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August 6, 2014

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

RE: *In re 2010 and 2014 Quadrennial Regulatory Reviews – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*
MB Docket Nos. 14-50, 09-182 and 07-294

Dear Ms. Dortch:

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, “Fox”) hereby respectfully submit this information in response to the Commission’s Further Notice of Proposed Rulemaking in the above-referenced proceedings (the “Further Notice”). In the Further Notice, the Commission indicates that it is combining the existing record from the not-yet-completed 2010 quadrennial media ownership rule review with the initiation of a new review for the 2014 quadrennial period. Fox continues to believe that, based on any set of evidence, the Commission no longer can justify regulating ownership of media outlets, whether broadcast stations, networks or daily newspapers. That was true in 2002 and 2006, and it was true when the FCC kicked off the 2010 review approximately four years ago. Time has only served to further undermine any rationale for maintaining these antiquated rules. The last four years have borne witness to an ever-changing media marketplace that continues to become more diverse and more competitive. If the record evidence was adequate to eliminate all of these rules in 2010, that evidence is certainly sufficient to put these rules to rest today – at a time when the media landscape would be unrecognizable to the original authors of structural ownership regulations.

Accordingly, Fox is re-submitting for inclusion in the record here its comments and reply comments filed in response to the Commission’s Notice of Proposed Rulemaking in the 2010 proceeding.¹ As demonstrated in those filings, even the competitive landscape as it existed several years ago failed to justify the FCC’s efforts to maintain outmoded ownership regulations. As Fox explained then, notwithstanding seismic changes that irrevocably had altered the media marketplace, media companies continued to be shackled by archaic and counterproductive structural ownership rules. This is only more true today, given Americans’ increasing reliance upon broadband and consumers’ access to ever-more content from non-broadcast sources.

¹ See Comments and Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket Nos. 09-182 and 07-294 (submitted Mar. 5 and Apr. 17, 2012). Fox also directs the Commission to, and incorporates by reference, its earlier-filed comments on these same subjects, including those submitted in MB Docket Nos. 06-121 and 02-277.

Indeed, with each successive review of the media ownership rules, it has become more and more clear that traditional media has become less and less relevant.

In 1996, Congress directed the Commission to take stock of the modern media marketplace, to acknowledge how dramatically technology and innovation have transformed the ways that consumers use and interact with media, and to eliminate those regulations that no longer are necessary as the result of competition.² Despite this Congressional mandate, today's media ownership rules are virtually unchanged from those that existed in 1996. This cannot be what Congress intended. Equally significant, Fox continues to believe that the media ownership rules cannot be reconciled with the Constitution or media owners' First Amendment rights.

In light of the Commission's statutory mandate to "repeal or modify any regulation" that is no longer "necessary in the public interest as a result of competition,"³ Fox submits that the time has come (indeed, has long since passed) for the FCC to dismantle the decades-old structural ownership rules once and for all, and in the process eliminate the local TV ownership rule, the dual network rule, and the newspaper/broadcast cross-ownership rule. Put succinctly, the chasm between the media marketplace of 2014 and the decades-old rules that continue to bedevil broadcasters has never been wider or more perilous to the Commission's stated objectives. Unless the Commission embraces its statutory charge, and ensures that its rules reflect the world in which we live rather than the relics of a world long since gone, the FCC will imperil broadcasters' and newspapers' ability to advance competition, diversity and localism.

Should you have any questions concerning this submission, kindly contact the undersigned.

/s/

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Enclosures

² See Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996), § 202(h).

³ *Id.*

**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

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MB Docket No. 09-182
MB Docket No. 07-294

**COMMENTS OF FOX ENTERTAINMENT GROUP, INC.
AND FOX TELEVISION HOLDINGS, INC.**

Dated: March 5, 2012

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**COMMENTS OF
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.**

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, “Fox”) respectfully submit these comments in response to the Commission’s Notice of Proposed Rulemaking (the “*Notice*”) initiating yet another attempt at comprehensively reviewing the broadcast media ownership rules.¹ Notwithstanding seismic changes that irrevocably have altered the media landscape, today’s media companies continue to be shackled by archaic and counterproductive structural ownership rules. In 1996, Congress directed the Commission to take stock of the modern media marketplace, to acknowledge how dramatically technology and innovation have transformed the ways that consumers use and interact with media, and to eliminate those regulations that no longer are necessary as the result of competition.² Despite this Congressional mandate, the media ownership rules of 2012 are virtually unchanged from those that existed in 1996.

¹ See *In re 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*, Notice of Proposed Rulemaking, FCC 11-186, MB Docket No. 09-182 (rel. Dec. 22, 2011).

² Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996), § 202(h) (“1996 Act”).

I. INTRODUCTION AND SUMMARY

Media companies today continue to be stymied by rules passed 35 or more years ago – a time that bears no resemblance to the modern one in which they operate. The fits and starts that have characterized the periodic media ownership reviews to date have left those companies, the government and consumers in an infinite loop with no apparent escape valve. The process has been the same time after time: the FCC proposes rules; both advocates of relaxation and proponents of stricter rules seek judicial review; the agency’s decision is rejected by the courts for its inconsistency with the Administrative Procedure Act (“APA”) and for other problems;³ and the agency starts the tortuous process again. No one wins at this game, but the losers are many. Media companies beset by economic troubles in a transformative time do not have the flexibility to combine forces to weather the storm. The Commission continues to fail to comply with its Congressionally-mandated obligation to eliminate stagnant regulations. And most of all, consumers are harmed by rules that perpetuate restrictions on ownership combinations that, if permitted, quite clearly would enable the provision of *more* local news and *more* diverse content.

Fox continues to believe, as it has argued before the Commission and the courts, that the media ownership regulations reviewed in the *Notice* cannot be reconciled with the Constitution and with Fox’s First Amendment rights. But even putting those Constitutional arguments aside, Section 202(h) of the 1996 Act requires the FCC to determine whether any

³ See, e.g., *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (“*Sinclair*”) (remanding the Commission’s 1999 local television ownership rule for inconsistency with APA requirements); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus I*”) (remanding the Commission’s 2003 cross-media ownership limits for inconsistency with the public interest); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011), *petitions for cert. filed*, 80 U.S.L.W. 3368 (U.S. Dec. 5, 2011) (Nos. 11-696, 11-698) (“*Prometheus II*”) (remanding portions of the Commission’s 2008 newspaper/broadcast cross-ownership and broadcast ownership diversity rules for inconsistency with APA requirements).

of its media ownership rules are “necessary in the public interest as the result of competition” and to repeal or modify those that are not.⁴ Fox submits that the time has come (indeed, has long since passed) for the Commission to embrace its mandate and responsibility under Section 202(h) to dismantle the decades-old structural ownership rules once and for all, and in the process eliminate the local TV ownership rule, the dual network rule, and the newspaper/broadcast cross-ownership rule (the “NBCO rule”). Doing so would mark a significant step forward in the FCC’s quest to become a modern agency focused on meeting the challenges of the world in which we live rather than an agency distracted by the relics of a world long since gone.

The FCC has been admirably forward-thinking in addressing the fast-changing world of modern technology, aligning its policies for the Internet and personal wireless communications market segments, among others, toward the future. Yet the Commission’s regulation of broadcasting remains stuck in a time warp. It is simply unfathomable that the vast changes to the modern media marketplace since the 1996 Act have been met with miniscule changes to the outmoded rules. It is particularly inexplicable that the Commission has granted so little relief given the command of Section 202(h), a statute that clearly requires rules to be repealed or modified unless they remain essential.⁵ Whatever one’s view as to the scope of Section 202(h), there can be no doubt that Congress had in mind a statute that was deregulatory in nature. How regulations can be almost unchanged since 1996, even

⁴ 1996 Act, at § 202(h).

⁵ To be clear, Section 202(h) requires the FCC to modify or repeal all rules that are not essential to the public interest in light of competition. *See* Petition for Writ of Certiorari, National Association of Broadcasters v. FCC, 80 U.S.L.W. 3368 (U.S. Dec. 5, 2011) (No. 11-698), at 21-22 n.5.

as the media world has witnessed such sweeping transformation, remains one of the enduring mysteries of government.

The current *Notice*, unfortunately, makes many of the same mistakes as its predecessors,⁶ as well as a few new ones. Rather than moving to effectuate its statutory mandate, the Commission has proposed yet another timid modification to the NBCO rule, while suggesting no relaxation at all of the local television ownership rule or the other regulations that hamstring broadcasters uniquely among media enterprises. In fact, rather than focusing on ways to deregulate, as it should, the Commission has teed up a litany of questions about whether and how to impose *more* regulation upon certain agreements that struggling media businesses have used to maintain service amidst severe economic difficulties.

The Commission has inquired, for example, about local news service (“LNS”) agreements. These innocuous agreements simply enable independent stations to share raw video footage of news events in a manner akin to the video pool arrangements that long have been a hallmark of good and ethical journalism. In fact, LNS agreements actually enhance localism and diversity because they free individual stations to devote their resources to

⁶ As in 2006, the *Notice* calls for comment on the media ownership rules in the context of responding to the Court of Appeals for the Third Circuit’s remand decision in the latest iteration of *Prometheus*. See *Notice*, at 2. Fox continues to believe that the Commission should not narrowly tether itself to the court’s disposition of prior ownership reviews. Rather, the FCC is obliged to address the touchstone question presented by Section 202(h): whether any of the ownership rules remain “necessary in the public interest as the result of competition.” As both the D.C. Circuit and the Third Circuit have recognized, the periodic review provisions of Section 202(h) are key components of a larger legislative scheme (the 1996 Act) that is designed to be deregulatory in nature. See *Prometheus I*, 373 F.3d at 394; *Sinclair*, 284 F.3d at 159 (citing *Fox TV Stations v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (“*Fox TV Stations*”). Under Section 202(h), the FCC is required to undertake a thorough reevaluation of its structural media ownership rules to determine if deregulation is warranted. The statute demands that the Commission evaluate the rules in light of the competitive realities that exist *today* – a task wholly separate from the *Prometheus* remand, which by its very nature is confined to reexamination of a prior review. While the remand decision may be instructive as the Commission moves forward in this proceeding, the Commission must make a fresh attempt to determine whether the media ownership rules remain necessary in the public interest as the result of competition.

pursuing unique stories. With LNS agreements, participants can rely upon a video crew shared by a number of local stations to obtain footage of a press conference or other local event that otherwise participating stations each would have had to cover individually. The participating stations share costs by each allocating some staff to the shared crews while maintaining complete editorial independence from one another. Each chooses whether and how to use the “pool” footage and each uses its own writers, reporters, editors and news management to craft and present any stories that it deems worthy of inclusion in a newscast.

Meanwhile, by eliminating the duplication inherent in multiple stations sending personnel to gather footage of the same live event, each participating station can dedicate its staff to covering other stories of interest to its community. There is absolutely nothing nefarious about these contracts, nor is there anything about them that confers on one station any type of control or influence over any other. There is thus no possible basis for the Commission to consider these agreements as attributable under its rules or to otherwise be concerned. The FCC should acknowledge that these innovative arrangements can be tremendously helpful in ensuring that consumers continue to have access to more and better local television journalism despite difficult economic conditions for the industry.

Equally frustrating, given the realities of the modern media marketplace, is the Commission’s proposal to modify rather than repeal the NBCO rule. It is baffling that the FCC would conclude in 2012 that any version of this rule remains appropriate when more than 10 years ago it concluded, rightly, that the rule had outlived its usefulness. Indeed, while little about the agency’s media ownership reviews has been met with anything other than disapprobation by the courts, the Third Circuit confirmed in the first *Prometheus* case that “reasoned analysis” supported the FCC’s “determination that the blanket ban on

newspaper/broadcast cross-ownership was no longer necessary in the public interest.”⁷ In light of the proliferation of competition and diverse viewpoints since the 2002 review, and the difficulties faced by newspapers, the Commission cannot possibly justify retention of the NBCO rule today.

The Commission’s tentative decision to tweak the NBCO rule is no more than a nominal concession. Even with this meager adjustment, the FCC would permit common ownership among broadcast stations and newspapers only in the most limited of circumstances, even in the nation’s largest media markets. Quite clearly, in the vast majority of markets – and certainly in the nation’s largest markets – there is such a surge of challengers competing to attract consumers with local content that structural ownership regulations are in no way necessary to serve the public interest. By rejecting common ownership of more than one television station with a newspaper (even when such ownership otherwise would be permitted by the local television ownership rule) and by refusing to allow a combination between a newspaper and a top-four ranked television station, the Commission’s proposed changes to the NBCO rule cannot be reconciled with the modern world or the Section 202(h) mandate.

Put succinctly, the chasm between the media marketplace of 2012 and the decades-old rules that continue to bedevil broadcasters has never been wider or more perilous to the Commission’s stated objectives. Unless the Commission abruptly changes its focus and embraces the true goals of Section 202(h), it may one day look back and realize only too late that its intransigence contributed to the weakening of traditional media, and that its actions hindered broadcasters’ and newspapers’ ability to advance competition, diversity and

⁷ *Prometheus I*, 373 F.3d at 398.

localism. Ultimately, it is consumers and our democracy that will suffer. Fox accordingly urges the FCC to jettison its rules-based approach to media ownership regulation and in so doing free broadcasters to compete in a modern world of ubiquitous and diverse media voices.

