

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

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review –	)	MB Docket No. 14-50
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
2010 Quadrennial Regulatory Review –	)	MB Docket No. 09-182
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	
	)	
Rules and Policies Concerning	)	MB Docket No. 04-256
Attribution of Joint Sales Agreements	)	
In Local Television Markets	)	

**COMMENTS**



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## I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”) files these comments in response to the Further Notice of Proposed Rulemaking in the above-referenced dockets.<sup>1</sup> ACA addresses two issues related to the evasion of the Commission’s local television ownership limits that must be addressed: (i) affiliation swaps leading to common ownership by a single entity of two top four rated (“Top Four”) stations in a local television market; and (ii) dual affiliations by a single station in a market under multicast arrangements with the “Big Four” television networks (ABC, CBS, Fox and NBC).<sup>2</sup>

ACA has long supported the Commission’s efforts to promote competition in local broadcast television markets through its media ownership rules because its member companies and their customers have experienced first-hand the harmful effects when local broadcasters in the same market combine their operations. Broadcasters who have simultaneously negotiated retransmission consent on behalf of two Big Four networks affiliates in the same market have been able to extract supra-competitive retransmission consent fees from ACA members, and their customers have paid the price as these higher fees were passed through. In comments filed in 2010, ACA noted this can occur either through joint control, where one Big Four station negotiates on behalf of a separately owned Big Four station in the same market, or through joint ownership,<sup>3</sup> where a single entity owns two broadcast television stations – whether full- or low-power – in the same designated market area (“DMA”) that are affiliated with two different Big

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<sup>1</sup> *In the Matter of 2014 Quadrennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Further Notice of Proposed Rulemaking, MB Docket No. 14-50, MB Docket No. 09-182, MB Docket No. 07-294, MB Docket No. 04-256 (rel. Apr. 15, 2014) (“FNPRM”).

<sup>2</sup> See 47 C.F.R. § 73.3613(a)(1) (defining broadcast networks as of Feb. 8, 1996).

<sup>3</sup> *In the Matter of Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association, at 9-13 (filed May 18, 2010) (“ACA 2010 Petition for Rulemaking Comments”).

Four networks or a station owner broadcasts one Big Four network on its primary video stream and another Big Four network on its multicast stream (i.e., a multicast duopoly).<sup>4</sup>

In the years subsequent, ACA and the Commission have focused on addressing one part of the competitive concerns ACA initially raised in 2010: joint control of key station functions by separately owned stations. ACA focused on the competitive harm of separately owned, same market broadcasters coordinating their retransmission consent negotiations, and other parties focused on limiting the use of television Joint Sales Agreements (“JSAs”) where broadcasters in the same market jointly sell advertising. As the Commission’s authority to address the harms of coordinated negotiations of retransmission consent under both its media ownership rules and in its retransmission consent good faith negotiation rules was clear, the matter was fully discussed in both the 2010 Quadrennial Regulatory Review and the Retransmission Consent Reform Rulemaking.

ACA again applauds the Commission for promoting competition in local broadcast television markets by taking highly significant steps to curb broadcaster market abuses earlier this year. In the Report and Order in this proceeding, the Commission adopted new attribution standards for television JSAs based on its finding that agreements that cover more than 15 percent of the weekly advertising time for the brokered station convey sufficient influence to the brokering station to be akin to ownership.<sup>5</sup> While the Commission could have addressed ACA’s concerns regarding joint control of Big Four network retransmission consent negotiations in the Report and Order in the same way it addressed joint advertising sales, it elected instead to deal with coordination of retransmission consent negotiations under its good faith negotiation rules. The Commission accordingly prohibited, as a *per se* violation of the obligation to negotiate

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<sup>4</sup> *Id.* at 10.

