

February 12, 2014

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

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; Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71; Applications Seeking To Transfer Control of Licenses from Belo Corp. to Gannett Co., Inc. et al., MB Docket No. 13-189; Applications of Stainless Broadcasting L.P. and Mission Broadcasting, Inc. For Consent to the Assignment of the Broadcast Station Licenses of WICZ-TV, WBPN-LP, WBPN-LD, CDBS File Nos. BALCDT-20130927AHG, BALTVL-20130927AHH, BAPDTL-20130927AHI; Applications Seeking Consent To Transfer Control of Licensee Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc., MB Docket No. 13-203; CDBS File Nos. BTCCDT-20131226AAF, BALCDT-20140115ABA, BTCCDT-20131226AAH, BALCDT-20140115ABC, BTCTTA-20131226AAI, and BALDTA-20140115ABD

Dear Ms. Dortch:

On January 22, 2014, the undersigned MVPDs met with Gigi B. Sohn, Special Counsel to Chairman Wheeler; Maria Kirby, the Chairman’s Legal Advisor for Media, Consumer and Governmental Affairs, and Enforcement; Sara Morris, Acting Director of the Office of Legislative Affairs; and Shannon Gilson, Director of the Office of Media Relations, to discuss the significant public interest harms stemming from broadcasters’ coordination of retransmission consent negotiations between and among stations that are supposed to be direct competitors, often by relying on local marketing agreements (“LMAs”), shared services agreements (“SSAs”), joint sales agreements (“JSAs”), transition services agreements (“TSAs”), and other “sharing” arrangements (whether formal or informal). We write today to provide supplemental information for the record demonstrating how widespread and egregious this anticompetitive behavior has become.

A. Competing Broadcast Stations Are Collusively Coordinating Retransmission Consent Negotiations Often Under Cover of Facilities and Services Sharing Agreements

As we explained in our January 24, 2014 *ex parte* letter, non-commonly owned broadcast stations routinely utilize sharing agreements, often in conjunction with multicasting arrangements, to collude in the negotiation of retransmission consent. We provide below a number of representative examples of a single broadcaster's use of such agreements to acquire control of multiple broadcast affiliates—including as many as three or four of the “Big Four” broadcast affiliates—in a single designated market area (“DMA”) or across DMAs.

- **Casper, WY and Cheyenne, WY:** Coordinated carriage negotiations have substantially reduced competition between and among Big Four affiliates in the Casper, WY and Cheyenne, WY DMAs. In particular, although three of the Big Four affiliates in Casper—ABC, FOX, and CBS (KTWO-TV, KFNB, and KGWC-TV, respectively)—and two of the Big Four affiliates in Cheyenne—ABC and FOX (KLWY-D2 and KLWY, respectively)—are owned by three ostensibly independent entities, they designate a single representative to negotiate retransmission consent with MVPDs. In 2012, when DISH Network could not reach agreement with the stations' negotiating representative, DISH was forced to black out the programming of all five affiliates for approximately four months.
- **Youngstown, OH:** As a result of various sharing agreements with Vaughan Media (“Vaughan”), LIN TV Corporation (“LIN”) controls the retransmission consent negotiations of three of the Big Four affiliates and four of the six national network affiliates operating in the Youngstown, OH DMA. LIN acquired ownership of the local CBS and FOX affiliates in the market (WKBN-TV and WYFX-LD, respectively) in 2012. In a concurrent transaction, Vaughan acquired formal ownership of WYTV, which multicasts ABC and MyNetworkTV programming. As part of the transaction, LIN and Vaughan entered into a number of sharing agreements, which cede effective control over carriage negotiations for WYTV to LIN.
- **Columbus-Tupelo-West Point, MS:** Similarly, retransmission consent has been subject to collusive negotiations on behalf of three Big Four affiliates in the Columbus-Tupelo-West Point, MS DMA. For some time, Southern Broadcasting, Lingard Broadcasting Corporation, and WTVA Inc. (“WTVA”) colluded in retransmission consent negotiations on behalf of WKDH, the ABC affiliate; WLOV-TV, the FOX affiliate; and WTVA, the NBC affiliate, respectively. As a result, DISH Network subscribers lost access to the programming of all three Big Four affiliates in a single retransmission consent dispute in 2012. More recently, WTVA expanded its market power by acquiring the ABC affiliation in the DMA, and now multicasts NBC and ABC network programming under the WTVA call sign.
- **Fort Wayne, IN:** In 2011, Granite Broadcasting Corp. (“Granite”) obtained effective control over three of the Big Four affiliates and five of the six national