II. THE INTERNET HAS FUNDAMENTALLY ALTERED THE MEDIA LANDSCAPE, RENDERING THE TRADITIONAL JUSTIFICATIONS FOR MEDIA OWNERSHIP REGULATION INAPPOSITE

The media landscape today would be unrecognizable to the original authors of structural ownership regulations. When the Commission initiated its first regulatory review of media ownership rules nearly 15 years ago,⁸ only 22% of American adults used the Internet, and only a little more than a quarter of those users looked for news online.⁹ The Internet's impact, its ability to inform the public, and most especially its contribution to localism, diversity and competition were negligible. Today, in contrast, it is hardly hyperbole to observe that the Internet stands alone as the most powerful platform for distributing information and enabling public participation in the democratic process.

From organizing and fostering social movements to developing outlets for all manner of public debate and commentary, the Internet dwarfs every previous media technology in its ability to both empower individual users to speak *and* to enable masses of consumers to freely receive information.¹⁰ Among Americans seeking national and international news, the

⁸ See Press Release, FCC, 1998 Biennial Review of FCC Regulations Begun Early; To Be Coordinated by David Solomon (Nov. 18, 1997), *available at* http://transition.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7094.html.

⁹ See ERIC C. NEWBERGER, U.S. CENSUS BUREAU, COMPUTER USE IN THE UNITED STATES: OCTOBER 1997, at 9 (1999) (detailing percentage of people using the Internet to get “news, weather, or sports” information).

¹⁰ See Marwan Bishara, *The Miracle Generation*, AL JAZEERA, Feb. 12, 2012 (“*The Miracle Generation*”) (describing the central role of the Internet within the 2011 pro-democracy protest movement across the Arab world).

Internet has surpassed the newspaper and is “slowly closing in on television” for the title of Americans’ number one preferred news source.¹¹ New Internet news sources also have closed in on traditional providers in the local news arena – nearly as many Americans now get their news from independent websites as from newspapers *and* those newspapers’ websites combined.¹²

The Commission repeatedly has recognized the upheaval caused by the Internet, and has prioritized an agency-wide effort to assess the titanic shifts in the media marketplace and to ensure the survival of a vibrant local media landscape.¹³ Even as it has done so, however, the Commission has barely touched the media ownership regulations, which have stood virtually unchanged since passage of the 1996 Act. This stasis is impossible to square with the Commission’s obligation to repeal or modify unnecessary rules under Section 202(h). It is even more difficult to fathom given the FCC’s stated commitment to preserving competition, diversity and localism in media outlets. This proceeding gives the Commission renewed opportunity to match its rules to its rhetoric.

¹¹ PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE, at 2 (2011) (“INTERNET GAINS AS NEWS SOURCE”).

¹² PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, PEW INTERNET & AMERICAN LIFE PROJECT, AND THE KNIGHT FOUNDATION, HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY, at 3 (2011) (“HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY”) (noting that for local news, “50% [of people] turn to newspapers and their websites . . . and 47% [] turn to [independent] web-only sources [not operated by broadcasters or newspapers]”).

¹³ See Press Release, FCC, Steven Waldman Named to Lead Commission Effort on Future of Media in a Changing Technological Landscape (Oct. 28, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294328A1.pdf. Waldman and his working group recently released their report. See STEVEN WALDMAN AND THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE (2011) (“INFORMATION NEEDS OF COMMUNITIES”).

A. Innovation In the Provision of News and Information Is Accelerating Beyond the Ability of Government Regulation to Keep Pace

In its 2006 comments, Fox noted that “the last four years have witnessed an even greater sea change in the media universe [than had been seen through 2002].”¹⁴ The acceleration of change has continued unabated: in the six years since the last ownership review, that sea change has become a complete transformation. The Internet is more central to the American media consumption experience than ever before.¹⁵ The broadband revolution has now been paired with a wireless Internet revolution, making high-speed network access a ubiquitous experience for many.¹⁶ Social media sites such as Facebook and Twitter that were embryonic in 2006 now serve hundreds of millions of users.¹⁷ This explosive reconfiguration of the American media experience has wrought key changes in the way that Americans consume the political and public interest information whose accessibility once served as the putative rationale for regulating media ownership.

The so-called “monopoly” that traditional media were thought to hold over the presentation of information about America’s local and national communities, if it ever

¹⁴ See *In re 2006 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. 06-121, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 5 (filed Oct. 23, 2006) (“Fox 2006 Comments”).

¹⁵ Nearly four out of every five adult Americans is now an Internet user. See LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, *THE INTERNET AS A DIVERSION AND DESTINATION*, at 6 (2011) (“INTERNET AS DIVERSION AND DESTINATION”).

¹⁶ 44% of Americans now use their cell phone to access the Internet. AARON SMITH, PEW INTERNET & AMERICAN LIFE PROJECT, *AMERICANS AND THEIR CELL PHONES*, at 6 (2011) (“AMERICANS AND THEIR CELL PHONES”).

¹⁷ Facebook, which at the end of 2006 claimed over 12 million active users, now claims more than 845 million. *Number of Active Users at Facebook Over the Years*, CBS MONEYWATCH, Feb. 2, 2012, http://www.cbsnews.com/8301-505250_162-57370133/number-of-active-users-at-facebook-over-the-years/. Twitter, which was founded in July 2006, now handles more than 200 million Tweets per day. *200 Million Tweets Per Day*, TWITTER BLOG (June 30, 2011, 1:03 PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

existed, has now been definitively broken. News consumers have an unprecedented ability to take information from any number of sources, combine it in new ways, and re-broadcast it to friends, acquaintances or the entire country. News makers can use social media tools to speak directly with the news consumer, bypassing traditional media and putting the citizen remixer of news on an equal footing with many journalists. This new “participatory news consumer” is an increasingly common phenomenon.¹⁸

Social media has been a particularly important part of the transformation. Each Internet user now has his or her own digital printing press. According to one recent study, “37% of internet users have contributed to the creation of news, commented about it, or disseminated it via postings on social media sites like Facebook or Twitter.”¹⁹ The availability of wireless broadband also has transformed the way that people use social media services and other news sources. Many Americans now have at their fingertips a constant stream of personalized news.²⁰

With the rise of these new avenues for citizen participation, Internet democracy has come of age. More and more Americans use the Internet as their primary source of political information,²¹ making it an ever-more critical component of the support structure of American democracy. President Obama raised more than half a billion dollars from direct

¹⁸ See KRISTEN PURCELL ET AL., PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM AND PEW INTERNET & AMERICAN LIFE PROJECT, UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER, at 2-6 (2010) (“UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER”).

¹⁹ *Id.* at 2.

²⁰ According to Pew, “33% of cell phone owners now access news on their cell phones.” *Id.* at 2.

²¹ The percentage of voters using the Internet as a primary source for campaign news has increased from 7% in 2002 and 15% in 2006 to 24% in 2010. See AARON SMITH, PEW INTERNET & AMERICAN LIFE PROJECT, THE INTERNET AND CAMPAIGN 2010, at 3 tbl. “Main sources of campaign news, 2002-2010” (2011) (“INTERNET AND CAMPAIGN 2010”).

donations online while a candidate in 2008 – the bulk of his total fundraising.²² The Tea Party and Occupy Wall Street movements both were fueled by members’ online participation through websites, blogs and Facebook pages run not by traditional media, but by individuals.²³ The Internet enables those who share common ideals to marshal their resources to advance any cause, enabling even niche ideas to gain currency and spark a movement of thousands or even millions of citizens – regardless of whether traditional media find those ideas newsworthy.²⁴ There is no longer a plausible argument that traditional media do – or could – control political discourse.

The reduced role of traditional media in presenting news has been paired with a corresponding decrease in its preeminence as an authority on news. The Internet is no longer an upstart alternative for news consumers; it is instead a mainstream choice. For younger Americans, the Internet already is the first choice for national and international news.²⁵ Within a few years, it is expected to overtake television among Americans ages 30 to 49 as well.²⁶

²² See Jose Antonio Vargas, *Obama Raised Half a Billion Online*, 44: POLITICS AND POLICY IN OBAMA’S WASHINGTON, WASHINGTON POST (Nov. 20, 2008, 8:00 PM EST).

²³ See Ben McGrath, *The Movement: The Rise of Tea Party Activism*, THE NEW YORKER, Feb. 1, 2010 (“*Rise of the Tea Party*”) (describing the tea party movement as beginning with a Seattle blogger, a viral video of a cable news reporter, and a series of websites); Erik Eckholm and Timothy Williams, *Anti-Wall Street Protests Spreading to Cities Large and Small*, N.Y. TIMES, Oct. 3, 2011 (“*Anti-Wall Street Protests Spreading*”) (describing the Occupy Wall Street campaign as spreading “[w]ith little organization and a reliance on Facebook, Twitter and Google groups to share methods”).

²⁴ See, e.g., *The Miracle Generation* (explaining the Internet’s role in the Arab Spring); *Rise of the Tea Party* (explaining the Internet’s role in the Tea Party movement); *Anti-Wall Street Protests Spreading* (explaining the Internet’s role in the Occupy Wall Street movement).

²⁵ “In 2010, for the first time, the internet has surpassed television as the main source of national and international news for people younger than 30.” INTERNET GAINS AS NEWS SOURCE, at 2.

²⁶ “Among those 30 to 49, the internet is on track to equal, or perhaps surpass, television as the main source of national and international news within the next few years.” INTERNET GAINS AS NEWS SOURCE, at 2.

Over the last few years, in a less heralded but no less important development, the Internet also has become a vital player in local news. The *Notice* expresses the Commission’s concerns about dire economic forecasts for the newspaper business in light of the persistent importance of newspapers in covering local news,²⁷ and cites one Pew study’s finding that newspapers rank first or tie for first as the source people rely on most for 11 of 16 surveyed categories of local information.²⁸ However, an untold part of that story is the appearance of a newly diverse Internet marketplace for local news that has become a robust competitor to local newspapers.

The same Pew study cited in the *Notice* also found that nearly the same number of people use independent Internet sites for local news as use their local newspaper or its website.²⁹ Moreover, it also found that “[f]or adults under 40, the web is [the] first [choice] for 11 of the top 16 topics – and a close second on four others.”³⁰ If the underlying rationale for the media ownership rules is to “continue to serve [the Commission’s] public interest goals of competition, localism, and diversity,”³¹ the effect of the Internet on local news markets must be weighed in the balance.

²⁷ See *Notice*, at 3.

²⁸ *Id.* at 32 n.201 (citing HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY, at 1).

²⁹ See HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY at 3 (noting that for local news, “50% [of people] turn to newspapers and their websites . . . and 47% [] turn to [independent] web-only sources [not operated by broadcasters or newspapers]”).

³⁰ *Id.* at 2.

³¹ *Notice*, at 2.

B. The Commission in Particular, and the Federal Government in General, Repeatedly Have Recognized the Transformative Power of the Internet and Its Effect on Political Participation and Newsgathering

Such a powerful new media force inevitably will produce a significant impact on traditional media, and indeed, the Commission consistently has acknowledged the magnitude of the Internet’s impact. In the 2002 media ownership review, the FCC pointed out that “via the Internet, Americans can access virtually any information, anywhere, on any topic” and stated that the Internet’s ubiquity casts doubt on the continued status of radio and television broadcasters as “America’s information gatekeepers.”³² In the 2006 media ownership review, the FCC further noted that “Internet use . . . is changing how traditional news media operate” and that “the diminishment of mainstream media power over information flow is real.”³³ In the *Notice* announcing the instant proceeding, the Commission once more notes that “[t]he proliferation of broadband Internet and other new technologies has had a dramatic impact on the media marketplace.”³⁴

In other contexts, the Commission has been even clearer about the magnitude of the changes wrought by the Internet. In the National Broadband Plan, the authors noted that “high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks [such as railroads, highways, and

³² See *In re 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 & Order, 18 FCC Rcd 13620, 13623 (2003) (“2002 Review Order”).

³³ See *In re 2006 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*, Report & Order & Order on Reconsideration, 23 FCC Rcd 2010, 2030-31 (2008) (“2006 Review Order”).

³⁴ *Notice*, at 2.

electricity].”³⁵ While the Commission has said that traditional media provide “essential” services to a community as a whole,³⁶ the National Broadband Plan stated that the Internet is *so* critical to today’s media environment that *individual access* to broadband is “essential to opportunity and citizenship.”³⁷ In fact, the Commission has argued that the Internet will increasingly take over the role of traditional media in community involvement and political dialogue: “Increasingly our national conversation, our sources for news and information and our knowledge of each other will depend upon broadband” given the fact that “traditional sources of news and information journalism are under severe stress.”³⁸

Other agencies have joined the Commission in recognizing the impact of broadband on the competitiveness of the media marketplace. The U.S. Copyright Office has stated that “it is possible and probably likely that the Internet will replace cable and satellite as the preferred way to consume broadcast and cable content in the majority of American households” and that “any changes in the law should take that possibility into consideration.”³⁹ Focusing in on the Internet’s effect on traditional news media, the Federal

³⁵ OMNIBUS BROADBAND INITIATIVE, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 3 (2010) (“NATIONAL BROADBAND PLAN”).

