (2011).

IV. Many Complaints about Joint Arrangements' Effects on Local News Operations Are Erroneous and Based on Unrealistic and Unproven Assumptions

Contentions that JSAs and SSAs have harmed the quantity and quality of local news, and resulted in extensive cut-backs in local news operations and news staff, are erroneous. These claims are based on unrealistic assumptions about the economics of local newsrooms, as discussed above, and by a failure to examine basic facts about the stations in joint arrangements.

Specifically, these critics implicitly assume that both stations in joint arrangements had been providing or would be providing the same quantity and quality of local news programming even without the joint arrangement. These assumptions are wholly unjustified. In fact, even a cursory review of the record shows that many of the stations in joint arrangements had not been airing local news programming prior to the sharing agreements, or if they were, the stations were struggling to maintain that programming and may not have continued that programming but for the formation of the joint arrangements. Moreover, in several instances, the stations in the sharing arrangements that had the stronger, more financially viable news operations were able to increase their total hours of news after the formation of the arrangements.

For example, in Eureka, CA, the "economies of scale created by the JSA/SSA" between two stations, neither of which had been offering local news, will enable both stations to launch local news this year.[39] Even in a market as small as Eureka (DMA 195), initiating local news operations is expensive. The broadcasters report investing $750,000 to date, and estimate the incremental operating costs for the first year alone

[39] *Ex Parte* Letter from Jennifer Johnson, Eve Pogoriler, Howard Liberman and Alisa Lahey, MB Docket Nos. 07-294, 09-182 and 10-71 (Feb. 19, 2014) at 2.

to be $400,000. They state that this investment "would not have been made without the JSA/SSA in place, and it is an investment that the Commission would strand if it attributed this relationship."[40] Previously, the Eureka market had only one station offering local news; this arrangement has thus increased competition, diversity and localism.

Similarly, prior to the JSA/SSA involving WVNY and WFFF in Burlington, VT/Plattsburgh, NY being formed in 2005, neither of the two stations was airing local news programming. This sharing arrangement enabled these stations to collectively air local news in the mornings, early evening and late evening. According to the owners of WFFF, without the joint agreements, "launching a new news operation in this market would be impossible . . . .[41] Clearly, this sharing arrangement enhanced the quantity and diversity of news programming in the Burlington market, as well as employment – the new news operation "created 28 new local jobs."[42] Joint arrangements involving two stations neither of which aired local news prior to their agreement have produced competitive and diverse local news offerings in other small markets as well.[43]

The record also shows that stations lacking their own news operations have been able to begin offering local news by entering into JSAs and/or SSAs with stations with viable news operations. For example, in West Palm Beach, FL, a joint arrangement resulted in the provision of news by a station without its own local news operation and allowed the station already with a news operation to "add[] 15 employees," enabling it to

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[40] *Id*.

[41] Coalition to Preserve Local TV Broadcasting, Reply Comments to *Notice of Inquiry* in MB Docket No. 09-182 (July 26, 2010), at 12.

[42] *Id.*

[43] *See, e.g.,* Comments of the Coalition to Preserve Local TV Broadcasting, MB Docket Nos. 09-182, 07-294 (Mar. 5, 2012) at 12 (discussing agreement in Baton Rouge, LA).

"provid[e] more journalists to cover more stories" and "expand investigative journalism."[44] In Wausau, WI, an SSA "helped to launch a local news operation that had not existing previously and likely never would have existed in the absence" of the SSA because the "station involved simply could not afford the expenses of providing local news until the SSA was implemented."[45] In Chico, CA, a JSA/SSA allowed the creation and subsequent expansion of local news on a station previously unable to support a news operation and enabled the hiring of "15 new employees."[46]

Similarly, joint agreements in other small markets around the country have permitted stations previously unable to afford local news operations to begin airing news and/or allowed the station with a viable news operation to increase their local news offerings.[47] A JSA with an established station also enabled a new entrant in the television industry (a historically African-American college) to invest in new programming and equipment, compete for advertising, hire additional employees, and plan for the creation of a weekly news magazine program and, eventually, daily

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[44] *Ex Parte* Letter from Jennifer Johnson, Covington & Burling LLP, MB Docket Nos. 10-71, 09-182, 07-294 (Jan. 28, 2013) at 3.