<sup>5</sup> *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order, and Further Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 14-29 (rel. Mar. 31, 2014) (“Joint Negotiation Order”)

retransmission consent in good faith, the practice of separately owned, Top Four stations in a single DMA jointly negotiating retransmission consent with an MVPD.<sup>6</sup> In most cases, the top four-rated station in a DMA is affiliated with one of the Big Four television networks.<sup>7</sup> The Commission accepted ACA's evidence, and recognized that separately-owned Top Four stations in a single DMA obtained undue leverage by negotiating together as if commonly owned, eliminating price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues.<sup>8</sup>

Although the broadcast ownership rules prohibit duopoly ownership of two Top Four stations in a single DMA, and the Commission has now prohibited the coordination of retransmission consent by separately owned, same market Top Four broadcasters, ACA remains concerned, as it was in 2010, that station owners can effectively cause the same harms that these prohibitions are meant to prevent through other means, and can do so outside both the Commission's media ownership review processes and the scope of the prohibition on commonly-owned Top Four stations jointly negotiating retransmission consent. Affiliation swaps and dual affiliations result in the identical harm: in each case, regardless of the process by which it obtained its common control, a single owner controls two Top Four stations in the same market (even if one is a multicast stream rather than an FCC licensed "station"), and may negotiate retransmission consent for two Big Four stations at the same time, to the detriment of competition and consumer welfare.

While the harm to MVPDs is identical, there is no effective redress under the new prohibition on joint negotiations because that rule targets only non-commonly owned Top Four

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<sup>6</sup> Joint Negotiation Order, ¶ 6.

<sup>7</sup> See FNPRM, ¶ 47.

<sup>8</sup> *Id.*, ¶ 10 (the Commission found that the economic theory that joint negotiation leads to increases in retransmission consent fees supporting its action would cover all television stations negotiating jointly, but limited its ruling to Top Four stations because the empirical data amassed in the record supporting the theory centered largely around evidence regarding the impact of joint negotiation by Top Four stations).

affiliated stations, whereas affiliation swaps result in two Top Four stations under common ownership in a local market, and these stations most often will be affiliates of the Big Four television networks. ACA submits that the most efficient means and appropriate place for addressing the problem of a single broadcaster commonly owning two Top Four stations in a market through either an affiliation swap or the creation of a multicast Top Four duopoly, is by tightening the Commission's local television rules to prevent this type of consolidation from happening in the first place. Such action would be fully consistent with the Commission's policy goals of promoting and protecting competition in local broadcast television markets.

Accordingly, in this quadrennial media ownership review it is appropriate for the Commission to prohibit the practice of "affiliation swaps" that result in an entity holding an attributable interest in two Top Four stations in a local television market outside the Commission's purview. Similarly, the Commission must limit the ability of stations to utilize their multicast capacity to form dual affiliations with top-four broadcast networks in certain markets. Absent Commission action, broadcasters will increasingly use each of these mechanisms to consolidate their already substantial market power in local television markets, subverting the intent of the Commission's local television ownership limits without Commission review or oversight, to the detriment of local television competition and the viewing public.

## **II. THE LOCAL TELEVISION OWNERSHIP RULES CONTINUE TO SERVE THE PUBLIC INTEREST AND SHOULD BE BUTTRESSED BY ACTION CLOSING THE "AFFILIATION SWAP" LOOPHOLE IN THE OPERATION OF THE DUOPOLY RULE**

Under the duopoly rule, one party may "own . . . two television stations licensed in the same Designated Market Area (DMA) . . . only [if] *at the time of the application* to acquire . . . the station, at least one of the stations is not ranked among the top four stations in the DMA. . . ."<sup>9</sup> This is commonly referred to as the "top four" prohibition. However, unless a transaction involves the transfer of a license, as opposed to the swap of a contractual right of affiliation with

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<sup>9</sup> 47 C.F.R. § 73.3555(b)(1).

another station, the parties are not required to obtain Commission approval of the arrangement. As the FNPRM observes, Big Four networks are the highest-rated networks nationally, these rankings are reflected in local markets, and an affiliation swap involving a Top Four station and a non-top-four station “will nearly always result in the non-top-four station becoming a top-four station after the swap.”<sup>10</sup> Consequently, a station owner owning one Top Four station and one non-top-four rated station can create an otherwise prohibited duopoly by swapping the affiliation of its previously non-top-four rated station for a Top Four network affiliation, and instantly turn this second station into a Top Four station in the market without opportunity for Commission review.<sup>11</sup> The Commission has consistently re-affirmed the need to prohibit duopoly ownership of two Top Four stations in a local market, and to ensure that its rules achieve their desired ends, must put an end to stations engaging in affiliation swaps to make an end-run around this important safeguard.