³⁶ *See, e.g., 2006 Review Order*, 23 FCC Rcd at 2047 n.209 (describing “news that is essential to democracy” coming “from the newspaper and local television”); *In re Amendment of Part 73 of the Commission’s Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Notice of Proposed Rulemaking, 45 FCC 2146, 1962 WL 159611, at *2 (1965) (describing “network television licensees” as lacking the chance to perform “essential parts of their duty [to serve their community] as trustees for the public”).

³⁷ NATIONAL BROADBAND PLAN, at 5.

³⁸ *Id.* at 299.

³⁹ U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: § 302 REPORT, at 33-34 (2011).

Trade Commission has pointed out that “the fourth estate is undergoing drastic changes.”⁴⁰ The FTC in particular has noted its concern that the Internet has made it significantly more difficult for many traditional media operations to compete: “[t]he Internet has changed how many consumers receive news and altered the advertising landscape,” and those “developments are challenging the ability of news organizations to fund journalism.”⁴¹ This chorus of governmental voices – including the Commission’s own – demonstrates how earth-shaking the impact of the Internet has been and compels the FCC to take account of that impact as part of this review.

C. The Commission Has a Statutory Obligation to Consider the Transformation Wrought by the Internet When Reviewing its Media Ownership Rules

In the 1996 Act, Congress mandated change in the media-ownership rules unless the FCC could show that continued restrictions are necessary in the public interest after taking account of competition. Yet despite Congress’ plan, a regulatory regime that has been outdated for decades remains unchanged in 2012 and, based on the suggestions in the *Notice*, may be destined to remain in effect for the foreseeable future, burdening both broadcasters and newspapers, punishing consumers, and pushing traditional media to and possibly beyond the brink of insolvency.

Section 202(h) requires the Commission to determine whether any of its media ownership rules are “necessary in the public interest as the result of competition” and to

⁴⁰ Federal Trade Commission, *Internet Issues: Consumers’ Evolving Online Experience*, PROTECTING CONSUMERS IN THE NEXT TECH-ADE, Nov. 6-8, 2006, <http://www.ftc.gov/bcp/workshops/techade/internet.html> (last visited Mar. 5, 2012).

⁴¹ Federal Trade Commission, *Public Workshops and Roundtables: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?*, Notice Announcing Public Workshops and Opportunity to Comment (Sep. 30, 2009).

repeal or modify those that are not.⁴² As the *Prometheus I* court stated, “no matter what the Commission decides to do to any particular rule—retain, repeal, or modify . . . – it must do so in the public interest and support its decision with a reasoned analysis.”⁴³ At this point in the trajectory of media transformation, where the facts demonstrate an overwhelming shift in the competitive landscape, and where the Commission and other Federal agencies repeatedly have corroborated that finding, the FCC must conclude that regulatory intervention is no longer necessary to ensure competition, diversity and localism.

As Fox consistently has argued in media ownership review proceedings dating back almost a decade,⁴⁴ broadcasters no longer possess the loudest or the most effective megaphones in the public arena. The developments recounted above merely reconfirm that obvious truth. Broadcasters also have no unique hold, if they ever did, over the information stream that allows Americans to participate in their own governance. With each successive review of the media ownership rules, it has become more and more clear that traditional media has become less and less dominant. The time has come for the FCC to match its rules to reality.

Accordingly, Fox suggests that the Commission re-evaluate the *Notice*'s tentative conclusions and re-direct this proceeding toward the complete elimination of structural media ownership rules, which are no longer necessary or effective in promoting diversity and localism. To the extent that the Commission has any residual concern about competition in markets for advertising or content production, it should defer to antitrust authorities who

⁴² 1996 Act, at § 202(h).

⁴³ *Prometheus I*, 373 F.3d at 395.

⁴⁴ See Fox 2006 Comments, at 17-18 (citing to Fox comments in previous proceedings).

already are charged with ensuring competition in these purely economic markets. In particular, the FCC should revisit its presumption that independent websites do not contribute mightily to viewpoint diversity. In light of recent reports showing that independent local news websites reach an audience close to that of many traditional local news providers, that such websites have surpassed most of those providers for the attentions of younger Americans, and that hyperlocal websites are becoming an increasingly powerful competitor in the local news space,⁴⁵ it is clear that the Commission no longer can dismiss the impact of these rapidly growing Internet-based speakers.

Fox does not suggest that traditional media will cease to play any meaningful role in the future marketplace of ideas. Quite the contrary: broadcasters and newspapers undoubtedly will continue to be prominent in local reporting, especially if they are freed to compete without the restrictions of ownership regulations. However, given the widespread economic struggles afflicting many traditional local news outlets, which stem both from a challenging national economy and a wrenching transition to the new digital age,⁴⁶ it no longer makes sense to force owners of traditional media outlets to avoid pro-consumer combinations that would allow them to pool resources and share expertise. Indeed, the Working Group on Information Needs of Communities (the “Working Group”) commissioned by the FCC itself observed that the agency would do well to reconsider some of its long-held assumptions about ownership in light of the seismic shifts in the media ownership marketplace caused by the Internet:

⁴⁵ See INTERNET GAINS AS NEWS SOURCE, at 2; HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY, at 2-3; INFORMATION NEEDS OF COMMUNITIES, at 117, 121-22.

⁴⁶ See INFORMATION NEEDS OF COMMUNITIES, at 8 (noting that “civic and media leaders grew alarmed a few years ago when the digital revolution began undercutting traditional media business models, leading to massive layoffs of journalists at newspapers, newsmagazines, and TV stations”).

> The nature of the ‘diversity’ calculus may have changed. In an earlier day, it was reasonable to assume that a diversity of ‘voices’ indicated general media health. Now, a media market can simultaneously have a diversity of voices and opinions and yet a scarcity of journalism.

> More is not necessarily better. Another assumption of past regulatory efforts was that more choices lead to greater benefits for consumers. But changes in the media market can sometimes call this assumption into question. For instance, it might be better to have nine TV stations in a market than 10, if consolidation leads the remaining stations to be economically healthier and therefore more able to invest in local journalism.⁴⁷

For all of these reasons, Fox respectfully submits that – both as required by Section 202(h) and as a matter of sound policy – the Commission must assess the benefits that would flow from eliminating the media ownership rules altogether. As the *Notice* observes, the Working Group (made up of “Commission staff, industry scholars, and consultants”) pointed out that such changes could well improve local newsgathering.⁴⁸ Even if the Working Group’s suggestions do not “necessarily represent the views of the Federal Communications Commission” as a whole,⁴⁹ it nonetheless is incumbent upon the FCC to evaluate the Working Group’s conclusions, together with the information that media companies such as Fox have submitted for many years, as part of reaching a reasoned analysis.

When diverse viewpoints are easier to come by than ever before, a regulatory regime that privileges the health of local news operations over the quantity of “voices” in a market is the best way to preserve a strong and vital local news culture in communities across America. Traditional media still have the opportunity to play the role of aggregator and facilitator for

⁴⁷ INFORMATION NEEDS OF COMMUNITIES, at 25-26.

⁴⁸ *See Notice*, at 33 n.204.

⁴⁹ *Id.* (internal quotations omitted).

disseminating important information that all Americans should share, as a supplement to the personalized experience enabled by the Internet. But if structural regulations continue to inhibit traditional media's ability to thrive, let alone its ability to grow in the digital age, it is those outmoded regulations – and not deregulation – that will pose the true threat to democracy.

III. THE COMMISSION'S PROPOSED NBCO RULE IS COUNTER-PRODUCTIVE AND FAILS TO TAKE INTO ACCOUNT THE UNIQUE DIVERSITY OF MAJOR MARKETS SUCH AS NEW YORK

Fox continues to believe that sound public policy and Section 202(h) both demand a comprehensive elimination of all of the media ownership rules. Moreover, Fox submits that aside from any statutory or policy arguments, the media ownership rules cannot withstand scrutiny under the Constitution.⁵⁰ Rather than repeat here all of the reasons justifying elimination with respect to each rule, Fox respectfully requests that the Commission incorporate into the record of this proceeding its comments filed in connection with the 2002 and 2006 ownership proceedings, which collectively demonstrate that neither the local TV ownership rule, the dual network rule, nor the NBCO rule makes sense in the modern world of diverse and ubiquitous media voices. Fox does believe, however, that the NBCO rule – which for 35 years has hamstrung broadcasters and newspapers based merely on speculative

⁵⁰ The FCC's proposals in the *Notice* are particularly unacceptable given that the Commission is regulating speech clearly protected by the First Amendment. The rules continue to limit broadcasters' ability to choose how and what they can broadcast out of government concern that their voices, when merged or combined with newspapers, could become too loud and influential. Likewise, newspapers are singled out as the only mass medium precluded from merging with broadcasters to enhance the quality of the informational offerings of both. Under an appropriate application of strict Constitutional scrutiny, none of these calcified, content-based regulations can survive a First Amendment challenge. Fox believes that media ownership regulations can no longer appropriately be subjected to mere rational basis scrutiny, given the dubious status of the scarcity doctrine. *See generally* Petition for Writ of Certiorari, *Tribune Co. et al. v. FCC*, 80 U.S.L.W. 3368 (U.S. Dec. 5, 2011) (No. 11-696) (explaining the inapplicability of the scarcity doctrine to modern broadcasters).

fears that never have come to pass – is so anachronistic that it warrants a brief extended treatment here.

A. Limiting Broadcast-Newspaper Combinations Will Harm Localism and Diversity, Given the Current State of the Newspaper Market

The NBCO rule actively discourages partnerships that could advance the FCC’s core goals while addressing the Commission’s stated concerns about the decline of local news reporting generally and newspapers in particular. Given the current economic plight of the newspaper industry, future application of the NBCO rule will only exacerbate the challenges facing an industry that has witnessed the demise of more than a dozen daily metropolitan newspapers over the past five years alone.⁵¹ Studies show that print media is “still laboring to find a sustainable business model for the future,”⁵² and media experts are concerned that papers’ ability to report local news is increasingly degraded.⁵³ Even the Commission has recognized that “broadcast and newspaper consumption in traditional forms is in decline.”⁵⁴ The FCC also has acknowledged that newspaper/broadcast cross-ownership can serve to ensure the success of a financially unstable media outlet that needs to “remain together [with a more successful partner] if it is to continue to grow.”⁵⁵ Yet the *Notice* suggests that the Commission intends to do no more than fiddle while the newspaper market burns.

⁵¹ See Newspaper Death Watch, <http://newspaperdeathwatch.com/> (last visited Mar. 5, 2012).

⁵² RICK EDMONDS ET AL., PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2011: AN ANNUAL REPORT ON AMERICAN JOURNALISM – NEWSPAPERS: MISSED THE 2010 MEDIA RALLY (2011), <http://stateofthemedias.org/2011/newspapers-essay/> (last visited Mar. 5, 2012) (“In a year when most other media businesses rallied, advertising revenues at newspaper organizations continued to fall – roughly 6.3% for the year.”).

⁵³ See INFORMATION NEEDS OF COMMUNITIES, at 8.

⁵⁴ *Notice*, at 3.

⁵⁵ *In re Field Communications Corporation*, 65 F.C.C. 2d 959, 961 (1977). See also *In re K. Rupert Murdoch*, 21 FCC Rcd 11499, 11501 (2006).

Perhaps the most remarkable aspect of the *Notice*'s tentative decision to retain the NBCO rule is that the FCC already has recognized explicitly its ineffectuality. The Commission originally promulgated the NBCO rule primarily on the theory that it would promote diversity, though the FCC lacked conclusive evidence that the ban would in fact achieve that result.⁵⁶ The subordinate goal of promoting economic competition provided the second of the rule's "two foundations."⁵⁷ Doubts as to the efficacy of the rule and concern that it might in fact harm diversity by hastening the demise of newspapers, however, culminated in a series of rulemakings that ultimately led to rejection of the underlying rationale for the NBCO rule.⁵⁸

In the *2002 Review Order* that repealed the NBCO rule, the Commission evaluated the rule and determined "that (1) the rule cannot be sustained on competitive grounds, (2) the

⁵⁶ See *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, Order & Notice of Proposed Rulemaking, 16 FCC Rcd 17283, 17284 (2001) ("*Cross-Ownership Order*") (describing history of the NBCO rule).