[45] *Ex Parte* Communication of the Coalition of Smaller Market Television Stations, MB Docket Nos. 10-71, 09-182 (Dec. 21, 2011) at 3.

[46] *Ex Parte* Communication of NAB, MB Docket Nos. 09-182, 04-256, 10-71 (Mar. 14, 2014) at 1.

[47] *See, e.g., Ex Parte* Letter from Jennifer Johnson, Covington & Burling LLP, MB Docket Nos. 10-71, 09-182, 07-294 (Jan. 28, 2013) at 3 & Attachment; *Ex Parte* Communication of the Coalition of Smaller Market Television Stations, MB Docket Nos. 04-256, 07-294, 09-182, 10-71 (Mar. 20, 2014) at 3-5; *Ex Parte* Letter from M. Anne Swanson, Dow Lohnes, MB Docket No. 09-182 (Jan. 8, 2013) at 2; *Ex Parte* Letter from Jennifer Johnson, Eve Pogoriler, Howard Liberman and Alisa Lahey, MB Docket Nos. 07-294, 09-182 and 10-71 (Feb. 19, 2014) at 2-3; Comments of the Coalition to Preserve Local TV Broadcasting, MB Docket Nos. 09-182, 07-294 (Mar. 5, 2012) at 12-13.

newscasts – all of which contribute to competition, diversity and localism in the Jackson, MS market.[48]

The failure to consider information pertaining to the levels of local news provided by stations in various sharing agreements prior to the establishment of their arrangements fatally undermines complaints about the supposed deleterious effects of these arrangements on news programming in local markets. In particular, we observe that diversity in local news programming – which the critics inevitably claim suffers harm as a result of sharing arrangements – cannot possibly be hurt, and should be enhanced, if one (let alone both) of the stations in the arrangement did not even air news prior to the formation of the arrangement.[49]

Those opposing joint arrangements, moreover, discount or fail to even acknowledge that the record includes many instances where struggling local news operations were maintained or expanded as a result of the efficiencies achieved through joint arrangements, as well as extensive showings about other programming and

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[48] *Ex Parte* Letter from Jennifer Johnson, Covington & Burling LLP, MB Docket Nos. 07-294 and 09-182 (Feb. 28, 2014). *See also Ex Parte* Letter from James Winston, National Association of Black Owned Broadcasters, MB Docket Nos. 09-182 & 07-294 (Feb. 27, 2014) (stating that FCC should examine JSAs and SSAs for their potential to promote diversity of ownership).

[49] Interestingly, a report in the record criticizing joint arrangements makes these fundamental errors – it erroneously claims that the "obvious" result of sharing arrangements is to reduce the number of news voices, while not even attempting to determine whether the stations in the sharing arrangements in the eight markets he examined actually aired news prior to the formation of the arrangements. Danilo Yanich, *Local TV News & Service Agreements: A Critical Look* (Oct. 2011), filed in MB Docket No. 09-182 (Oct. 24, 2011) at 100. For example, among the small number of markets and joint agreements Yanich examined are several sharing arrangements (including WVNY and WFFF in Burlington, VT, discussed above) where neither or only one of the stations involved was airing news before their joint arrangement. Obviously, arrangements such as these do not reduce the news voices in local markets. *See also* NAB Ownership Comments at 60-64 (discussing numerous shortcomings of the Yanich report); Reply Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182, 07-294 (Apr. 17, 2012) at 18-20.

technical improvements made possible by joint agreements.[50] Indeed, empirical studies have shown that TV stations commonly owned or operated (via a local marketing agreement or other local service agreement) with another station in the same market are more likely to carry local news, public affairs or current affairs programming.[51] Members of the public, including local community organizations and advertisers, moreover have attested to the public benefits of joint arrangements and the efficiencies that those agreements have provided for stations' advertising clients.[52] It would be arbitrary and capricious for the Commission to ignore this evidence and rely on faulty