network affiliates in the Fort Wayne, IN DMA when FOX shifted its affiliation in the market from WFFT-TV, a station owned by Nexstar Broadcasting Group (“Nexstar”), to Granite-owned WISE-TV, a decision which prompted Nexstar to file a federal antitrust lawsuit against Granite.¹ At the time it acquired the FOX affiliation, WISE-TV already served as the market’s NBC and MyNetworkTV affiliates via multicast signals. Granite also controlled WPTA-TV, a multicasting ABC and CW affiliate, through an SSA with Malara Broadcasting. FOX subsequently reaffiliated with Nexstar-owned WFFT in 2013 (and Nexstar and Granite settled their litigation),² but Granite continues to control the ABC, NBC, CW, and MyNetworkTV affiliates in the Fort Wayne, IN DMA.

- **Binghamton, NY:** Notwithstanding Nexstar’s opposition to Granite’s control of multiple Big Four affiliates in the Fort Wayne, IN DMA, Nexstar currently is attempting to obtain control of three Big Four affiliates in the Binghamton, NY DMA in a transaction involving Mission Broadcasting, Inc. (“Mission”) and Stainless Broadcasting, L.P. (“Stainless”). In particular, Nexstar already owns the ABC affiliate in Binghamton, WIVT, and multicasts the signal of the local NBC affiliate, WBGH-CA. The television ownership rule thus precludes Nexstar from acquiring Stainless’s broadcast properties in the DMA,³ which include the FOX affiliate, WICZ-TV, and a low-power station affiliated with the MyNetworkTV network, WBPN-LP and WBPN-LD. Although Nexstar instead intends to rely on Mission to hold Stainless’s broadcast licenses, the parties’ sharing agreements and public disclosures leave no doubt that Nexstar would coordinate retransmission consent negotiations on Mission’s behalf.⁴ Accordingly, if the Mission-Stainless

¹ See Complaint, *Nexstar Broad., Inc. v. Granite Broad. Corp.*, No. 11-cv-249 (N.D. Ind. July 25, 2011), attached to *Ex Parte* Letter of Elizabeth Ryder, Vice President and General Counsel, Nexstar Broadcasting, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (filed July 27, 2011).

² See Merrill Knox, *Nexstar, Granite Settle Antitrust Lawsuit, Returning Fox Affiliation to Fort Wayne’s WFFT*, TVSPY (Feb. 6, 2013 4:47 PM), http://www.mediabistro.com/tvspy/nexstar-granite-settle-antitrust-lawsuit-returning-fox-affiliation-to-fort-waynes-wfft_b79808.

³ 47 C.F.R. § 73.3555(b).

⁴ Tellingly, the parties have not denied that the proposed transaction, if approved, would result in Nexstar’s coordination of retransmission consent negotiations on behalf of the Binghamton, NY stations that Mission proposes to acquire. See Reply of American Cable Association and Time Warner Cable Inc., CDBS File Nos. BALCDT-20130927AHG, BALTVL-20130927AHH, BAPDTL-20130927AHI, at 3 (filed Dec. 16, 2013); see also Press Release, Nexstar, Nexstar Broadcasting Group and Mission Broadcasting to Acquire Five Television Stations in Four Markets for Total Consideration of \$103.3 Million in Accretive Transactions (Sept. 16, 2013), http://www.nexstar.tv/index.php?option=com_content&view=article&id=16092:-nexstar-broadcasting-group-and-mission-broadcasting-to-acquire-five-television-stations-in-four-markets-for-total-consideration-of-1033-million-in-accretive-transactions&catid=40:cat-

transaction were approved without appropriate conditions, Nexstar would control carriage negotiations for three of the Big Four affiliates and four of the six national broadcast network affiliates in the Binghamton, NY DMA.