⁵⁷ *Id.*

⁵⁸ See *In re Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13003 (1996). Comments filed in that proceeding were then consolidated into the Commission's 1998 Biennial Regulatory Review. See *In re 1998 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*, Notice of Inquiry, 13 FCC Rcd 11276 (1998). In 2000, the Commission adopted the *1998 Biennial Review Order*, in which it determined that the NBCO rule should be retained, but indicated that there may be circumstances in which the rule may not be necessary to achieve its intended public interest benefits. The FCC specifically indicated that it would consider whether the rule appropriately reflected "contemporary market conditions" and whether, based on the size of the market and the particular newspaper and station involved, diversity and competition would remain after a combination. Accordingly, the Commission stated that it would initiate a proceeding to consider tailoring the rule. See *In re 1998 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*, Biennial Review Report, 15 FCC Rcd 11058, 11109 (2000). The FCC then released a notice of proposed rulemaking in late 2001, noting that the local media market had changed dramatically since the rule was adopted. See *Cross-Ownership Order*, 16 FCC Rcd at 17287 (2001). The Commission found that while there had been a substantial increase in the number of media outlets, the number of daily newspapers had decreased since 1975. See *id.* at 17288. After comments were received at the FCC, and the record appeared ripe for decision, the Commission consolidated the NBCO comments along with other ownership proceedings into the larger 2002 Biennial Review. See *2002 Review Order*, 18 FCC Rcd at 13622.

rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets.”⁵⁹ As a result, it attempted to eliminate the blanket ban on newspaper/broadcast cross-ownership, placing restrictions on cross-ownership only in select smaller markets.⁶⁰ The Third Circuit in *Prometheus I* agreed that “reasoned analysis supports the Commission’s determination that the blanket ban on newspaper/broadcast cross-ownership was no longer necessary in the public interest,” since common ownership can promote localism without dampening viewpoint diversity.⁶¹

Despite its own prior conclusions, and notwithstanding the Third Circuit finding, the Commission nevertheless changed course at the next periodic review. In 2006, the FCC proposed instead to retain an NBCO rule that would limit newspaper/broadcast cross-ownership to owners of a single television or radio station only in the top 20 markets. The Commission’s proposed rule also would have presumptively disallowed common ownership entirely between newspapers and TV stations ranked among the top-four in a market, although it would have permitted parties to seek a waiver.⁶² The Third Circuit rejected the 2006 rule on procedural grounds.⁶³

⁵⁹ See *2002 Review Order*, 18 FCC Rcd at 13748 (footnote omitted).

⁶⁰ *Id.* at Appx. H, p. 14.

⁶¹ *Prometheus I*, 373 F.3d at 398. The Commission had conceded, as it does today, that cross-ownership between newspapers and broadcast stations has no adverse affect on economic competition in any relevant product market. See *2002 Review Order*, 18 FCC Rcd at 13753, 13772; *Notice*, at 38-43 (justifying its proposed rules on the basis of increased diversity and better local news service, not on increased competition).

⁶² See *2006 Review Order*, 23 FCC Rcd at 2018-57.

⁶³ See *Prometheus II*, 652 F.3d at 453-54.

As part of the current ownership review, the FCC is obligated to evaluate the NBCO rule anew based on today's marketplace realities. Unfortunately, in the *Notice*, the FCC proposes a rule that is substantially similar to the 2006 rule – limiting cross-ownership to a single station and newspaper in top 20 markets and precluding a combination involving a top-four ranked station.⁶⁴ In other words, the FCC proposes to repeat the same mistakes. The judicially-supported rationale advanced for consigning the NBCO rule to the dustbin in 2002 still stands, however. If anything, the ever-increasing contributions of the Internet to viewpoint diversity and localism further solidify the conclusion that the NBCO rule should now be scrapped in its entirety.

The NBCO rule serves none of the Commission's three stated goals: competition, localism and diversity. First, limits on cross-ownership of newspapers, both by licensees who own multiple local stations and by those who own a top-four station, clearly are not necessary to protect competition, as the FCC previously has made clear. The Commission noted in 2002 that consumers experience advertising in print and on broadcast media very differently, and thus said that competition in the advertising market is not enhanced by cross-media constraints.⁶⁵ That statement continues to be true today, and stands unchallenged in the *Notice*.⁶⁶

Second, those same limits on cross-ownership actively inhibit localism. The Commission itself has long acknowledged, as it repeated in the *Notice*, that “the opportunity to share newsgathering resources and realize other efficiencies derived from economies of

⁶⁴ See *Notice*, at 30-44.

⁶⁵ See *2002 Review Order*, 18 FCC Rcd at 13748-49, 13753.

⁶⁶ See *Notice*, at 33.

scale and scope may improve the ability of commonly-owned media outlets to provide local news and information”⁶⁷ – the *sine qua non* of localism. As this statement suggests, eliminating the NBCO rule would actively advance the Commission’s localism goal. The FCC found in 2002 that an association between a local newspaper and a broadcast station directly correlates with a rise in the quality and quantity of news produced by that station.⁶⁸

The *Notice* indicated that the 2002 finding should be tempered by the conclusion of a recent Commission media study purporting to find that “a market with a cross-owned station offers somewhat less news than a market without [one].”⁶⁹ However, the *Notice* appears to misstate the conclusion of the study, which in fact says explicitly that the only definitive statement that its author can make about the effect of cross-ownership is that it *enhances* news coverage on the cross-owned station.⁷⁰ Moreover, the study also cites two additional recent analyses of the overall market impact of newspaper/broadcast cross-ownership, one of which found that there is *no* definite correlation between enhanced local news coverage and cross-ownership, and the other of which found that there is a significant *positive* correlation between the two.⁷¹ In short, the very evidence offered by the Commission to question

⁶⁷ *Id.*

⁶⁸ *See 2002 Review Order*, 18 FCC Rcd at 13753-60 (citing both studies and anecdotal evidence).

⁶⁹ *See Notice*, at 37.

⁷⁰ JACK ERB, OFFICE OF STRATEGIC PLANNING AND POLICY ANALYSIS, FCC, LOCAL INFORMATION PROGRAMMING AND THE STRUCTURE OF TELEVISION MARKETS, at 40 (2011) (“[W]e cannot rule out the possibility that there is no correlation between newspaper cross-ownership and local news at the market level. At the station level, however, the coefficient on permanent stations is statistically different from zero, and indicates that permanent [cross-ownership waiver-holding] stations air almost an hour more local news than non-cross-owned stations.”).

⁷¹ *Id.* at 10-11 (“In their own analysis of the data employed in Shiman (2007a), Kimmelman et al. (2007) determine that at the market level, markets containing a newspaper-television cross-ownership relationship do not offer more local news or public affairs programming. In fact, many of the coefficients in their models suggest a negative (albeit statistically insignificant) relationship between cross-ownership and local information programming (cont’d)

whether any newspaper/broadcast cross-ownership rule would have a measurable impact on localism is instead renewed evidence that its proposed rule harms localism and should be dismantled.

That leaves viewpoint diversity, which is the only one of its core goals that the FCC has even posited may remain relevant in connection with the NBCO rule.⁷² In trumpeting diversity, however, the Commission has turned a blind eye to the contributions and increasing prominence of Internet news providers in local news, which is particularly notable among younger news consumers.⁷³ The FCC has disregarded the extent to which the Internet has become an unparalleled engine for viewpoint diversity, providing every consumer the opportunity to become a commentator and have his or her voice heard. As has always been the case, it is an outlet's ability to contribute to discourse that renders it a factor in the marketplace of ideas, not its relative popularity as measured by consumer use at any given moment. The Internet has proven time and time again that all outlets have an equal capacity to reach citizens today.

In attempting to justify the NBCO rule on the basis of its purported diversity benefits, the Commission also has ignored its own media ownership studies, which confirm that the rule has no measurable impact on viewpoint diversity. In anticipation of this proceeding, the

Shiman (2009) revisits the original analysis, modeling only the local news programming aired by the stations (in addition to incorporating many of the other suggestions from peer reviews and filed comments). . . . Shiman (2009) also performs a market-level analysis of the effect of cross-ownership that is similar to the Kimmelman et al. (2007) analysis. The model specifications between the two market-level studies differ in meaningful ways, and Shiman's results are in direct contradiction to the results in the Kimmelman et al. (2007) analysis – namely, that markets with newspaper cross-owned stations produce more (not less) local news.” (footnotes omitted).

⁷² See *id.* at 35-37 (noting Americans' continued use of traditional media to access local news).

⁷³ See HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY, at 2-3; INFORMATION NEEDS OF COMMUNITIES, at 117, 121-22.

FCC commissioned two studies that directly and empirically measured broadcast viewpoint diversity. The first found that the impact of the rule on viewpoint diversity was “statistically indistinguishable from zero.”⁷⁴ The second found that there was not even sufficient data to reach a conclusion as to the NBCO rule’s impact.⁷⁵ This is in keeping with commissioned studies in previous ownership review cycles, which also have found that newspaper/broadcast cross-ownership has no measurable impact on viewpoint diversity.⁷⁶ Given the absence of empirical evidence supporting its diversity-enhancement hypothesis – indeed, in the face of direct evidence to the contrary – the FCC cannot sustain the burden of proof required under Section 202(h) to perpetuate a highly restrictive cross-ownership rule in an effort to “protect” viewpoint diversity,⁷⁷ which is flourishing on the Internet in the absence of regulation. The Commission should focus instead on the enhancements to localism that would be effectuated by removing the NBCO rule.

There are at least two additional reasons that the top-four limitation is particularly ill-conceived. First, the limitation prohibits those station owners who have the greatest news experience and the most resources from combining forces with daily newspapers to promote more and better news coverage. Second, the top-four restriction continues to be antithetical to

⁷⁴ See ADAM D. RENNHOFF AND KENNETH C. WILBUR, LOCAL MEDIA OWNERSHIP AND VIEWPOINT DIVERSITY IN LOCAL TELEVISION NEWS, at 22 (2011).

⁷⁵ See LISA M. GEORGE AND FELIX OBERHOLZER-GEE, DIVERSITY IN LOCAL TELEVISION NEWS, at 10 (July 2011) (“[W]e might also expect newspaper and television cross-ownership to affect product differentiation. However this variable does not change in our sample over time and cannot be included.”).

⁷⁶ See JEFFREY MILYO, THE EFFECTS OF CROSS-OWNERSHIP ON THE LOCAL CONTENT AND POLITICAL SLANT OF LOCAL TELEVISION NEWS, at 28 (September 2007) (“[N]ewspaper cross-ownership is not consistently and significantly related to partisan slant in local television news . . .”).

⁷⁷ See *Prometheus I*, 373 F.3d at 395.

the First Amendment, which prohibits government from precluding a speaker from acquiring additional outlets on the basis of the popularity of the speaker’s content.⁷⁸

Separately, the *Notice* also requests comment on the Commission’s proposed factors for reviewing transactions that would result in the cross-ownership of newspapers and broadcast stations.⁷⁹ Under those factors, the FCC would ask whether a transaction would 1) increase the amount of local news produced, 2) allow all outlets to continue to exercise “independent news judgment,” and 3) result in undue market concentration; it also would 4) examine the financial condition of the parties.⁸⁰

These factors are so invasively focused on content that they cannot possibly coexist with the First Amendment. First, the Commission does not have any authority to dictate to licensees how much time they should devote to local issues or how they should research, prepare and present their news coverage or staff their newsrooms.⁸¹ Second, and equally

⁷⁸ Cf. *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) (citing *Texas v. Johnson*, 491 U.S. 397 (1989); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) (“The First Amendment protects expression, be it of the popular variety or not. . . . And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.”). For that matter, Fox notes that the proposed NBCO rule set forth in the *Notice* quite clearly would be a content-based restriction that could not survive strict Constitutional scrutiny. Among other things, the Commission proposes in the potential new rule to evaluate newspaper/broadcast combinations with respect to the amount of local news coverage the combination would broadcast and the makeup of the editorial boards of both the newspaper and the broadcast station (among other expressly content-related criteria). Because the NBCO rule also singles out newspaper owners for special restrictions on their speech that do not apply to cable television systems or Internet sites, the rule is invalid not only for the reasons laid out above, but also for violating the equal protection component of the Fifth Amendment.

⁷⁹ See *Notice*, at 43.

⁸⁰ See *id.*

⁸¹ See 47 U.S.C. § 326 (prohibiting the FCC from issuing any “regulation or condition” that “interfere[s] with the right of free speech by means of radio communication”); *MPAA v. FCC*, 309 F.3d 796, 804-05 (D.C. Cir. 2002).

important, the FCC has no authority to regulate newspapers.⁸² None of the newspaper-related subjects covered by these factors – a newspaper’s decisions about how to set up its editorial staff, the stories and issues it will cover, the amount of space it will devote to news topics and the amount it will invest in newsroom resources and operations – involves “radio communications” that are within the Commission’s statutory authority to regulate.

The proposed factors would force newspaper/broadcast combination applicants to negotiate with the FCC over management of their newsrooms and to offer concessions to gain Commission approval. This would inject the FCC into editorial decisions and newsroom operations protected by the very core of the First Amendment.⁸³ The Constitution simply does not permit the FCC to use its licensing authority to influence or compromise the editorial independence of a newspaper or broadcast outlet in an attempt to manage “viewpoint diversity” across the entire marketplace of ideas.

In short, the newspaper industry continues to face serious upheaval. If the restrictions in the NBCO rule are finally lifted, there can at least be hope of renewed investment for newspapers in financial straits, which continue to provide vital local news and keep citizens informed.

B. The Commission’s Proposed NBCO Rule Is Especially Inappropriate for the New York Metropolitan Area, the Most Vibrant Media Market in America

Regardless of the Commission’s conclusion with respect to the fate of the NBCO rule writ large, there can be no doubt that a cross-ownership restriction is unnecessary in New

⁸² See *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (FCC has no authority to leverage its authority over wire and radio communications to support direct regulation of services that do not involve such communications); *GTE Servs. Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (same); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (same).