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[50] *See, e.g.*, *Ex Parte* Communication of the Coalition of Smaller Market Television Stations, MB Dockets 04-256, 07-294, 09-182, 10-71 (Mar. 20, 2014) at 3-4 (describing Dayton and Youngstown, OH markets, among others); NAB Notice of *Ex Parte* Communication, MB Docket Nos. 04-256, 09-182, 10-71 (Mar. 14, 2014) (discussing Augusta, GA market in detail); *Ex Parte* Letter from Jack N. Goodman in MB Docket Nos. 04-256, 09-182, 10-71 (Feb. 26, 2014) (discussing Springfield, MO and other markets); Comments of the Coalition to Preserve Local TV Broadcasting, MB Docket Nos. 09-182, 07-294 (Mar. 5, 2012) at 12-13 (describing El Paso, TX and other markets); NAB Notice of *Ex Parte* Communication in MB Docket No. 09-182 (Feb. 18, 2014); *Ex Parte* Letter from John K. Hane, Pillsbury Winthrop Shaw Pittman LLP, MB Docket Nos. 09-182, 07-294, 10-71 (Feb. 26, 2014), at 3 & Attachments (discussing how sharing arrangements benefit public in seven medium and smaller markets). An attachment to NAB's February filing provided numerous illustrative examples of benefits resulting from joint arrangements, including increased news and other local programming such as sports, community affairs and foreign language programming; increased staffing in newsrooms; extensive technical and equipment upgrades such as high definition capabilities and increasing the reach of stations' over-the-air digital signals; other expanded programming options such as programming from new networks targeting minority audiences; and enhanced weather radar facilities.

[51] *See* NAB NOI Comments at 82, citing, *inter alia*, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated, *Effect of Common Ownership or Operation on Television News Coverage: An Update* (Nov. 1, 2007) (finding that a station in a same-market combination is 6.2 percent more likely to carry local news and public affairs programming than a station not in such a local combination).

[52] *See, e.g., Ex Parte* Letter of Jack N. Goodman, MB Docket Nos. 04-256, 09-182, 10-71 (Feb. 26, 2014) at 5 & Attachments; *Ex Parte* Communication of the Coalition of Smaller Market Television Stations, MB Docket Nos. 04-256, 07-294, 09-182, 10-71 (Mar. 20, 2014) at 5 & Attachments.

allegations and false assumptions about joint arrangements and their impact on local stations and programming, including news.[53]

Finally, NAB notes that evidence from other sources shows that local TV newsrooms continue to employ large staffs and provide increasing amounts of local news. According to the most recent survey conducted for the Radio Television Digital News Association (RTDNA), the average TV station airs about 5.4 hours of local news per weekday, with growing amounts on weekends, and the average local TV station news staff includes 38.5 persons, far exceeding the 27.5 average news staffers on U.S. daily newspapers.[54] Stations continue to expend large amounts on their news operations despite an increasingly challenging advertising marketplace, with the news expenses of major network affiliates consistently reaching 26-27 percent of their total expenses.[55] On this record, there is no basis for the Commission to take action impairing TV stations' competitiveness, financial standing and ability to improve, or even maintain, local news services.

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[53] *See, e.g., American Radio League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (FCC faulted for unreasonably dismissing information in the record); *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995); (court found FCC acted arbitrarily and capriciously by failing to consider all aspects of problem*); Western Union Corp. v. FCC*, 856 F.2d 315, 319 (D.C. Cir. 1988) (FCC erred by not addressing "pertinent question" presented by party).

[54] RTDNA, Bob Papper, *Survey Shows Near-Record Year for Local News* (June 17, 2013) and *Newsroom Staffing Stagnates* (July 15, 2013), available at http://www.rtdna.org. The amounts of local news aired per station have steadily increased over the years, rising from 3.7 hours in 2004 and averaging around five and a half hours per weekday since 2011. Total TV staffing (27,605 people) is virtually the same as reported in 2012 and only slightly less than the record set in 2000. RTDNA's survey also showed more extensive and varied online activities, including more streaming newscasts, live streaming of news events, additional mobile apps, and enhancements to political coverage online. *Id*., *What's New Online for Broadcasters*.

[55] *See* Attachment A.