- **Grand Junction-Montrose, CO:** Similarly, Nexstar also has proposed to acquire control of two Big Four affiliates in the Grand Junction-Montrose, CO DMA. In applications recently filed with the Media Bureau, Nexstar proposes to acquire the CBS and MyNetworkTV affiliates in the market (KREX-TV, KREY-TV, KGJT, and their affiliated translator stations) from Hoak Media, while its sidecar entity, Mission, proposes to acquire the FOX affiliate (KQFX), from Parker Broadcasting. Nexstar’s previous course of conduct demonstrates that, if the applications are granted, Nexstar will control retransmission consent negotiations on behalf of the FOX affiliate in addition to the carriage negotiations of its own in-market affiliates. Given CBS’s and FOX’s control of NFL broadcasts on Sundays, Nexstar’s control of the two stations would confer substantial undue leverage on Nexstar in retransmission consent negotiations with MVPDs.
- **Honolulu, HI:** The Media Bureau acknowledged that Raycom Media Inc. (“Raycom”) acquired control over two of the top four stations in the Honolulu, HI DMA, the “net effect” of which “is *clearly* at odds with the purpose of the duopoly rule.”⁵ As the Order and Notice of Apparent Liability recounts, Raycom exchanged its MyNetworkTV affiliation, related programming agreements, and call sign for HITV License Subsidiary, Inc.’s (“HITV’s”) CBS affiliation, programming agreements, and call sign.⁶ Because Raycom already controlled the local NBC station in Honolulu, KHNL(TV), the transaction resulted in Raycom’s control of two Big Four stations in the Honolulu, HI DMA (CBS and NBC), as well as its continued control of the MyNetworkTV affiliate through its sharing agreements with HITV.⁷
- **Phoenix, AZ and Tucson, AZ:** Notwithstanding the *Raycom Order*, the Media Bureau recently approved the acquisition of Belo Corp. (“Belo”) by Gannett Co., Inc. (“Gannett”), in which Gannett obtained effective control of Belo’s stations in

newsarticles&Itemid=97 (quoting Nexstar’s CEO as stating that “Mission’s acquisition of two stations in Binghamton [would] enhance[] *our* overall presence in central/western New York” (emphasis added)).

⁵ *KHNL/KGMB License Subsidiary, LLC, Licensee of Stations KHNL(TV) and KGMB(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 ¶¶ 14, 23 (MB 2011) (“*Raycom Order*”) (emphasis added).

⁶ *Id.* ¶ 3.

⁷ *Id.* ¶¶ 3-6.

the Phoenix, AZ and Tucson, AZ DMAs.⁸ In the Phoenix, AZ DMA, Gannett already owned the local NBC affiliate, KPNX, while Belo owned KTVK, a top four-rated independent station, and KASW, the CW affiliate. In the Tucson, AZ DMA, Gannett already owned a newspaper and Belo held an existing duopoly consisting of the local FOX and MyNetworkTV affiliates, KMSB and KTTU, respectively. Thus, even though Gannett’s existing media holdings in those markets precluded it from acquiring formal ownership of Belo’s former stations,⁹ Gannett nevertheless controls the stations’ retransmission consent negotiations by virtue of its arrangements with the new owners of Belo’s Phoenix and Tucson stations—entities that appear to have been established for the primary purpose of holding Belo’s broadcast licenses.¹⁰ As a result of the transaction, Gannett now controls (i) two top four-rated affiliates (plus the CW affiliate) in the Phoenix, AZ DMA, and (ii) the FOX and MyNetworkTV affiliates and a newspaper in the Tucson, AZ DMA.

- **Corpus Christi, TX:** Cordillera Communications, Inc. (“Cordillera”) currently controls retransmission consent negotiations for a total of *four* national broadcast affiliates in the Corpus Christi, TX DMA, two of which are Big Four affiliates. Cordillera owns the NBC affiliate, KRIS-TV; the Telemundo affiliate, K22JA-D

⁸ As part of the same transaction, Gannett also proposed to acquire Belo’s CBS-affiliated station in the St. Louis, MO DMA, where Gannett already owns the local NBC affiliate, KSDK. The Department of Justice (“DOJ”), however, blocked that aspect of the proposed transaction in light of competitive concerns raised by the sharing agreements between Gannett and Jack Sander, a former Belo executive. Under the agreement reached with DOJ, Gannett and Sander, among other things, were required to (i) divest the St. Louis station to a third party, and (ii) refrain from entering into any sharing agreement or otherwise “conducting ... business negotiations jointly” with the purchaser of the St. Louis station. *United States v. Gannett Co., Inc.*, Proposed Final Judgment, at 5, 14 (filed Dec. 16, 2013), <http://articles.law360.s3.amazonaws.com/0496000/496186/Gannett-Belo%20PFJ.PDF>. Although DOJ focused only on the competitive harms that the parties’ coordinated decisionmaking would create in the spot advertising market in the St. Louis, MO DMA, Gannett’s ability to coordinate retransmission consent negotiations in the Tucson, AZ and Phoenix, AZ DMAs will cause comparable competitive harms.