**A. The Commission Should Retain its Local Television Ownership Limits Including the Top Four Prohibition.**

The NPRM proposes to retain the local television ownership rule with limited modifications, including the current numerical limits and the prohibition on mergers between two

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<sup>10</sup> FNPRM, ¶ 47. However, ACA notes that Univision, a non-Big Four network, recently garnered top ratings for its programming. See Dominic Patten, *RATINGS RAT RACE: Univision Wins Primetime Demo, ‘Hell’s Kitchen’ Rises, ‘Big Brother’ Even, ‘Black Box’ Down*, DEADLINE HOLLYWOOD (Jul. 18, 2014), available at <http://www.deadline.com/2014/07/univision-tops-ratings-hells-kitchen-big-brother-gang-related-welcome-to-sweden/>.

<sup>11</sup> The Top Four prohibition is designed to be non-static in operation in recognition of the fact that stations can shift their relative ranks in a market through improved programming offerings and better customer service. See generally *In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, ¶¶ 65-66 (1999) (“1999 TV Duopoly Order”). The Media Bureau recently dealt with such a situation, and found itself essentially powerless to take action against Raycom’s creation of an otherwise prohibited duopoly in Honolulu, Hawai’i. See FNPRM, ¶¶ 47, 48; See also *In the Matter of KHNL(TV) and GMB(TV), Honolulu, Hawaii and HITV License Subsidiary, LLC; Licensee of Stations KHNL(TV) and GMB(TV), Honolulu, Hawaii and HITV License Subsidiary, Inc.; Licensee of Station KFVE(TV), Honolulu, Hawaii*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087, ¶ 23 (Media Bureau, 2011) (finding that application of the top-four prohibition in the case of affiliation swaps where no application is required is unclear; agreeing with the petitioner that the “net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is clearly at odds with the purpose and intent of the duopoly rule” and should therefore be included in the Commission’s ongoing media ownership review).

Top Four rated stations in a local market, consistent with the tentative conclusion in the 2010 NPRM.<sup>12</sup> Specifically, the Commission reiterates that mergers involving two Top Four stations in a market are “the most deleterious to competition,” because such combinations “would often result in a single firm obtaining a significantly larger market share than other firms in the market and that such combinations could create welfare harms.”<sup>13</sup> Such harms include reduction in the incentives for a station to improve its programming in order to minimize competition between commonly owned stations.<sup>14</sup>

ACA once again supports the Commission’s conclusion that retention of its current local television rule remains necessary in the public interest because it continues to serve the longstanding public interest goals of competition, localism, and diversity. In each of its media ownership reviews, the Commission has consistently found that restrictions on common ownership of television stations in local markets, including the numerical limits and Top Four prohibition on duopoly ownership in any market, continue to be a public interest necessity to protect competition for viewers in local markets and in local television advertising markets.<sup>15</sup>

**B. The Commission Should Close the Top Four Prohibition Loophole Created by Affiliation Swaps.**

The current duopoly prohibition applies to mergers between two Top Four stations in a local market, but, as noted above, does not apply to transactions that do not involve the transfer

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<sup>12</sup> FNPRM, ¶¶ 15, 35, 39, 41 (proposing to retain local television ownership rule with limited modifications; preliminarily proposing to retain current numerical limits; and proposing to continue to prohibit mergers between two top-four rated stations in a local market, consistent with the tentative conclusion in the 2010 NPRM).

<sup>13</sup> *Id.*, ¶ 44.

<sup>14</sup> *Id.*

<sup>15</sup> *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003); *In the Matter In the Matter of 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 and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008); 1999 TV Duopoly Order, 14 FCC Rcd 12903; FNPRM, ¶ 15 (tentative conclusion).