V. The Commission Has No Basis for Attributing Television JSAs

The "broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[56] As the record shows, the Commission has no basis for adopting its proposal from 10 years ago to attribute local TV station JSAs across the board.[57] Altering the regulatory treatment of JSAs, particularly without examining the current restrictive TV duopoly rule, would be inconsistent with the Commission's obligations under Section 202(h) and would be arbitrary and capricious.

The arbitrariness of a *per se* rule effectively banning TV JSAs is even more apparent, given that appropriately targeted alternatives based on current Commission standards are available.[58] In an earlier filing,[59] NAB proposed an exemption from attribution, and from application of the Media Bureau's recently announced processing

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[56] *Columbia Broad. Sys. v. Democratic Nat'l Comm*., 412 U.S. 94, 102 (1973). *See also Comcast Corporation v. FCC*, 579 F.3d 1, 9-10 (D.C. Cir. 2009) (citing this "crucial fact about the nature of the video industry").

[57] As NAB has previously explained, TV JSAs are fundamentally different than the radio JSAs that the Commission determined to attribute in 2003. *See Television and Radio JSAs Are Not the Same*, attached to NAB Notice of *Ex Parte* Communication, MB Docket Nos. 09-182, 04-256, 10-71 (Mar. 14, 2014) (explaining that the different incentive structure of TV JSAs, where both market risk and upside potential remain with the licensee, completely undermines the basis of the FCC's rationale for attributing radio JSAs).

[58] *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal."); *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (FCC reversed for failing to consider "all aspects of the problem" and failing to examine "a viable option" presented by a party); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983) (agency's "failure to consider … alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious, in violation of section 10(e) of the APA") (footnote omitted).

[59] NAB Notice of *Ex Parte* Communication, MB Docket Nos. 09-182, 07-294, 04-256 (Mar. 20, 2014), with attached letter.

guidelines,[60] for those TV JSAs that provide public interest benefits and meet well-established FCC criteria for control.[61] We urge the Commission to consider this approach and to reject its blunderbuss proposal that would sweep away even appropriately structured JSAs regardless of their public benefits. For all the reasons discussed in detail above, that is the very essence of arbitrary and capricious action.

Respectfully submitted,

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March 21, 2014

[60] Public Notice, *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, DA 14-330 (Mar. 12, 2014).