⁹ See 47 C.F.R. § 73.3555.

¹⁰ For example, the TSAs that Gannett holds in the Tucson, AZ DMA include provisions expressly calling for Gannett to act as the stations’ “agent” in carriage negotiations and requiring the formal station owners to “consult and cooperate” with Gannett in retransmission consent matters. Application for Consent to Assignment of Broadcast Construction Permit or License, CDBS File No. BALCDT-20130619AFL, Asset Purchase Agreement, Exhibit E § 6.4 (filed June 19, 2013) (emphasis added). Notably, Gannett never disclaimed its intention to coordinate carriage negotiations on behalf of Belo’s former stations in Phoenix and Tucson in response to the petition to deny filed by American Cable Association (“ACA”), DIRECTV, and Time Warner Cable (“TWC”).

(known on-air as KAJA); and multicasts the CW affiliate, KRIS-D2. Through an SSA, JSA, and other option and lease agreements, Cordillera also controls the local CBS affiliate, KZTV, which is nominally owned by SagamoreHill of Corpus Christi, LLC (“SagamoreHill”). In fact, until Time Warner Cable objected in a Commission filing, key Cordillera management personnel at KRIS-TV (including the President/General Manager, News Director, Chief Engineer, and Director of Sales, among others) were serving in similar, if not identical, positions at SagamoreHill-owned KZTV.¹¹

- **Traverse City, MI:** In late 2011, DISH Network subscribers lost access to CBS and FOX programming after Heritage Broadcasting, which owns the CBS affiliate (WWTW) and controls retransmission consent negotiations on behalf of the FOX affiliate (WFQX) in Traverse City, MI, demanded an increase in carriage fees of more than 500 percent.

These egregious examples of collusion and *de facto* consolidation among nominally “competing” local broadcasters are just the tip of the iceberg. The record in the Commission’s media ownership proceeding is replete with examples of coordination among multiple broadcasters in the same DMA. ACA has submitted a report showing that, as of April 2012, there were 65 instances of sharing agreements between two or more separately owned “Big Four” stations in 58 DMAs served by ACA members across the country.¹² According to ACA’s report, in 48 of these instances across 43 DMAs, retransmission consent negotiations were conducted by a single representative for two or more stations.¹³ Similarly, DIRECTV submitted an analysis showing that in nearly half of all DMAs in which it provides local signals, DIRECTV must negotiate with a party controlling multiple Big Four affiliates, often through JSAs, SSAs, and other sharing agreements.¹⁴ Several other MVPD commenters have provided specific examples of collusion among independently owned stations in retransmission consent negotiations.¹⁵ These broadcasters make no secret of the fact that they are engaging in collusive

¹¹ See Opposition and Answer of Time Warner Cable Inc. to Petition for Finding of Bad Faith Retransmission Consent Negotiations, MB Docket No. 12-15, at 21-23 (filed Feb. 1, 2012).

¹² Reply Comments of American Cable Association, MB Docket Nos. 09-182, 07-294, at 7-8 (filed Apr. 17, 2012) (“ACA Reply Comments”); see also Comments of American Cable Association, MB Docket Nos. 09-182, 07-294, at 6-7 (filed Mar. 5, 2012) (“ACA Comments”) (reporting similar figures from earlier survey).

¹³ ACA Reply Comments at 7-8.

¹⁴ See Letter from Stacy Fuller, DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71 and 09-182 (filed Dec. 6, 2013).