⁸³ See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

York, the nation’s most diverse and vibrant media market. The New York media marketplace features 27 licensed television stations,⁸⁴ 72 AM and FM radio stations,⁸⁵ and at least three dozen newspapers,⁸⁶ all competing with billions of websites (including thousands of New-York-oriented websites) and the ubiquitous social media giants for the privilege of the New York audience’s attention. Given the innumerable voices reporting on and commenting within the New York marketplace, the Commission’s putative need to preserve diversity makes less sense in New York than anywhere else in the country.⁸⁷

Fox previously has demonstrated the value of cross-ownership in the New York market, as the Commission itself has acknowledged. In granting Fox’s parent News Corporation a permanent waiver permitting cross-ownership of the *New York Post* and WNYW(TV), the FCC noted that before News Corporation’s purchase, the paper was in bankruptcy, staff morale was low, circulation was down, and its “overall conditions were dire.”⁸⁸ Indeed, the Commission suggested that “absent a waiver, [the *Post*’s] future is in doubt.”⁸⁹ Well after News Corporation received a temporary waiver permitting further cross-

⁸⁴ See New York Television Stations – Station Index, at <http://www.stationindex.com/tv/markets/New+York> (last visited Mar. 5, 2012).

⁸⁵ See New York Radio Guide: A Guide to New York Radio Stations, at <http://www.nyradioguide.com/index.shtml> (last visited Mar. 5, 2012).

⁸⁶ See List of New York City Newspapers and Magazines, Wikipedia, http://en.wikipedia.org/wiki/List_of_New_York_City_newspapers_and_magazines (last visited Mar. 5, 2012).

⁸⁷ Other, similarly diverse markets such as Los Angeles and Chicago should be treated in the same manner, as the FCC itself has recognized. See *In re Shareholders of the Tribune Company*, 22 FCC Rcd 21266, 21277 n.68 (2007) (stating that the approval of a permanent NBCO waiver in Chicago was justified in part, as previous permanent waivers of the NBCO rule in New York and Chicago had been, on those metropolitan areas’ status as “large, competitive, and diverse TV markets”).

⁸⁸ See *In re Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5343 (1993), *aff’d sub nom. Metropolitan Council of NAACP Branch v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (granting a permanent waiver of the rule).

⁸⁹ *Id.* at 5349.

ownership between the *Post* and WWOR-TV, the FCC observed that “the conditions justifying that original waiver, the financial vulnerability of the [*Post*] and the unique diversity of the New York market, still exist.”⁹⁰

In fact, in re-authorizing that temporary waiver, the Commission stated that its previous waiver, “granted primarily to preserve the operation of the newspaper,” had resulted in “demonstrable public interest benefits.”⁹¹ The *Post* itself, once left for dead, continues to compete with local rivals.⁹² Moreover, these demonstrable public interest benefits have done nothing to hinder the diversity of viewpoints in the New York area. There are more local television stations and more local newspapers operating in the market today than existed five years ago.⁹³ There are significantly more outlets in the city today than were operating in 1993 when the Commission first stated that “[g]iven the wide array of voices in New York City, any detriment to diversity caused by common ownership of [*the Post* and WNYW(TV)] would be negligible”⁹⁴ And of course, that is to say nothing of the explosion of distinct and diverse voices on the Internet. The Commission should recognize that the unique diversity of the New York media ecosystem would not be challenged one iota by cross-

⁹⁰ See *In re K. Rupert Murdoch*, 21 FCC Rcd 11499, 11502 (2006).

⁹¹ *Id.* at 11501.

⁹² See Jim Romanesko, *WSJ Remains Largest Circulation U.S. Daily Newspaper*, POYNTER.COM, May 4, 2011 (listing the *Daily News* and the *Post* as the seventh- and eighth-highest-circulation papers in the country).

⁹³ Compare *In re 2006 Quadrennial 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. 06-121, Comments of News Corporation and Fox Television Stations, Inc., at 9 (filed Dec. 11, 2007) (“News 2007 Comments”) (noting the existence in New York in 2007 of 23 TV stations and 29 daily newspapers) with notes 84 and 86, *supra* (noting the existence in New York today of 27 TV stations and at least three dozen daily newspapers).

⁹⁴ *In re Fox Television Stations*, 8 FCC Rcd at 5351 (footnote omitted). Compare *id.* (noting the existence in New York in 1993 of 11 full-power TV stations and four daily newspapers) with notes 84 and 86, *supra* (noting the existence in New York today of 27 TV stations and at least three dozen daily newspapers).

ownership of newspapers and broadcast stations – not when more voices are speaking out in the marketplace every year.

At the very least, in a market with literally hundreds of independently-owned media voices, there can be no doubt that cross-ownership between newspapers and broadcast stations in New York would cause no public interest harms and should be permitted.

IV. LOCAL NEWS SERVICE AGREEMENTS IMPROVE LOCAL NEWS BY PROMOTING DIVERSITY AND LOCALISM

Apart from its evaluation of the media ownership rules *per se*, the *Notice* also requests information about LNS agreements, asking commenters to explain how these arrangements are distinct from other types of agreements that are currently attributable for purposes of the rules.⁹⁵ The FCC also asks how LNS agreements impact member stations' ability to support the Commission's competition, localism and diversity goals.⁹⁶ Fox submits that LNS agreements are innocuous arrangements that simply enable independently owned stations to share raw video footage of news events in a manner akin to the video pool arrangements that long have been a hallmark of good and ethical journalism. Equally significant, LNS agreements actually enhance localism and diversity because they free individual stations to devote their resources to pursuing additional news stories and unique news coverage.

LNS agreements possess none of the characteristics of attribution that typically concern the Commission. They do not confer on any one station any ability whatsoever to influence, let alone control, any other station's programming or its independent editorial decisions. LNS agreements do, however, actively support the Commission's goals of

⁹⁵ See *Notice*, at 81.

⁹⁶ See *id.*

enhancing diversity and localism within local television news and enable cash-strapped stations to more effectively deploy their resources in a way that allows them to cover more stories.

A. LNS Agreements Feature None of the Indicia of Influence Found in Attributable Agreements

As the Commission’s Working Group on Information Needs of Communities explained, “[i]n a typical LNS, two or more stations contribute camera crews to a jointly run assignment desk that decides which stories to cover and feeds video back to individual newsrooms to be produced internally.”⁹⁷ Fox agrees that this is an apt description; an LNS arrangement is really nothing more than an agreement to share raw video footage.

Participating stations can rely upon a single video crew shared by a number of local outlets to obtain footage of a press conference or other local event. Participants share the cost of that crew by each allocating some of their staff to man the LNS team, while maintaining total editorial independence from one another. Each station chooses how and whether to use the “pool” footage, and each uses its own writers, reporters, editors and news management to craft and present any stories that it deems worthy of inclusion in a newscast.

Thus, it is incorrect for groups such as the Communications Workers of America (“CWA”) to suggest that an LNS agreement is a “joint news gathering effort” distinguishable from “traditional ‘pool’ coverage of events.”⁹⁸ In fact, an LNS agreement involves no joint effort of any kind when it comes to actual newsgathering. Even if each station were to send a separate video photographer to each LNS-covered event, the footage would be virtually

⁹⁷ INFORMATION NEEDS OF COMMUNITIES, at 97.

⁹⁸ See Notice, at 76 & n.485 (citing CWA comments).

identical, since LNS arrangements are designed to share footage only for events where independent photography likely would be of little to no value.

In the hopes of putting these questions to rest once and for all, Fox hereby provides a brief overview of how LNS agreements typically work:

- * Two or more stations in a market enter a contract to share certain resources. No separate legal entity is created. Employees of each participating station remain employees of that station; report solely to the management of that station; and continue to be paid by that station.
- * Participating stations designate a small number of employees to contribute to the LNS arrangement; these personnel can either be assigned to the LNS dynamically (rotating through on a daily or shift-by-shift basis) or for a temporary fixed period (such as for a few months at a time). When a station's personnel are sent to cover an event as part of an LNS assignment, they utilize their station-owned vehicles and equipment. Stations do *not* pay each other for participating in an LNS agreement. In most cases, no money changes hands at all.⁹⁹
- * LNS agreements typically cover a limited set of personnel: several video photographers and assignment editors and a single managing editor. No reporters or writers participate.
- * Each day, the managing editor assigned to the LNS team sends around to all participating stations a list of the news events at which the LNS team plans to obtain video footage (e.g., a political press conference or the scene of a newsworthy casualty event such as a forest fire). The assignment editors assigned to the LNS team coordinate with the various video photographers to ensure that each is in place for the assigned events.
- * This daily event list tells stations what footage they will be receiving, so that they can focus their resources on covering other newsworthy local events. If for any reason a participating station desires to send its own stand-alone video photographer to an event covered by the LNS team, it remains free to do so. *In addition, stations can and often do send their own reporters and field producers to the same event at which the LNS team is obtaining video footage,*

⁹⁹ The only exceptions relate to (i) LNS arrangements involving a newsgathering helicopter, in which cases stations might reimburse the station owning or leasing the helicopter for its operating costs; and (ii) those agreements in which a single managing editor from one station is assigned to an LNS team for a temporary term – there, other stations may reimburse the employer station for a pro rata portion of the managing editor's salary and benefits.

so that these stations can couple the shared footage with reporting about the applicable story from their own perspective.

- * The video photographer assigned to the LNS team distributes the raw footage to each participating station either live (via microwave or fiber) or in recorded form later in the day, depending on the nature of the event. The LNS team does not produce any news stories, nor does it possess any reportorial discretion.
- * Upon receiving raw video footage, each participating station decides independently whether and, if so, how to edit and use the footage in presenting the news to viewers. Each station independently produces any reports for stories that utilize shared footage. If a viewer were to watch the newscasts of two LNS member stations that happen to use some of the same raw footage, the stories likely would have entirely different areas of emphasis or coverage and definitely would have different reporters and separate writing and graphics.

Thus, an LNS agreement is precisely describable as a media pool, much like the White House video pool, that operates on an ongoing basis, acquiring footage of a set of events as designated by the managing editor assigned to the LNS team. Each station can then report on those covered events while still retaining enough flexibility to deploy camera crews to an LNS-covered event if a given station would like to shoot different video or to deploy them elsewhere, as required. No station in any LNS agreement of which Fox is a part has surrendered any editorial discretion over any part of its local news broadcast.

That LNS agreements are harmless is readily apparent when they are compared to more ambitious forms of intra-market program-sharing. For example, under a local marketing agreement (“LMA,” also known as a time brokerage agreement), a station in a given market can agree to sell a competitor in that market a discrete block of time for that competitor to program at its discretion, subject to the licensee’s ultimate supervisory control. Under the Commission’s rules, however, even an LMA is not attributable unless a station

sells 15 percent or more of its broadcast time per week to that competitor.¹⁰⁰ An LNS arrangement does not provide to member stations anywhere close to 15 percent of the video content of an individual local news program, much less 15 percent of a participating station's full weekly broadcast time. Moreover, as described above, even the video content that an LNS team does provide is edited at the discretion of each station's news team and paired with audio containing unique reporting by that station's own staff. If a station's outright sale of up to 15 percent of its entire broadcast schedule to a market rival does not trigger attribution, the use of a few minutes of shared raw video footage each day quite clearly should not require attribution.

B. LNS Agreements Improve Local News Coverage by Enabling Competition to Promote Diversity and Localism

If anything, the FCC should acknowledge that innovative arrangements such as LNS agreements can be tremendously helpful in ensuring that consumers continue to have access to the best of local television journalism, despite the increasingly difficult economic conditions facing the industry. As historically has been the case in all types of journalism, it makes little sense for multiple television stations to send multiple video photographers to stand side-by-side all recording footage of the same static press conference, just as it makes little sense for multiple newspapers all to send photographers to take pictures of the State of the Union address. By eliminating duplication, each participating station can focus on covering a wider variety of stories of interest to its community.

In this regard, LNS agreements do not stand in the way of member stations fulfilling Commission goals, but rather serve to enhance diversity, localism and competition between

¹⁰⁰ See 47 C.F.R. § 73.3555(j)(2).

local news operations. With the flexibility allowed by LNS agreements, Fox stations and their competitors can expand and diversify local news coverage, sending more camera crews to more events than otherwise would be possible while preserving resources that can be used for investigative and enterprise news gathering. It is completely counterfactual to suggest that LNS arrangements reduce news coverage or diversity. Indeed, precisely as a result of LNS agreements, participating stations can actually engage in *more* specialized coverage of local news, differentiating themselves more clearly from other players in the market and competing on their unique strengths. Likewise, by sharing significant expenses such as helicopter rentals that increase the cost of obtaining footage of routine events, such as traffic on a major highway, local stations preserve resources that they can invest in newsgathering and investigatory journalism. Notably, of the 11 Fox-owned television stations that participate in an LNS agreement, eight have increased the total number of minutes of local news that they produce each week compared to the time period before entering into those agreements.

