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By ECFS and email

Ex Parte

May 25, 2021

Marlene Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: *Ex Parte presentation.* MB Docket Nos. 20-73, 17-105 (Significantly Viewed Stations NPRM); MB Docket No. 18-349 (Quadrennial Review of Media Ownership Rules); MB Docket No. 14-261 (MVPD Definition NPRM); MB Docket No. 17-289 (Broadcast Incubator Program); IB File Nos. SAT-T/C-20210322-00037, SAT-T/C-20210322-00038, SES-T/C-20210322-00546, SES-T/C-20210322-00547 (AT&T/TPG Transfer of Control Applications)

Dear Ms. Dortch:

On May 21, 2021, I provided the attached presentation regarding proposals for promoting local television journalism to Commissioner Nathan Simington and his Media Advisor, Adam Cassady. These proposals touch on issues raised in the above-referenced proceedings currently pending before the Commission. Accordingly, pursuant to 47 C.F.R. §1.1206, a copy of this letter and the attachment have been filed with the Commission in those dockets and a copy of this letter has been provided electronically to the recipients of the attached proposals.

Please do not hesitate to contact me should any questions arise.

Sincerely,

Robert M. McDowell

Robert M. McDowell
Counsel to Gray Television, Inc.

cc: Commissioner Nathan Simington
Mr. Adam Cassady

Gray Television, Inc.
Proposed Initiatives To Support Local Television Journalism
May 2021

Background

- Local television newscasts are the most trusted and relied-upon source for local news, weather, information, and emergency programming in the United States.[1]

- Local television stations enthusiastically embrace this role and have made unprecedented investments in local journalism over the past two decades, increasing the average number of hours of weekday local TV news per local television station by 60% since 2003.[2]

- Local journalism is expensive to produce and requires a stable revenue base.[3] Local television stations have two chief revenue sources – advertising and MVPD "retransmission consent" payments.
    - Local television advertising revenue has declined by 40% since 2000, when adjusted for inflation.
    - Retransmission consent fees continue to grow on a per-subscriber basis, but as cord cutting accelerates (cable TV subscriptions have been projected to decline by 27% in 2021[4]), there will be increased pressure on this revenue stream.

- While the FCC does not directly regulate local TV journalism, its general regulation of TV broadcasting and station carriage by MVPDs has an important effect on the resources TV stations can dedicate to local journalism.

- To promote local journalism going forward, the FCC should be considering regulatory initiatives to permit efficient defensive business combinations and to further reduce outdated and counter-productive regulatory burdens that undermine broadcasters' crucial revenue streams.

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1 *Local Journalism: America's Most Trusted News Sources Threatened*, U.S. Senate Committee on Commerce, Science, and Transportation (October 2020), *available at* https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf.

2 Pew Research Center, *Local TV News Fact Sheet*, *available at* https://www.journalism.org/fact-sheet/local-tv-news/.

3 Mark R. Fratrik, Ph.D, BIA Advisory Services, *The Impact on the Amount of News Programming from Consolidation in the Local Television Station Industry*, Sept. 23, 2020, available at https://gray.tv/uploads/documents/Gray%20Local%20News%20Programming%20Report%20.pdf

4 The Trade Desk, New Survey Shows 27 Percent of U.S. Households Plan to Cut Cable TV Subscriptions in 2021, Press Release, *available at* https://www.thetradedesk.com/us/news-room/new-survey-shows-27-percent-of-u-s-households-plan-to-cut-cable-tv-subscriptions-in-2021.

<u>Preserving Broadcasters' Access to Local Revenue Streams</u>

- ***Significantly Viewed Rulemaking***. The definition of a television station's local market is crucial for determining where the station can sell advertising, gain MVPD retransmission, and assert or defend its rights under the Commission's program exclusivity rules. Under current Commission rules and related rules under the Copyright Act, a television station's local market is its Nielsen Designated Market Area ("DMA"), plus any area outside its DMA where the station is deemed "significantly viewed." The rules for determining where a station is significantly viewed are archaic (they were developed in the early 1970s) and badly in need of an update. The Commission has a pending rulemaking considering modernizing the rules for determining whether a station is significantly viewed in a particular community or county. Concluding this rulemaking to make significantly viewed determinations more accurate and easier to obtain as proposed in that proceeding would strengthen broadcasters' abilities to serve their local communities of license and better invest in local journalism.