or assignment of licenses from one entity that would otherwise have the same result – ownership of two Top Four stations in a single market.<sup>16</sup> As tentatively noted in the FNPRM, “transactions involving the sale or swap of network affiliations between in-market station that result in an entity holding an attributable interest in two Top Four stations can be used to evade the Top Four prohibition.”<sup>17</sup> Therefore, a licensee is able to obtain control over two Top Four stations in a market through a transaction or series of transactions, “sometimes referred to as ‘affiliation swaps,’ that do not require prior Commission approval.” The Commission has tentatively concluded that such transactions should be subject to the top-four prohibition because “they circumvent the intent of our rule and are not in the public interest.” The FNPRM explains that through this mechanism, an owner of one Top Four and one non-Top Four rated station can switch the network affiliation of its non-Top Four station to one of the other Big Four national television networks (generally Top Four stations in a market by audience share), effectively creating a duopoly that, if effectuated via merger, would be prohibited under Commission rules. In the case of affiliation swaps, however, the stations, but not the licenses, effectively change hands without prior Commission review or approval because such approval is technically not required under the current rules.<sup>18</sup> Labeling this a “loophole,” the Commission “proposes to clarify that such transactions must comply with the top-four prohibition at the time the agreement is executed.”<sup>19</sup> The result would place any party that has control over two Top

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<sup>16</sup> 47 C.F.R. 73.3555(b)(1)(i) (“At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service”).

<sup>17</sup> FNPRM, ¶ 49.

<sup>18</sup> *Id.*, ¶ 48.

<sup>19</sup> *Id.*, ¶ 49. Specifically, the FNPRM seeks comment on a proposed approach to closing the loophole that would prohibit the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the “new affiliate”) acquires the network affiliation of another station (the “previous affiliate”), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement.

Four stations in the same DMA, as a result of such transactions, in violation of the top-four prohibition and subject to enforcement action.<sup>20</sup>

ACA agrees with the Commission's analysis and reasoning, and supports closing the affiliation swap loophole so that stations can no longer circumvent the prohibition on owning more than one Top Four station in a single market through transactions that result in duopoly ownership of Top Four stations but do not involve assignment or transfer of a license requiring Commission approval under Section 310(d). Where the swap of network affiliations from a commonly owned non-top-four results in a single owner controlling two Top Four stations in a market, the practice should be prohibited just as a merger achieving the same ends would be prohibited. The harms associated with single-entity ownership are the same, regardless of how the duopoly is created.

Similarly, the harm to local television competition arising from joint negotiation of retransmission consent on behalf of two or more Top Four stations in the same DMA will be identical regardless of whether the stations are non-commonly owned or commonly owned as a result of an affiliation swap, but neither existing media ownership rules nor the recently-adopted good faith prohibition bars broadcasters from using this strategy as an end run around the intent of the rules. The Commission's amendment of its good faith negotiation rules prohibits only separately owned, Top Four stations in the same market jointly negotiating retransmission consent with an MVPD.<sup>21</sup> The practice was found to replace local competition with coordination

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<sup>20</sup> *Id.*

<sup>21</sup> The Commission recognized that separately-owned Top Four stations in a single DMA obtained undue leverage by negotiating together as if commonly owned, eliminating price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues, and permitting them to raise prices above levels achievable through independent negotiations. The sheer threat of simultaneously losing the programming of stations negotiating jointly was found to give those stations undue bargaining leverage in negotiations with MVPDs. The Commission also found that the economic theory that joint negotiation leads to increases in retransmission consent fees supporting its action would cover *all* television stations negotiating jointly, but limited its ruling to Top Four stations because the empirical data amassed in the record supporting the theory centered largely around evidence regarding the impact of joint negotiation by Top Four stations. Joint Negotiation Order, ¶¶ 10, 13.

and therefore to be inconsistent with the statutory directive that negotiations for carriage and fees be conducted consistent with “competitive marketplace considerations.”<sup>22</sup> However, similar to the media ownership rules, the new retransmission consent good faith rules provide no redress in cases where a broadcaster already owns two stations in a market, where one is a Top Four station and one a non-Top Four, and converts its non-Top Four station into a Top Four station by swapping the station’s affiliation to another Big Four network and conducts retransmission consent negotiations jointly for the two stations. MVPDs facing retransmission consent negotiations with a single owner of two Big Four-network affiliated stations in a local market will suffer exactly the same harm of decreased negotiating leverage and increased prices by having to bargain with a single entity for carriage of two “must have” stations at the same time. The threat of the simultaneous loss of two Big Four stations makes it nearly impossible for an MVPD, particularly smaller providers, to resist requested price increases, no matter how exorbitant they are.<sup>23</sup> The best means of addressing the shortcoming in the retransmission consent good faith rules is by prohibiting the practice of affiliation swaps in the instant media ownership proceeding, where the Commission has recognized this practice to violate the intent of the duopoly prohibition.