¹⁵ See, e.g., Comments of Time Warner Cable Inc., MB Docket Nos. 09-182, 07-294, at 4, 7-8, 12-13 (filed Mar. 5, 2012) (noting collusive activity by Sinclair Broadcast Group, Nexstar Broadcasting, and Cordillera Communications, among others); Reply Comments of DISH Network, MB Docket Nos. 09-182, 07-294, at 3 (filed Apr. 17, 2012) (“[I]n the past year, 60 percent of retransmission consent-related programming blackouts on DISH

behavior. Sinclair, for one, admits that its sharing agreements with various sidecar entities under its control enable it to “act as agent with respect to the negotiation of any retransmission consent agreements” for multiple Big Four affiliates in a single DMA, and even has attempted to defend such arrangements as “customary” among broadcasters.¹⁶

“Customary” though it may be, this conduct is anticompetitive and is making a mockery of the Commission’s local ownership restrictions. Indeed, antitrust principles make clear that joint negotiation among competing local broadcast stations constitutes a *per se* violation of Section 1 of the Sherman Act. In an antitrust suit brought against three stations in Corpus Christi, Texas for jointly withholding retransmission consent, the DOJ explained that “[a]lthough the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters.”¹⁷ The DOJ went on to explain, in no uncertain terms, that “[w]hen competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals . . . their conduct violates the Sherman Act.”¹⁸

Proof of the harmful effects of such conduct—though typically unnecessary for *per se* antitrust violations—abounds in the record before the Commission. Former FCC Chief Economist William Rogerson has authored two studies examining the effect of joint negotiation on the fees for retransmission consent, both of which conclude that such conduct inevitably leads to higher rates for MVPDs and their subscribers.¹⁹ Professor Rogerson’s conclusion is supported by “empirical evidence submitted by cable operators,” which shows that “common control or ownership of multiple Big 4 affiliates in a single market results in significantly higher retransmission consent fees, ranging from 21.6% to 161% higher than for separately-owned or controlled broadcast affiliates.”²⁰ Another study by Michael Katz, Jonathan Orszag, and Theresa Sullivan similarly concludes that “joint negotiations [facilitated by sharing agreements] eliminate

occurred in instances where DISH was negotiating with an entity engaged in some form of multiple station shared control arrangement, and in all of these instances there were at least 2 separately-owned Big 4 stations negotiating in a coordinated manner.”).

¹⁶ See Consolidated Opposition to Petitions to Deny, MB Docket No. 13-203, at 2, 4 (filed Sep. 26, 2013).

¹⁷ *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement, at 8 (S.D. Tex. Filed Feb. 2, 1996), available at <http://www.justice.gov/atr/cases/texast0.htm> (emphasis added).

¹⁸ *Id.*

¹⁹ See William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of American Cable Association, MB Docket No. 10-71 (filed May 27, 2011); William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees*, MB Docket No. 10-71 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

²⁰ ACA Comments at 9 (citing Rogerson studies).

competition ... [and] result in higher fees and consumer harm.”²¹ A study authored by Professor Steven Salop suggests that broadcasters’ threats to “go dark” in retransmission consent negotiations are more successful in DMAs where stations have executed sharing agreements with one another, because “LMAs and ... sharing agreements strengthen the broadcasters’ bargaining position” vis-à-vis MVPDs.²² These studies dovetail with a 2007 report compiled by the Congressional Research Service, which noted that “it was striking how often the broadcaster involved in a [retransmission consent] dispute owned or controlled more than one broadcast station,” and explained that such conduct places MVPDs “in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.”²³

By contrast, the record in the media ownership proceeding is devoid of evidence that joint negotiations among competing broadcasters yield any cognizable efficiencies or consumer benefits. Broadcasters are fond of asserting that SSAs and similar agreements enable stations to share news operations, back office services, and other resources. But such assertions are entirely beside the point. Even assuming that the consolidation of news operations can be beneficial in some limited respects,²⁴ the sharing of local news resources (such as a helicopter or weather forecasting equipment) certainly does not require—much less justify—broadcasters’ joint negotiation of retransmission consent agreements and, in any event, the substantial consumer harms associated with coordinated retransmission consent negotiations far outweigh any legitimate benefits that may flow from the sharing of local news resources.

Nor can broadcasters sanitize their joint selling conduct by drawing comparisons to the joint purchasing activities of some cable operators, including TWC and Bright House Networks. Among other key distinctions, the antitrust laws have long recognized that joint *purchasing*

²¹ Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269, at 27 (filed Dec. 16, 2009).

²² Steven C. Salop *et al.*, *Economic Analysis of Broadcasters’ Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 53 (June 3, 2010), filed as an attachment to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed June 3, 2010).

²³ CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at CRS-70 (Jul. 9, 2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf>.