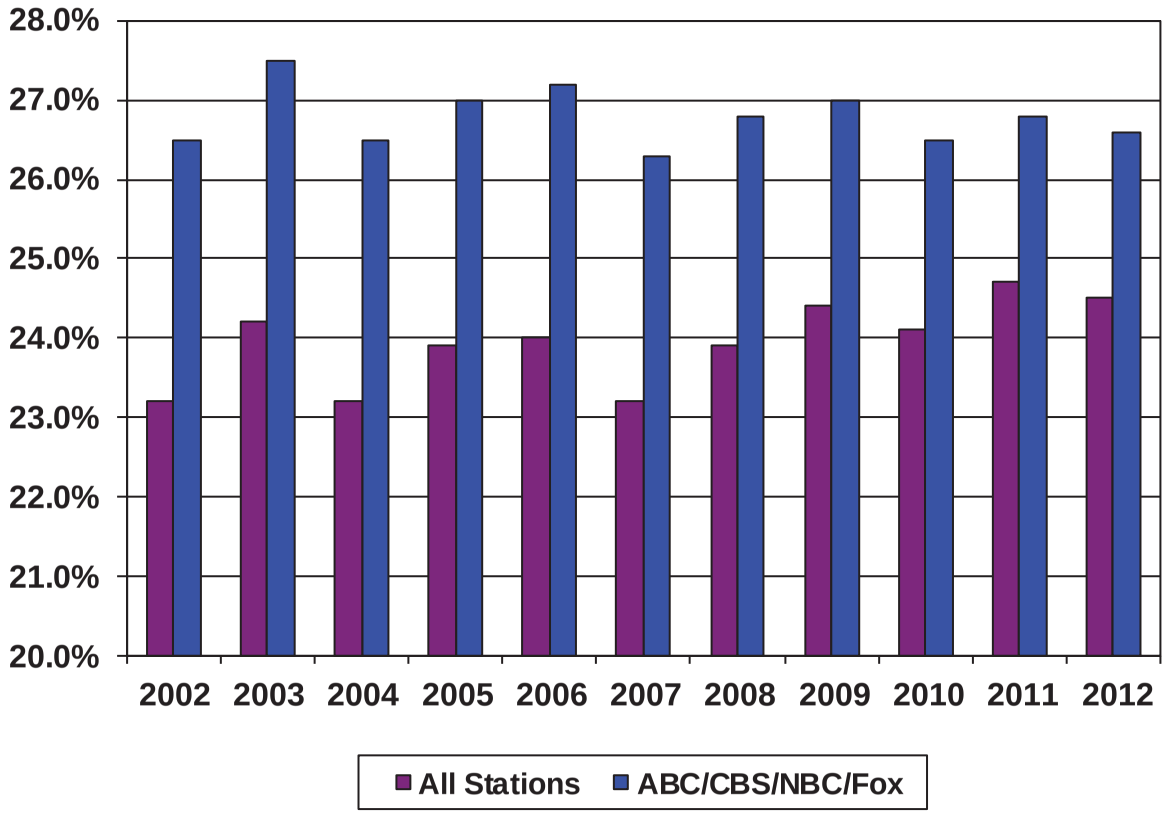
[61] *See, e.g., In re Application of WGPR, Inc. and CBS, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8141 (1995) ("The focus of any Commission inquiry with respect to locus of control of a station's operation is tripartite: the programming, the personnel and the finances."). With regard to evaluating control, the Commission has no basis for ignoring its own precedent or the significant database of information about JSAs that resides at the FCC. In particular, there can be no basis for the Commission to rely on, let alone draw dispositive conclusions from, Securities and Exchange Commission filings by individual broadcast companies. Those filings respond to rules and goals established by the SEC for an entirely different purpose than FCC licensing, and SEC filings are not part of FCC precedent or law.

Attachment A

News Expense:

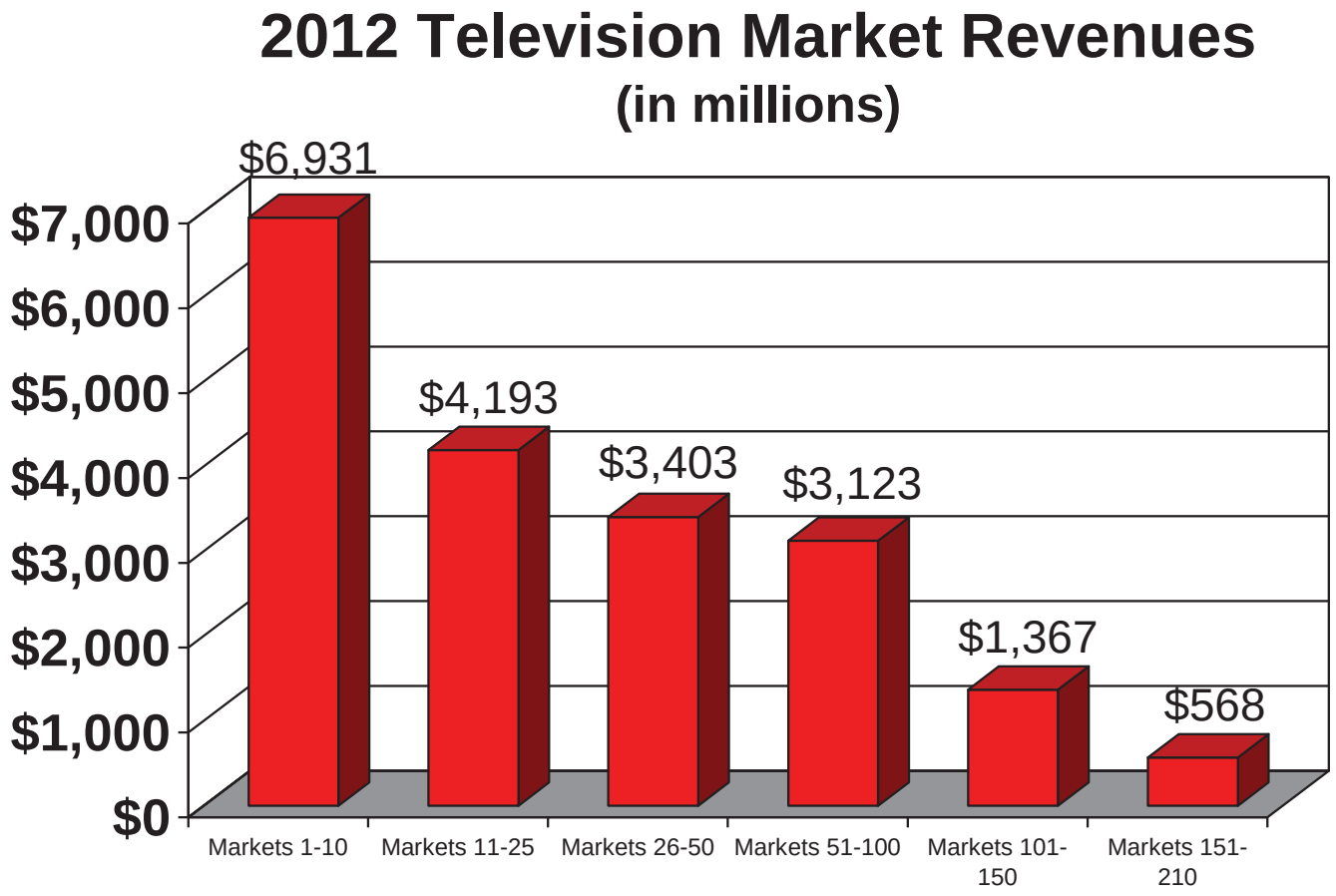
% of Total Expenses

(Data detail contained in next chart)



Source: NAB Television Financial Surveys: 2003-2013

News Expense: % of Total Expenses		
Year	**All Stations**	**ABC/CBS/NBC/Fox Stations**
2002	23.2%	26.5%
2003	24.2%	27.5%
2004	23.2%	26.5%
2005	23.9%	27.0%
2006	24.0%	27.2%
2007	23.2%	26.3%
2008	23.9%	26.8%
2009	24.4%	27.0%
2010	24.1%	26.5%
2011	24.7%	26.8%
2012	24.5%	26.6%
Source: NAB Television Financial Reports		



Source: BIA Media Access Pro.

	Markets 1-10	Markets 11-25	Markets 26-50	Markets 51-100	Markets 101-150	Markets 151-210
Number of Commercial Stations	148	158	204	327	229	164
Avg. Revenue per Station (000)	$46,832	$26,538	$16,682	$9,551	$5,969	$3,464
Avg. Revenue per TV HH in Market	$202	$184	$161	$142	$123	$110

The Relationship between Market Size and Advertising Revenue per TVHH

The chart above illustrates the importance of market size to the ability of television stations to attract advertising revenues. As numbers of households go down, so does the advertising value of TV Households in those markets. For example, stations in the top

ten DMAs contain 34.4 million TV Households. Each of these TV Households was worth $202 in advertising revenues in 2012. Markets in the top ten DMAs include New York, Los Angeles, Chicago, Philadelphia, Dallas-Fort Worth, San Francisco, Boston, Washington, D.C., Atlanta and Houston. Stations in markets ranked 11-25 represent 22.7 million TV Households worth an average of $184 per household. Stations in markets ranked 26-50 represent 21.1 million TV households worth an average of only $161 per household. Stations in markets ranked 51-100 represent 21.9 million TV Households valued at an average of $142 per household. Stations in markets ranked 101-150 represent 11.1 million TV households with an average advertising value of just $123. Stations in the smallest markets ranked 151-210 represent 5.2 million TV households that are worth an average of only $110 per household. Stations in the top ten DMAs receive 35 percent of all market advertising dollars. Stations in the smallest 110 DMAs (ranked 101-210) receive only ten percent of all advertising dollars. In other words, not only are smaller TV markets more challenged in the advertising marketplace simply because they have fewer eyeballs to sell to prospective advertisers, but also, the viewers they do have are valued less by advertisers on a per household basis than are those in larger markets.