ACA further agrees with the Commission’s assessment that prohibiting the acquisition of control over a second in-market Top Four station through affiliation swaps is consistent with the Commission’s policy of avoiding constraints on commercial activities designed to effect station improvements.<sup>24</sup> Legitimate actions a station may take to increase its ratings at the expense of a competitor, turning a non-top-four rated station into a Top Four station, will remain unaffected by the prohibition on entering into an affiliation swap transaction. In any individual case where

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<sup>22</sup> *Id.*, ¶ 13. In this case, the Commission found the prohibition on joint negotiation to be “harmonious with antitrust law, which generally prohibits contracts or combinations in restraint of trade.” *Id.*, ¶ 22.

<sup>23</sup> *See Id.*, ¶ 16.

<sup>24</sup> FNPRM, ¶ 50.

the new rule would pose a hardship or run counter to the policy of encouraging better ratings, a station can apply for a waiver.

### **III. THE COMMISSION SHOULD PROHIBIT BIG FOUR NETWORK “VIRTUAL DUOPOLIES” THROUGH MULTICASTING IN CERTAIN MARKETS**

As the FNPRM notes, the transition to digital television gives a station the ability to broadcast multiple program streams (i.e., multicasting). Multicasting has, in turn, given rise to the practice of a single station entering into affiliation arrangements with two or more Top Four broadcast networks, often referred to as the creation of “virtual duopolies,” and multicasting the programming streams of each broadcast signal.<sup>25</sup> While this practice may not, as the FNPRM finds, justify either a tightening or loosening of the Commission’s duopoly ownership rule, dual affiliation should be regulated in the context of the Commission’s media ownership rules. Specifically, the Commission should limit the ability of stations to utilize their multicast capacity to form dual affiliations with Big Four broadcast networks.<sup>26</sup> Dual affiliation by a station with two Big Four broadcast networks creates the same consolidation of significant market power by a single station owner in a local television market that the duopoly prohibition aims to prevent and should be similarly prohibited in markets where the competitive harms outweigh the public interests benefits of dual affiliation.<sup>27</sup>

In the 2010 Quadrennial Review NPRM, the Commission explored the impact of dual affiliations on local markets and sought comment on whether limits should be imposed on the ability of stations to utilize their multicast capacity to form dual affiliations with certain

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<sup>25</sup> See ACA 2010 Petition for Rulemaking Comments at 10; Appendix C.

<sup>26</sup> FNPRM, ¶ 66 (seeking comment on proposal declining to regulate dual affiliations in the context of media ownership rules at this time).

<sup>27</sup> *Id.*, ¶ 61. See *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 201 (2004) (“We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of its local broadcast television stations.”).

networks.<sup>28</sup> The FNPRM recites that the record received in response showed the primary concern to be with dual affiliations involving two Big Four networks and that such arrangements were generally, if not exclusively, limited to smaller markets with an insufficient number of full-power commercial television stations to accommodate each Big Four network, or where other unique marketplace factors were responsible for creating the dual affiliation arrangements.<sup>29</sup> The FNPRM also notes that a significant majority of dual affiliation arrangements disclosed in the record were between a Big Four network and a “Little Two” network (either The CW or MyNetworkTV).<sup>30</sup> Although the Commission recognizes that “there may be potential harms that result from certain dual network affiliations,” the FNPRM tentatively agrees with broadcasters “that the potential benefits of dual affiliation via multicasting in these smaller markets, including dual affiliating with more than one Big Four network, outweigh any potential harms to our policy goals.”<sup>31</sup> The FNPRM cites marketplace incentives that operate to limit the occurrence of dual affiliations via multicasting involving Big Four networks to these smaller markets (below the top 100 DMAs), but seeks comments on any marketplace changes that may have occurred since the 2010 NPRM that would warrant a different outcome.<sup>32</sup>

ACA submits that the Commission’s action deeming certain television JSAs, combined with its increased scrutiny of broadcast transactions involving other forms of sharing agreements, will drive an increasing number of stations to achieve the same results of entering into sharing arrangements by utilizing their multicasting capacity to enter into dual affiliations with Big Four networks, resulting in the creation of “virtual duopolies” and that these “virtual

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<sup>28</sup> FNPRM, ¶ 66; *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*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 57 (2011).