News directors at Fox-owned stations that participate in LNS agreements have been highly enthusiastic about the increased local news coverage enabled by these agreements. According to one assistant news director, LNS coverage allows Fox's stations to send crews to cover other stories on a daily basis. Over just a few days in February, assorted Fox news directors catalogued a variety of examples of how LNS crew coverage improves their ability to serve their communities:

- **Boston:** Fox's station was planning to cover the New England Patriots football team's return from its Super Bowl loss. When the local LNS managing editor advised Fox's station that an LNS crew would obtain footage of this event, Fox did not have to send a second camera crew to the stadium. By avoiding duplicative efforts, the station was able to cover an enterprise journalism story on roll-your-own (RYO) cigarette machines that have started popping up in gas stations throughout

Massachusetts. These RYO machines are intended to circumvent the state's cigarette tax law. Within 24 hours of Fox's airing of this story, the State Attorney General announced an investigation into whether these machines are legal under current law. Meanwhile, a state legislator contacted the station to say that he is considering drafting legislation that would close any loophole in the law.

- **Los Angeles:** On the day that the U.S. Court of Appeals for the Ninth Circuit announced its decision regarding California Proposition 8, Fox's station knew that it wanted to cover the story from all angles. Given that there were multiple press conferences from both sides of the contentious issue, absent an LNS crew, Fox would have had to spread its resources thin to cover multiple simultaneous events. Instead, through coordination with the local LNS team, Fox knew that it would obtain shared footage of one of the press conferences; it sent one of its crews to another. As a result, the Fox station had the opportunity to cover breaking news at the headquarters of the Los Angeles Unified School District regarding a teaching scandal. The station also was able to send a crew to an event where a local man was claiming that he was being subject to wrongful deportation.
- **Dallas:** When the local LNS crew obtained footage of an important vote regarding changes to local school districts, Fox's station was freed to send a separate crew to cover multiple breaking news and enterprise journalism stories, including a profile of a local couple who started a foundation after their young daughter died of cancer, as well as a fatal house fire during the station's 9 p.m. newscast. In another instance, raw footage received from the LNS crew assigned to a Dallas City Council meeting regarding neighborhood school issues sparked the idea for the Fox station's news team to pursue its own, more in-depth look at the issue, leading to the station producing a detailed story completely differentiated from the coverage on any other local station.
- **Philadelphia:** During Cardinal Bevilacqua's funeral in Center City Philadelphia, Fox's station relied on a live feed from an LNS crew for video footage. Because the service took place across two work shifts, utilizing the LNS team saved Fox from having to dedicate two separate video photographers to the event. Instead, Fox's station was able to send one of its reporters to the funeral while obtaining footage from the LNS photographers; meanwhile, it was able to send other crews out into the field to pursue other stories exclusive to Fox.

As these examples indicate, LNS agreements serve many purposes: i) freeing up reporters to cover new, important stories of local significance; ii) allowing stations to concentrate several crews on one story of particular importance without losing the ability to continue to cover other stories; and iii) serving as a jumping-off point for further reporting about subjects based

on initial information obtained via the LNS. All of those purposes in turn support the Commission's ultimate goal of ensuring better, more diverse local news coverage.

C. Regulating LNS Agreements Would Be an Inappropriate Departure From Commission Precedent, and Would Exceed the Commission's Statutory and Constitutional Authority

Broadcasters' decisions about how to acquire news footage – and more generally how to engage in newsgathering and the presentation of news – are matters that lie at the very heart of Constitutionally-protected editorial discretion. Any FCC effort to second-guess these choices would run afoul of both the First Amendment and the Commission's statutory mandate. As the FCC repeatedly has made clear:

Section 326 of the [Telecommunications] Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees. Because of this statutory prohibition, and because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, the Commission has very little authority to interfere with a licensee's selection and presentation of news and editorial programming. The Commission has long held that '[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter to the licensee's good faith discretion,' and that 'the Commission will not review the licensee's news judgments.'¹⁰¹

In fact, the Commission has refused to “substitute its judgment for that of the broadcaster in the selection and presentation of material for news programs . . . ,”¹⁰² barring “extrinsic evidence of any intentional incidents of news suppression or distortion.”¹⁰³ Even

¹⁰¹ *Letter to Chicago Media Action and Milwaukee Public Interest Media Coalition from Barbara Kreisman, Chief, Video Division, Media Bureau*, 22 FCC Rcd 10877, 10878 (2007) (quoting *In re American Broadcasting Companies, Inc.*, 83 FCC 2d 302, 305 (1980)) (footnotes omitted). *See also In re Liability of NPR Phoenix, LLC*, 13 FCC Rcd 14070, 14072 (1998); *Letter to Paul Klite et al from Barbara Kreisman, Chief, Video Division, Media Bureau*, 12 Comm. Reg. (P&F) 79, 82 (1998); *In re American Broadcasting Companies, Inc.*, 83 FCC 2d at 305.

¹⁰² *In re Liability of NPR Phoenix*, 13 FCC Rcd at 14072.

¹⁰³ *In re American Broadcasting Companies, Inc.*, 83 FCC 2d at 305 (footnote omitted).

those who favor the regulation of LNS deals have adduced no such evidence.¹⁰⁴ As a result, any Commission action regulating stations' use of LNS agreements as a means of choosing how and when to cover particular news stories would contravene prudential, statutory and Constitutional guidance.

Even beyond the fact that regulation of LNS agreements would constitute government interference in the core editorial decision-making of broadcasters, government intervention in this instance would impermissibly distinguish between speakers based on the content of their speech and result in disparate treatment of similarly-situated entities. The Commission, in other contexts, has *endorsed* arrangements in which broadcasters are expected to share resources related to newsgathering. As part of the Comcast-NBC Universal merger, in an effort to promote localism, the FCC ordered television stations owned by NBC to enter into a number of resource-sharing agreements with local non-profit news organizations that go well beyond the degree of sharing contemplated by any LNS agreement.¹⁰⁵ Not only are NBC stations required to share “news footage and other content resources,” they also are compelled to provide assistance in the form of “story development,” “technical facilities and personnel,” “promotional assistance,” and “cross-linking/embedding of websites.”¹⁰⁶

If the Commission believes that these types of arrangements are desirable as a tool for increasing the ability of one set of speakers to produce news, then LNS agreements, which clearly contemplate less overlap between participants, cannot be subjected to regulatory

¹⁰⁴ See *Notice*, at 78 (restating concerns of CWA and Free Press in regard to LNS agreements; presenting no argument that such agreements result in the suppression or distortion of news) (footnotes omitted).

¹⁰⁵ See *In re Applications of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, Appx. A at XI.5.b (2011) (“Comcast Order”).

¹⁰⁶ *Id.*

restrictions simply because a different set of speakers is attempting to do something similar. To hold otherwise would be to distinguish between speakers based on the Commission’s understanding of the desirability of their speech in a manner that is clearly anathema to the First Amendment.¹⁰⁷ It is well-settled that the “government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.”¹⁰⁸

V. CONCLUSION

In sum, Fox submits that the Commission should eliminate entirely the legacy structural ownership regulations that tie the hands of broadcasters. As demonstrated above, the media marketplace of 2012 has become so robustly competitive and so diverse – offering a staggering quantity of independent voices on subjects too numerous to count – that the broadcast ownership rules cannot possibly survive the scrutiny required by Section 202(h).

The Internet, in particular, has resulted in a complete transformation of the way that Americans consume and create content. Its competitive impact vitiates the assumptions and justifications underlying the Commission’s ownership rules. This quadrennial review presents the FCC with a fresh opportunity to take account of the transformed media marketplace. When it does so, Fox believes that the only rational conclusion is that the Commission should eliminate the media ownership rules once and for all.

¹⁰⁷ See *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (stating that the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others”).

¹⁰⁸ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam); *First Nat’l Bank of Boston. v. Bellotti*, 435 U.S. 765, 791 n.30 (1978).

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March 5, 2012

**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

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MB Docket No. 09-182
MB Docket No. 07-294

**REPLY COMMENTS OF FOX ENTERTAINMENT GROUP, INC.
AND FOX TELEVISION HOLDINGS, INC.**

Dated: April 17, 2012

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

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

**REPLY COMMENTS OF
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.**

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, “Fox”) respectfully submit their reply to the comments filed in response to the Notice of Proposed Rulemaking (the “*Notice*”),¹ released in December 2011, initiating a review of the Commission’s media ownership rules. The strong majority of the comments submitted in response to the *Notice* confirm that structural media ownership rules are an idea whose time has passed. Several commenters, however, persist in ignoring the deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996, which gives rise to this proceeding.² These commenters would have the Commission ignore its deregulatory obligation and instead pile onerous new media ownership restrictions atop the layers of antiquated regulation that already shackle broadcasting and, consequently, harm the public interest. Specifically, these advocates of ever-more government control ask that the Commission:

¹ See *In re 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*, Notice of Proposed Rulemaking, FCC 11-186, MB Docket No. 09-182 (rel. Dec. 22, 2011).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(h) (“1996 Act”).

(i) regulate the use of innocuous local news service (“LNS”) arrangements; (ii) allow this media ownership proceeding to be hijacked by a retransmission consent sideshow, despite the separate, still-pending proceeding initiated to provide a forum for addressing that issue; and (iii) stretch the application of the dual network rule beyond all reasonable limits. These positions simply are not supportable as a matter of law or policy.

I. INTRODUCTION AND SUMMARY

As Fox explained in its opening comments, the modern media landscape would be astonishingly foreign to the authors of the structural ownership regulations.³ The Internet, cable and satellite systems, and innumerable other technological innovations have rendered moot any policy justification that may once have existed for the current rules. In light of these transformative changes, the media ownership regulations reviewed in the *Notice* cannot be reconciled with the Constitution and with Fox’s First Amendment rights. Even putting aside the Constitutional infirmities, Section 202(h) of the 1996 Act also requires the FCC to determine whether any of its media ownership rules are “necessary in the public interest as the result of competition” and to repeal or modify those that are not.⁴ Given the ongoing transformation of the media ecosystem, most notably including the burgeoning power of the Internet, the Commission cannot retain these ownership rules consistent with Section 202(h).

Moreover, because the ownership regulations restrict traditional media from banding together to form combinations that would enhance the provision of entertainment and local news, retention of these rules would be profoundly harmful to the public interest. For all of

³ See *In re 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, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 7 (filed Mar. 5, 2012) (“Fox Comments”). For ease of reading, all further references to “[Party Name] Comments” refer to comments filed by the party of that name on that same day in this same docket.

⁴ 1996 Act, at § 202(h).

these Constitutional, statutory and policy reasons, Fox continues to believe that the Commission should dismantle the moribund structural ownership rules once and for all. And as the record now makes clear, Fox is hardly alone in pointing out that the time has come for the FCC to jettison these archaic and counterproductive regulations.⁵

Nevertheless, there remain some who mistakenly believe that ownership limits continue to have a role to play in the Internet age. For example, several commenters request that the Commission regulate an amorphous class of sharing arrangements defined to include everything from shared services agreements (“SSAs”) to joint sales agreements (“JSAs”) to LNS agreements. These parties generally fall into two groups: one that is concerned with sharing arrangements that purportedly allow broadcasters to consolidate their news operations (the “Advocacy Group Commenters”),⁶ and one that suggests that sharing agreements should be regulated because they somehow implicate retransmission consent negotiations with multichannel video programming distributors (the “MVPD Commenters”).⁷

Both groups simply lump LNS arrangements together with station sharing agreements, even though LNS deals contain none of the indicia of actual station-to-station collaboration present in sharing contracts. Indeed, LNS agreements do not involve any

⁵ See, e.g., A.H. Belo Corporation Comments, at 3-8; Belo Corp. Comments, at 3-9; CBS Corporation Comments, at 2-6 & 10-18; Cedar Rapids Television Company Comments, at 3-14; Cox Media Group Comments, at 8-19; Grant Group, Inc. Comments, at 3-7; Gray Television, Inc. Comments, at 6-8; Morris Communications Company, LLC Comments, at 4-8 & 11-13; National Association of Broadcasters Comments, at 11-29 & 39-49; Newspaper Association of America Comments, at 20-27; Nexstar Broadcasting, Inc. Comments, at 10-27; Sinclair Broadcast Group, Inc. Comments, at 4-12.

⁶ See Communications Workers of America, *et al.* (“CWA”) Comments, at 5-7; Free Press Comments, at 43-61; Office of Communications of United Church of Christ, Inc., *et al.* (“UCC”) Comments, at 1-23.

⁷ See American Cable Association (“ACA”) Comments, at 13-27; Independent Telephone & Telecommunications Alliance (“ITTA”) Comments, at 5-7; Mediacom Communications Corporation, *et al.* (“Mediacom”) Comments, at 11-12 & 16-17; Time Warner Cable, Inc. (“Time Warner Cable”) Comments, at 4-17.

consolidation at all between independent stations. An LNS agreement does not even result in shared news reporting or production, let alone any exchanges of advertising, financial or other business information. Thus, the Commission should not consider LNS agreements to be “sharing arrangements” at all and should dismiss any suggestion that LNS deals be regulated.

In addition, to the extent that the MVPD Commenters attempt more broadly to haul the contentious issue of retransmission consent negotiation into this media ownership proceeding,⁸ the FCC easily can dismiss their arguments as sleight-of-hand. A review of the media ownership rules pursuant to Section 202(h) quite clearly is not the appropriate venue for evaluating commenters’ assertions about retransmission consent. This is especially true given the existence of an ongoing proceeding devoted specifically to these very MVPDs’ concerns.⁹

Even if that parallel proceeding did not exist, the MVPD Commenters’ attempts to tie retransmission consent to the media ownership rules are wholly unpersuasive. As Fox previously has explained,¹⁰ the Commission has no statutory authority to interfere with a broadcast station’s decision to assign or delegate its retransmission consent rights, whether to another station or to its network partner. In particular, the FCC cannot “interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate

⁸ See ACA Comments, at 3-29; DIRECTV, LLC (“DIRECTV”) Comments, at 1-10; ITTA Comments, at 5-12; Mediacom Comments, at 3-22; Time Warner Cable Comments, at 7-17 & 20-21.