²⁴ To be sure, parties in this proceeding have identified ample evidence that sharing news operations *harms* rather than helps localism. *See, e.g.*, Reply Comments of Time Warner Cable Inc., MB Docket No. 09-182, 07-294, at 9 & n.27 (filed Apr. 17, 2012) (citing multiple studies indicating that the rise in broadcasters’ use of sharing agreements has precipitated a significant *decline* in original, diverse local news and public affairs programming).

arrangements—in stark contrast to joint *sales* by competitors—are procompetitive in most circumstances.²⁵

In evaluating recent mergers involving sharing agreements, the Media Bureau repeatedly has deferred consideration of these competitive harms to the Commission’s rulemaking process.²⁶ With broadcaster collusion on the rise, the Commission should move swiftly to adopt rules that would resolve these issues once and for all. The Commission has an ideal opportunity to move forward with such reforms in the forthcoming order in its *2010 Quadrennial Media Ownership Review* proceeding.

Specifically, the Commission should expand its broadcast attribution rules to establish that coordination of retransmission consent negotiations by separately owned stations creates an “attributable interest” under Section 73.3555 of the Commission’s rules for purposes of the Commission’s ownership limitations,²⁷ and also clarify that a broadcast station’s assignment of its right to negotiate retransmission consent to any other party constitutes a “transfer of control” that requires Commission approval under Section 310(d) and the Commission’s rules.²⁸

²⁵ See, e.g., FED. TRADE COMM’N AND U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000) (explaining that joint purchasing arrangements, even as between direct competitors, usually “do not raise antitrust concerns and indeed may be pro-competitive,” because they “enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies.”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (“Wholesale purchasing cooperatives . . . are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects.”).

²⁶ See, e.g., *ACME Television Licenses of Ohio*, Letter Order, 26 FCC Rcd 5198, 5199 n.6 (MB 2011) (“To the extent that TWC challenges the propriety of in-market cooperative agreements, *per se*, such challenge is more appropriately raised in the context of the Commission’s pending review of its media ownership rules.”); see also, e.g., *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, MB Docket No. 13-189, Memorandum Opinion and Order, DA 13-2423, ¶ 31 (MB rel. Dec. 20, 2013); *Applications of Local TV Holdings, LLC, and Tribune Broadcasting Company II, LLC*, MB Docket No. 13-190, Memorandum Opinion and Order, DA 13-2422, ¶ 17 (MB rel. Dec. 20, 2013).

²⁷ 47 C.F.R. § 73.3555.

²⁸ 47 U.S.C. § 310(d). The Commission also should acknowledge in the parallel proceeding on retransmission consent that broadcaster collusion is inconsistent with “competitive marketplace considerations,” 47 U.S.C. § 325(b)(3)(C)(ii), making it a *per se* violation of the good-faith negotiation standard to “grant another station or station group the right to negotiate or approve its retransmission consent agreement when the stations are not commonly owned.” See *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 23 (2011).

The Commission has recognized that attribution is appropriate where a particular behavior or practice confers sufficient control or influence over the core operations of a station to another party. For example, the Commission has attributed agreements for joint sales of advertising by radio broadcasters based on the implicit recognition that the sale of advertising time—an important component of a station’s revenues—is a core operating function.²⁹ Similarly, the Commission has recognized that attribution may be appropriate in instances where an agreement for coordinated activity involving separately owned stations could “lead to the exercise of market power” and “raises related competitive concerns.”³⁰ Sharing agreements that facilitate the coordination of carriage negotiations between and among non-commonly owned broadcasters have all of the hallmarks of the type of agreement that the Commission has previously deemed attributable and therefore should be afforded the same treatment under the Commission’s rules. And for the same reasons, the Commission should not grandfather existing sharing agreements that facilitate coordinated retransmission consent negotiations, but should make such conduct attributable beginning on the effective date of the forthcoming media ownership order.

Moreover, because coordination of retransmission consent may take on many forms, the Commission should make clear that an attributable interest is created whenever a broadcaster in any way coordinates (or allows a third party to coordinate) retransmission consent negotiations on behalf of other non-commonly owned stations. In particular, the Commission should conclude that an attributable interest exists whenever a broadcaster:

- Delegates the responsibility to negotiate or approve retransmission consent agreements to another separately owned broadcaster;
- Delegates the responsibility to negotiate or approve retransmission consent agreements for multiple stations to a common third party;

²⁹ 47 C.F.R. § 73.3555.