<sup>29</sup> FNPRM, ¶ 69.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

duopolies” will cause the same types of public interest harms as an actual Big Four duopoly. In fact, there are already reports of such effects in the marketplace.<sup>33</sup> If the Commission permits a single broadcast station to affiliate itself with a second Big Four broadcast network, the Commission will be accepting a loophole that will significantly undermine its duopoly prohibition, rendering the prohibition relatively meaningless.

Not only will this loophole undermine the duopoly prohibition premised on competition, diversity and localism, it can undermine the Commission’s recent ban on coordinated retransmission consent negotiation by separately owned, same market broadcasters who are among the Top Four stations in their market. No existing retransmission consent rule or regulation will be able to effectively prevent the broadcast station from gaining and exercising the enhanced market power that undergirded the Commission’s decision to ban joint retransmission consent negotiations as a per se violation of the obligation to negotiate in good faith. While the benefit of dual affiliations in smaller markets or those with other unique characteristics that leave these markets without the ability to house all Big Four networks in separately licensed full power stations are evident, the potential harms of dual Big Four affiliations in larger markets warrants Commission action.

To this end, ACA proposes that the Commission amend its rules to prohibit a licensed commercial broadcast station in a DMA in which there are at least a set number—determined by the Commission—of other independently owned and operating full-power commercial television broadcast stations from broadcasting all or substantially all of the prime time schedule of more

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<sup>33</sup> See, e.g., Sara Barry James, *Broadcaster’s multicast is a distributor’s duopoly*, SNL KAGAN, Jul. 30, 2014, available at <http://www.snl.com/InteractiveX/Article.aspx?cdid=A-28757237-11306> (describing how, in light of recent FCC actions concerning shared services agreements, as part of Gray Television’s acquisition of Hoak Media’s NBC affiliate in the Lincoln-Hastings market in Nebraska, where Gray already owned KOLN, a CBS affiliate, and KSNB, a MeTV affiliate with programming from MyNetworkTV, Hoak transferred to Gray all of the NBC station’s affiliation, programming and operational agreements, as well as its tower, studio, and other tangible and intangible assets – everything except the KHAS FCC license and transmission equipment, allowing Gray to keep the NBC affiliation and comply with FCC rules by launching a new NBC service on KSNB and move the MeTV and MyNetworkTV programming to a digital sub-channel).

than one Big Four network. Thus, a single station could be the full-time affiliate of more than one of the Big Four broadcast networks in its DMA only if there are less than the set number of separately-licensed full time commercial stations in the market. Such a rule would protect the ability of broadcasters in the smallest markets to form dual affiliations where the community would otherwise not be served by a local Big Four affiliate, while preventing stations from combining the streams of two Top Four networks via multicasting in markets that can otherwise support independent ownership and network affiliation. The Commission may also make provision in its rules, or address via the waiver process, dual affiliations in markets with other unique circumstances preventing all of the Big Four national broadcast networks from having a local affiliate in that market.

Again, the harm of paired Big Four signals from the perspective of the MVPD negotiating retransmission consent is the same as that posed by two non-commonly owned stations teaming up to negotiate jointly: the pairing will increase the bargaining leverage of the signal owners, decrease that of the MVPD, and result in the stations extracting higher fees for the two signal streams together than either could hope to achieve through independent negotiations. This public interest harm is directly related to media ownership and should be addressed in the context of instant proceeding now, before the practice of end-running the duopoly ownership prohibition through dual affiliation passes constrained from smaller markets-only to larger markets.

#### **IV. CONCLUSION**

The public interest goals of the Commission's broadcast ownership rules are clear: the rules are intended to foster competition, localism and diversity in television markets.<sup>34</sup>

Broadcaster practices that have been occurring without Commission review, such as affiliate swaps, resulting in duopoly ownership of two Top Four stations in a single television market,

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<sup>34</sup> See FNPRM, ¶ 14.

and dual Big Four network affiliations via multicasting resulting in virtual Top Four duopolies in a single market, exploit loopholes in the functioning of the current local television ownership rule, undermining its effectiveness and thwarting achievement of its goal of fostering competition among television stations in a local market. The time has come for the Commission to conclusively to put an end to these practices.

Respectfully submitted,

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