⁹ See *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, Public Notice, MB Docket No. 10-71, 25 FCC Rcd 2731 (2010) (“*Retransmission Consent Proceeding*”).

¹⁰ See generally *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (filed June 27, 2011) (“*Fox Retransmission Reply Comments*”).

agreements”¹¹ This policy helps to ensure an effective network-affiliate partnership, which in turn promotes development and investment in over-the-air television programming.

Finally, a handful of parties suggest that the dual network rule should be applied to prohibit commonly-owned broadcast stations from affiliating with two major networks in a market, and to prevent any network affiliate from affiliating with a second network on a multicast subchannel.¹² These proposals find no support in the plain text of the dual network rule and, equally important, are wholly disconnected from the stated purpose of the rule. The dual network rule was promulgated to protect affiliates, not to promote the economic self-interest of MVPDs. If the rule is retained at all, the FCC should not permit it to be twisted to serve some new purpose utterly unrelated to its origins.

Put simply, none of these proposed modifications and additions to the media ownership rules can bear the weight of careful scrutiny. In light of the deregulatory mandate of Section 202(h), these schemes are especially inapt. Accordingly, Fox respectfully submits that the Commission is obligated to reject these proposed alterations to the rules. Instead, as Fox and numerous others have made clear, the FCC should focus its efforts on repealing the media ownership regulations in their entirety.

¹¹ *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10354 (2005) (“*Reciprocal Bargaining Order*”).

¹² *See* Time Warner Cable Comments, at 21; ITTA Comments, at 8.

II. LOCAL NEWS SERVICE ARRANGEMENTS BEAR NONE OF THE HALLMARKS OF ATTRIBUTION THAT SOME COMMENTERS WOULD ASSOCIATE WITH SHARING AGREEMENTS

A. The Advocacy Group Commenters Fail To Distinguish Between LNS Arrangements and Sharing Agreements

The Advocacy Group Commenters premise their arguments on the notion that the provision of local news has been harmed by some nebulous collection of station cooperation arrangements. Free Press, for example, says that “news and resource sharing agreements” are a “covert and insidious form of consolidation” that creates “a TV dial where most of the news is essentially a duplicate of what is aired on another local broadcast channel.”¹³ The Office of Communication of the United Church of Christ, et al. (“UCC”) states that sharing agreements “reduce competition, result in duplicative local news programming, and diminish opportunities for minorities and women”¹⁴ These groups assert that sharing agreements allow one station in a market to affect the programming decisions of other stations.¹⁵ They claim that these concerns justify the Commission’s application of its broadcast attribution rules to these types of arrangements.¹⁶

LNS arrangements, though, are merely an innocuous attempt to bring the traditional media pool forward into the modern era. In conflating a wide array of sharing agreements with LNS arrangements, these groups are committing a classic category error – linking together subjects as if they belonged with one another. Free Press says that the agreements

¹³ Free Press Comments, at 49.

¹⁴ UCC Comments, at 2.

¹⁵ See UCC Comments, at 15. See also Free Press Comments, at 59 (stating that such agreements create an entity that “walks like a duopoly and talks like a duopoly”).

¹⁶ See Free Press Comments, at 58-61; UCC Comments, at 15-23.

that concern it are “shared services agreements” and an undefined set of “other sharing arrangements.”¹⁷ UCC, meanwhile, defines “sharing arrangements” to include a grab bag of broadcast station collaborative activities, among them SSAs, JSAs, local marketing agreements and LNS agreements.¹⁸ Each group then argues that its preferred assortment of arbitrarily defined “sharing arrangements” possesses nefarious qualities.¹⁹

When it comes to pinning any harms directly on LNS agreements, however, these advocates become more circumspect. UCC musters only a lukewarm citation to the Commission’s report on the information needs of communities, weakly protesting that “enhanced service to local communities is not always the result [of an LNS agreement].”²⁰ Free Press does not even go that far, mentioning the words “local news service” or “LNS” only once in its comments, and then only in quoting UCC’s proposed new attribution regime.²¹ In other words, these commenters link LNS agreements to precisely zero negative consequences and demonstrate no way in which LNS agreements confer upon one station influence or control over any other. Notwithstanding this absence of evidence, Free Press and UCC ask the FCC to regulate a station’s participation in an LNS agreement simply

¹⁷ Free Press Comments, at 49.

¹⁸ See UCC Comments, at 1 n.2.

¹⁹ See Free Press Comments, at 50-52 (arguing that a sharing arrangement has caused one station to produce local newscasts for several others in the same market); UCC Comments, at 12 (arguing that a sharing arrangement has caused another station to outsource its local news coverage to a team in an entirely different metro area).

²⁰ See UCC Comments, at 9 (citing STEVEN WALDMAN AND THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE, at 97-98 (2011)).

²¹ See Free Press Comments, at 60.

because these advocates have arbitrarily chosen to place LNS agreements within the category of “sharing arrangements.”²²

Whether motivated by an affirmative desire to portray all cooperation as problematic or driven by a set of overbroad assumptions, the Advocacy Group Commenters’ decision to paint all broadcast collaboration with a single broad brush reflects a fundamental misunderstanding of LNS agreements. As Fox explained in its initial comments, LNS agreements are merely the equivalent of a traditional media pool operated on a standing basis. Each member station contributes personnel to an LNS team, which obtains raw video footage from events of collective interest, leaving each individual station to fashion its news coverage while conserving resources to enable pursuit of additional stories. The end-product of an LNS agreement is video footage from the LNS team. The ultimate decision as to how or even whether to use that footage belongs to each station alone. LNS agreements do not permit any participant to exercise any editorial discretion or control whatsoever over the newscast of any other station.

At the same time, LNS agreements actively provide important benefits to diversity and localism. By sending a single video photographer to common events, instead of sending three, four or more to the same event, each station can expand the number of stories that it is capable of covering in its local market. Likewise, an LNS agreement enables local stations to preserve resources that they can invest in newsgathering and investigatory journalism. This ultimately expands both the aggregate amount of unique news and the overall diversity of coverage within a market.

²² See UCC Comments at 19-20, Free Press Comments at 60.

B. The MVPD Commenters Do Not and Cannot Demonstrate Any Relationship Between Retransmission Consent and LNS Agreements

The MVPD Commenters suggest that sharing deals should be regulated not because of any inherent problems associated with those agreements, but because they purportedly indicate that the participants will conspire together in retransmission consent negotiations. The American Cable Association (“ACA”), for instance, states broadly that sharing agreements should result in attribution because of “[t]he competitive harm to competition and the degree of influence over another station conveyed by sharing agreements that facilitate the coordination of retransmission consent”²³ The Independent Telephone & Telecommunications Alliance (“ITTA”) argues that “[i]t is becoming increasingly common for broadcasters to rely on [sharing] arrangements, either formally or informally, for purposes of allowing multiple competing broadcast stations in a single market to collude in the negotiation of retransmission consent”²⁴ Time Warner Cable goes as far as to suggest that the Commission “adopt rules that pertain to *all* sharing agreements, regardless of label, that facilitate coordinated conduct among broadcasters”²⁵

As a threshold matter, it is quite clear that LNS agreements have nothing to do with stations’ external business dealings. As noted above, they are exclusively the province of broadcasters’ news departments, which work together on a limited basis to avoid wasteful and duplicative use of news resources. That at least some types of sharing agreements are innocuous is conceded by at least one MVPD commenter: “ACA recognizes that some forms of operational sharing agreements among separately owned stations may create efficiencies

²³ ACA Comments, at ii-iii.

²⁴ ITTA Comments, at 5.

²⁵ Time Warner Cable Comments, at 16.

that benefit both licensees and the viewing public.”²⁶ LNS agreements are precisely that – contracts that address internal efficiencies, not external business dealings – and as such do not belong within any category of “sharing arrangements” that concerns the MVPD Commenters.

To the extent that the MVPD Commenters suggest that LNS agreements should be regulated because they somehow signal intent by one participant to cede control to another in some *future* action or negotiation, the Commission can and should easily dispatch that argument. Even if the underlying fear were valid, and it is not, there is an inherent and obvious causal flaw in any proposal that would have the Commission ban the use of canaries in order to prevent mine explosions.

The bottom line is that no commenter has provided the Commission any basis to regulate LNS agreements. If the FCC says anything at all about LNS agreements in this proceeding, it should explicitly recognize that these pool arrangements support the Commission’s ultimate goal of ensuring better, more diverse local news coverage.

III. MVPD ARGUMENTS CONCERNING RETRANSMISSION CONSENT ARE FUNDAMENTALLY FLAWED AND BEYOND THE SCOPE OF THIS PROCEEDING

A. Requests for the Commission to Encumber Retransmission Consent Negotiations Are Unsupported By Commission Precedent, Illogical, and Regardless Should Be Raised in the Retransmission Consent Docket

Separate and apart from their groundless attacks on LNS agreements, the MVPD Commenters attempt at several points to draw a broader connection between the media ownership proceeding initiated in the *Notice* and questions about retransmission consent

²⁶ ACA Comments, at 22-23.

negotiations. Although the MVPDs employ various tenuous theories in an attempt to connect distant dots,²⁷ none of their arguments is new and none warrants analysis in this proceeding.²⁸

The MVPD Commenters begin inauspiciously by failing even to address the Commission's long-standing position that there is nothing wrong with broadcasters bargaining away some or all of their retransmission consent rights. While Congress initially may have given the retransmission consent right to "stations," Congress intended that the right "may be freely bargained away in future programming contracts,"²⁹ or for that matter assigned however a broadcaster sees fit.³⁰ Moreover, the Commission already has made clear that it will not "interject" itself into specific arguments concerning private agreements between broadcast stations and networks.³¹

Nevertheless, the MVPD Commenters press on, claiming that regulatory expansion is warranted "by recent developments in broadcast television markets, including the increasing importance industry-wide of retransmission consent fees as a source of revenue to local

²⁷ See ACA Comments, at 26-27; Mediacom Comments, at iv (suggesting that news sharing arrangements may indicate an abdication of control over a participating station's financial decision-making); ITTA Comments, at 3 (suggesting that news sharing arrangements amount to a non-compete agreement); Time Warner Cable Comments, at 17-21 (suggesting that dual affiliation is used as a ploy to gain an advantage in retransmission consent negotiations).

²⁸ One MVPD Commenter is bold enough to openly admit that all of its arguments retrace well-worn ground. See DIRECTV Comments, at 9 ("None of this is new.").

²⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6746 (1994) (the "Retransmission MO&O") (footnote omitted).

³⁰ See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005 (1993) ("We interpret Section 325 as meaning that the new right [to retransmission consent] may be bargained away by broadcasters in future contracts and conceivably could have been bargained away in some existing contracts").

³¹ See *In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13977, 13981 (2004).

television stations.”³² Of course, it is precisely because retransmission consent revenues are so important to local broadcasters that it would be folly for the Commission to interfere in a manner that inhibits flexibility in bargaining. If the FCC were to intercede, it would limit broadcasters’ ability to negotiate for this increasingly important second revenue stream, which is crucial to the future of over-the-air television.

Regardless, the Commission has heard all of the MVPD Commenters’ arguments before. The FCC established a proceeding in 2011 to give MVPDs an opportunity to make their case for increased regulatory oversight of retransmission consent.³³ As Section 325 of the Communications Act makes clear, the FCC has no authority to interfere in retransmission consent negotiations, the terms of which Congress intended be governed by the marketplace – not regulation.³⁴ Thus, there is no merit to the MVPDs’ arguments and no reason for any FCC action. Nevertheless, that proceeding remains pending and it remains the appropriate venue should anyone wish to extend this tiresome debate.

B. The Network Role in Retransmission Consent Is Fully Consistent With the Free Market Principles of the Communications Act and the Public Interest

Because some of the MVPD Commenters repeat here discredited allegations about network participation in retransmission consent negotiations,³⁵ Fox wishes to briefly reiterate

³² ACA Comments, at i. *See also* DIRECTV Comments, at 2 (“Retransmission consent fees have become an increasingly important component of [local stations’] finances.”); Mediacom Comments, at 7-8 (suggesting that the Commission should step in because retransmission consent revenues are “skyrocketing”).

³³ *See generally* *Retransmission Consent Proceeding*.

³⁴ *See Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., at 4-7 (filed May 27, 2011).