³⁰ *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 ¶ 15 (2004) (While “influence or control” might be less obvious in such situations, the Commission has recognized that capturing relationships and business arrangements that go “[b]eyond the issue of potential influence” under its attribution rules is necessary to prevent the lessening of competition through private agreements in local television markets.); *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 ¶ 319 n.695 (2003) (discussing decision in *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable / MDS Interests*, Report and Order, 14 FCC Rcd 12559 ¶ 1 (1999) to address the possibility that JSAs “could threaten competition” by retaining the “discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns”); *see also Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp. (Transferee)*, Memorandum Opinion and Order, 17 FCC Rcd 10828 (2002).

- Enters into or enforces any informal or formal agreement with an MVPD contingent on another separately owned broadcast station negotiating a satisfactory retransmission consent agreement with the same MVPD; or
- Engages in any discussions or exchanges of information with one or more separately owned broadcast stations (or their representatives) regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

B. Broadcasters Also Are Relying on Multicasting Arrangements To Control Multiple Big Four Broadcast Affiliates in a Single DMA

As noted above, broadcasters increasingly are relying on multicasting arrangements, in which a local broadcast station affiliates with two or more national networks, to multicast multiple streams of network programming. For example, in the Wheeling, WV-Steubenville, OH DMA, West Virginia Media Holdings LLC (“WV Media”) relies on multicasting arrangements to control retransmission consent negotiations for the affiliates of three of the Big Four networks. In particular, WV Media acts as the CBS, FOX, and ABC affiliates in the market through its ownership of WTRF-TV. In addition, broadcasters often use sharing agreements *and* multicasting arrangements concurrently to control carriage negotiations of multiple Big Four stations. Indeed, broadcasters are relying on a combination of such arrangements in each of the following markets identified above: Cheyenne, WY; Columbus-Tupelo-West Point, MS; Youngstown, OH; Fort Wayne, IN; Binghamton, NY; and Corpus Christi, TX. And just as the use of sharing agreements has exploded in recent years, so too have multicasting arrangements. For example, ACA, among its members alone, has documented more than 20 instances of common ownership of multiple Big Four affiliates in the same DMA using multicasting or similar arrangements, and that number likely has increased.³¹ The Commission should adopt rules limiting the ability of broadcasters to affiliate with multiple Big Four networks and multicasting those signals. In particular, the Commission should require a broadcaster seeking to affiliate with multiple national networks to apply to the Commission for approval, much like a broadcaster seeking to purchase another station. Likewise, the Commission should revise its duopoly rule to prohibit the ownership, operation, or control of two or more television station “signals” (as opposed to “stations”) in a single DMA unless the conditions of 47 C.F.R. § 73.3555(b)(1) are otherwise met. Such treatment is appropriate because, when a single broadcast station affiliates with two or more Big Four networks to multicast multiple streams of programming, that station obtains the same market power as if it owned multiple stations with a DMA.

* * * * *

The Commission has two options: either continue allowing local broadcast stations to collude in retransmission consent negotiations—conduct that drives up fees, increases the likelihood of a blackout, circumvents the Commission’s media ownership restrictions, and flouts broadcasters’ public interest obligations—or take concrete action to put an end to such

³¹ See Comments of American Cable Association, MB Docket No. 10-71, at App. C. (filed May 18, 2010).

anticompetitive conduct. If the Commission is serious about protecting competition and consumers, the latter option is clearly the correct policy choice, and one that finds ample support in the record.

Sincerely,

/s/ Ross Lieberman

Ross Lieberman
American Cable Association

/s/ Catherine Bohigian

Catherine Bohigian
Charter Communications

/s/ Stacy Fuller

Stacy Fuller
DIRECTV

/s/ Jeff Blum

Jeff Blum
DISH Network

/s/ Cristina Pauzé

Cristina Pauzé
Time Warner Cable

cc: Gigi Sohn
Maria Kirby
Sara Morris
Shannon Gilson

CERTIFICATE OF SERVICE

I, Cristina Pauzé, hereby certify that on this 12th day of February, 2014, a true and correct copy of the foregoing letter was served, via first-class mail, upon the following:

James R. Bayes
WILEY REIN LLP
1776 K Street, NW
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