³⁵ *See* ITTA Comments, at 11; DIRECTV Comments, at 6-9.

the points that it has made in previous filings with the Commission on this subject.³⁶ First, the Commission has stated that Congress granted broadcast stations a freely alienable retransmission consent right. Affiliates are thus well within their rights to engage in retransmission consent negotiations however they choose. Second, when networks seek to play a limited role in retransmission consent, they advance legitimate public interest goals by working to cultivate a second revenue stream to supplement cyclical advertising in support of over-the-air television. Third, there is no basis for the claim that a network role in retransmission consent implicates an affiliate's control of its license under Section 310(d) of the Communications Act.³⁷

As the record in the retransmission consent proceeding makes abundantly clear, the Commission long has acknowledged that Congress granted stations a right that “may be freely bargained away in future programming contracts.”³⁸ As the Commission also consistently has recognized, Congress did not intend for the retransmission consent regime “to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate’s right to redistribute affiliated programming.”³⁹ Network-affiliate agreements are the products of fair bargaining between two independent parties, who are free to accept or reject proposed deal terms and who enter a contract only when there is mutual agreement.

³⁶ See, e.g., Fox Retransmission Reply Comments, at 2-10.

³⁷ See 47 U.S.C. § 310(d) (requiring a Commission finding that any transfer of control over a station license serves the “public interest, convenience, and necessity”).

³⁸ *Retransmission MO&O*, 9 FCC Rcd at 6746 (footnote omitted).

³⁹ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354. See also *Retransmission MO&O*, 9 FCC Rcd at 6746 (citing S. Rep. No. 102-92, at 36 (1991) (“It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations”)).

Moreover, when networks play a role in retransmission consent they advance the public interest by helping to ensure that all of the players in the broadcast television ecosystem develop sufficient revenues to support over-the-air television. By assisting affiliate stations in obtaining fair compensation for MVPD subscribers' access to broadcast programming, networks ensure that broadcasters retain the ability to invest in the production and acquisition of the most popular news, sports and entertainment content on television. If the Commission were to interfere in this dynamic, it would put over-the-air viewers' access to compelling content at risk, as high-cost programming increasingly would migrate to pay-only outlets. Likewise, affiliates would struggle in bargaining for revenues that are increasingly critical to support production of local news and public interest programming. In any event, despite their protestations, advocates for retransmission consent reform continue to fail to produce a single example of a network ever serving as an impediment to an affiliate's successful negotiation of a retransmission consent agreement.

Finally, there is nothing about the network role in retransmission consent that raises any concern under Section 310(d) of the Act. As Fox previously has explained, in examining control of a broadcast license, the Commission looks to three main areas – programming, personnel and finances – and asks whether an entity has obtained the power to dominate the management or the corporate affairs of the licensee, or the right to determine the manner or means of operating the licensee or the policies that the licensee will pursue.⁴⁰ The MVPD Commenters go through the motions of suggesting that a network right to approve an affiliate's retransmission consent deal might permit the network to influence that station's programming or personnel, but the assertions lack both conviction and merit. At best, the

⁴⁰ See *WHDH, Inc.*, 17 FCC 2d 856, 861 (1969) (*aff'd sub nom Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (*cert. denied*, 403 U.S. 923 (1971))).

MVPD Commenters posit that a network might condition approval on “hiring employees preferred by the network.”⁴¹ This rank speculation – again, unsupported by a single concrete example of a network ever making such a demand – cannot possibly serve as a plausible basis for Commission action.⁴²

Even with respect to finances, the MVPD Commenters offer no rational justification for the FCC to abandon its long-held position that the Act permits the free alienability of retransmission consent rights. Historically, in reviewing financial issues under Section 310(d), the Commission has examined a licensee’s discretion to pay station bills, hire or fire personnel, or upgrade or repair a station’s facilities;⁴³ its right to receive advertising and other revenues;⁴⁴ and its ability to maintain independent financial accounts and take responsibility for independent obligations.⁴⁵ Neither a network’s ability to approve a retransmission consent agreement nor its participation as a bargaining agent has anything to do with these core economic rights.

A few MVPD Commenters shed some crocodile tears on behalf of local broadcasters, suggesting that a network role in transmission consent negotiations could “increase[] the risk

⁴¹ DIRECTV Comments, at 8.

⁴² Likewise, with respect to control over programming, the FCC looks to ensure that a licensee has the ability to air issues of importance to its station’s local community; broadcast educational and informational programming for children; reject or refuse portions of programming that the licensee believes to be contrary to the public interest; and interrupt any other programming for that which, in the licensee’s determination, is of greater local or national public importance. *See In re Paramount Stations Group of Kerrville, Inc.*, 12 FCC Rcd 6135, 6145 (1997). Network participation in retransmission consent fails to touch on any of these key issues.

⁴³ *See, e.g., In re Application of Radio Management Services, Receiver, and Clear Channel Commc’ns, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2959, 2964 (1992).

⁴⁴ *See In re Shareholders of the Ackerley Group Inc. and Clear Channel Commc’ns, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002).

⁴⁵ *See In re WGPR, Inc. and CBS, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8145 (1995), vacated on other grounds by *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

of impasse” or result in local broadcasters receiving a smaller share of retransmission consent fees.⁴⁶ They argue that “[s]uch network involvement in affiliates’ retransmission consent decisions conveys significant rights that touch on core licensee functions,”⁴⁷ and should therefore constitute a “*de facto* transfer of control.”⁴⁸ This is simply illogical.

MVPDs themselves sit opposite local stations in negotiations for the increasingly-important retransmission consent revenue stream. In this role, they have at least as much, if not more, impact as a network on local stations’ finances and revenues. If an affiliate were deemed to cede “control” over its core functions to a network solely by virtue of the network playing a role in retransmission consent, then just as surely each and every MVPD that negotiates for retransmission consent would have to be deemed to exercise the same “control” over affiliates’ finances (as would other program suppliers and even advertisers). Of course, neither networks nor MVPDs exercise “control” over licensees’ core functions as contemplated by Section 310(d) of the Act.

The MVPD Commenters have offered no substantive reason to bog down the media ownership proceedings with their well-worn complaints about broadcasters’ lawful exercise of their retransmission consent rights.

IV. MULTICASTING DOES NOT IMPLICATE THE DUAL NETWORK RULE

The dual network rule, which prohibits stations from affiliating with entities that own more than one of the Big Four networks,⁴⁹ is a sterling example of a rule that makes little sense in the modern media environment. When hundreds of channels and millions of

⁴⁶ Time Warner Cable Comments, at 17. *See also* DIRECTV Comments, at 6-9.

⁴⁷ DIRECTV Comments, at 6.

⁴⁸ Time Warner Cable Comments, at 17.

⁴⁹ *See* 47 C.F.R. § 73.658(g). The Big Four networks include ABC, CBS, FOX and NBC.

Internet properties compete for the right to provide users news and entertainment,⁵⁰ a merger between any two media outlets, even two networks, would not and could not have a harmful impact on localism, diversity, or, absent a violation of the antitrust laws, competition. The only two comments filed in this proceeding that even attempt to support the dual network rule as it currently stands provide no evidence for their contention that it remains necessary in the public interest as the result of competition.⁵¹ Fox maintains that the dual network rule, like the rest of the media ownership rules, is unnecessary and counterproductive and should be eliminated.⁵²

By its plain text, the dual network rule is about the affiliation of a “television broadcast station[.]” with a single “entity that maintains two or more networks.”⁵³ Two additional commenters, Time Warner Cable and ITTA, attempt to drag the rule in an entirely different direction. They do not argue that it is appropriate in its current incarnation, but rather inexplicably suggest that it should be applied any time one station affiliates with two of the Big Four networks, even when (as now) the networks are not commonly owned. Time Warner Cable and ITTA thus assert that a station that affiliates with two independently-owned networks somehow violates the “spirit” of a rule aimed entirely at preventing

⁵⁰ See Fox Comments, at 7-12.

⁵¹ See Comments of ABC Television Affiliates Association, CBS Television Affiliates Association, and NBC Television Affiliates, at 2 (asserting that “the dual network rule continues to serve as an important reinforcing mechanism for maintaining a proper balance in the network-affiliate relationship,” but providing no support for this contention); Comments of Writers Guild of America, West, at 6-7 (expressing commenters’ “belie[f that] the industry at present is already too consolidated and eliminating this essential rule would be detrimental to competition”).

⁵² See Fox Comments, at 2-7.

⁵³ 47 C.F.R. § 73.658(g).

common ownership of networks.⁵⁴ As a result, they say, the Commission should apply the dual network rule to target stations that affiliate with more than one network, whether by multicasting programming from a second network alongside their primary signal, or by affiliating with more than one Big Four network via two commonly-owned stations in a market.⁵⁵ Even if the Commission ignores the evidence commanding it to eliminate the dual network rule, this perplexing proposed expansion of the rule to a different set of parties for an unrelated purpose should be summarily dismissed as irrational.

The Commission has explained that the concern underlying the dual network rule was that “permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations.”⁵⁶ The rule, the FCC said, “may be viewed as an anti-merger rule that constrains the current organization of the network broadcasting industry.”⁵⁷ According to the Commission, this helps new networks find affiliates,⁵⁸ serves diversity and competition,⁵⁹ and protects affiliates by maintaining an appropriate balance of power between those affiliates and incumbent networks.⁶⁰

⁵⁴ See Time Warner Cable Comments, at 21 (“The Commission also should take steps to ensure that broadcasters cannot evade the purpose of the Commission’s dual network rule by affiliating with two or more of the Big Four networks.”); ITTA Comments, at 8 (“ITTA . . . urges the Commission to ensure that broadcasters cannot evade the purpose of the dual network rule by affiliating with two or more Big Four networks in a single market.”).

⁵⁵ See Time Warner Cable Comments, at 21; ITTA Comments, at 8.

⁵⁶ *In re Amendment of Section 73.658(g) of Commission’s Rules-The Dual Network Rule*, Notice of Proposed Rulemaking, 15 FCC Rcd 11253, 11254 (2000).

⁵⁷ *Id.* at 11255.

⁵⁸ See *id.* at 11254 (“The dual network prohibition, therefore, was intended to remove barriers that would inhibit the development of new networks, as well to serve the Commission’s more general diversity and competition goals.”).

⁵⁹ See *id.*

⁶⁰ See Notice, at 51 (citing *In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the*

Time Warner Cable and ITTA say nothing about the text of the rule and do not even attempt to address its underlying purposes. Instead, they apparently want the Commission to stretch the dual network so far beyond its boundaries that it would essentially become a brand new media ownership regulation. Whereas the existing rule is at least nominally aimed at *protecting* affiliates, Time Warner Cable and ITTA would have the Commission enforce a new rule that actually *restrains* affiliates. Likewise, whereas the existing rule is intended to prevent network consolidation, this ersatz new regulation instead would affect affiliates without any regard whatsoever for the ownership of the networks.

In fact, the Time Warner Cable/ITTA proposals would in no way serve the policies underlying the existing dual network rule. When a multicast affiliation agreement is concluded, the same number of stations remains in the market, owned by the same number of entities. When a single owner is lawfully the licensee of two stations in a market, each station's affiliation with a Big Four Network also leaves the same number of stations and owners in the market. Moreover, in either case, the same number of networks (and network owners) exists both before and after the signing of the agreement. Not only are the Time Warner Cable/ITTA proposals disconnected from the existing dual network rule, they also would reduce the bargaining power of local stations, thereby enriching MVPDs at the expense of broadcasters, networks and the programming that they provide. Stations that have the opportunity to affiliate with multiple networks at least have a chance to level the playing field with often-dominant MVPDs when it comes to retransmission consent bargaining.⁶¹

Telecommunications Act of 1996, Report and Order, 18 FCC Red 13620, 13855 (2003)) (concluding that mergers of the top four networks “would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates’ influence on network programming, and thus harming the ability of the affiliates to serve their communities”).

⁶¹ To the extent that there are any residual concerns with multiple affiliations unduly impacting competition, the antitrust laws are perfectly adequate to address the issue.

The Time Warner Cable/ITTA proposals not only would fail to serve the purposes of the dual network rule, they also would severely complicate FCC plans for an incentive auction of television broadcast spectrum. Later this month, the Commission plans to “consider a Report and Order establishing a regulatory framework for channel sharing among television licensees in connection with an incentive auction of spectrum.”⁶² To the extent that Time Warner Cable and ITTA would have the FCC interpret the dual network rule to prevent a single channel from affiliating with multiple networks, it could create a serious disincentive for any network affiliate to consider the voluntary relinquishment of its existing broadcast spectrum.

V. CONCLUSION

In sum, Fox maintains that the Commission should eliminate entirely the legacy structural ownership regulations that tie the hands of broadcasters. For the many reasons laid out in Fox’s opening comments, it is long past time to remove these rules, which serve not as a spur but as an impediment to competition, localism and diversity. If the Commission nonetheless believes that it should extend the lifespan of the existing regulations, it at least should avoid stacking burdensome new requirements on top of the already shaky foundation of ownership restrictions.

In particular, the Commission should ensure that LNS arrangements are properly distinguished from any sharing agreements that may be attributable under the Commission’s rules. The FCC also should avoid becoming bogged down here in discussions about retransmission consent, especially because there exists a stand-alone proceeding addressing that issue. Finally, the Commission should quash any proposal to expand the scope of the

⁶² Press Release, FCC News, FCC Announces Tentative Agenda for April Open Meeting (Apr. 6, 2012), <http://www.fcc.gov/document/fcc-announces-tentative-agenda-april-open-meeting>

dual network rule. Fox urges the Commission to recognize the new media environment for the vibrant competitive landscape that it is, and to allow networks and their affiliates the flexibility to continue to provide the best possible over-the-air programming to American consumers.

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