- ***DIRECTV/TPG Transfer – Universal Local-into-Local Service***. In past merger proceedings, DIRECTV has frequently committed to providing local-into-local service in all 210 TV DMAs. Currently, DIRECTV does not provide local-into-local service in 12 rural markets covering about 500,000 television households. DIRECTV has never made good on its commitment to add local stations in those markets. The FCC should take the opportunity of the pending license transfer to finally require DIRECTV to do what every other MVPD does – deliver local stations and local TV journalism to their subscribers in those markets. This result would pay immediate dividends for stations and DIRECTV subscribers in the 12 neglected rural markets where DIRECTV does not provide local-into-local service today. Thirty-two network-affiliated stations would be able to deliver their local news, public affairs and emergency programming to these local communities for the first time and tap an additional revenue stream from DIRECTV to help fund those services.

- ***OTT Retransmission Negotiations***. The 1992 Cable Act secured for broadcasters the ability to negotiate the value of retransmission of their stations' signals by cable and satellite operators. Due to quirks in federal copyright law and the FCC's regulations, online video distributors like DISH Sling, Hulu and YouTube TV currently are not required to negotiate retransmission consent with individual stations. Instead, the major television broadcast networks (ABC, CBS, FOX and NBC) negotiate agreements with the online video distributors and then offer those agreements to local affiliates on an opt-in basis, often at per-subscriber rates that are far lower than the stations receive for traditional MVPD retransmission consent. This regulatory distortion artificially reduces station resources that otherwise would be directed to local news production. Pending at the FCC since 2014 is a rulemaking that would begin to correct this problem by appropriately classifying linear online video distributors as MVPDs for retransmission consent purposes. A favorable result in that rulemaking would rationalize retransmission consent compensation.

Permitting Efficient Business Combinations

- ***Small Market Duopoly Relief*.**

    - Local News Presumption. Many small markets produce too little revenue for stations to operate substantial news operations. In those markets, common ownership of more than one station is really the only way to make expensive news operations a reality. In 2017, the Commission expressed a willingness to consider Top 4 station combinations in small markets. The Commission should adopt a rule making it easier for a broadcaster to acquire a second television station in a market when the broadcaster commits to creating additional local news programming or saving a "failing" news operation. The Commission should employ a rebuttable presumption in favor of such proposed combinations because creating new news gathering resources or saving an existing news gathering resource from elimination is *per se* in the public interest.

      The presumption could be satisfied by (1) showing that at least one of the stations in the proposed combination does not presently offer more than five hours per week of locally produced, regularly scheduled local news programming and (2) pledging to increase the combined hours of locally produced, regularly scheduled local news across both stations (excluding replays and simulcasts) by more than five hours per week.

      The presumption also could be met if one or both news operations has been "failing" for at least three years. A news operation would qualify as "failing" if the station's advertising revenue (excluding political revenue because it is unpredictable and inconsistent) does not exceed the station's expenses (excluding programming fees because those fees are offset and paid for by retransmission consent revenue). To qualify for a presumption for saving a failing news operation, the applicant must pledge to maintain at least 85% of the pre-combination total average weekly hours of locally produced, regularly scheduled local news programming across both stations (excluding replays and simulcasts), provided that each station will continue to air local news programming.

      To ensure accountability, the Commission could include a question in license renewal applications (similar to the question required for recipients of failing station waivers) asking that any recipient of a waiver certify that it continues to provide the requisite hours of local news, and, if it cannot make such a certification, it must demonstrate why its combination remains in the public interest.

      Finally, the Commission should ensure that requests for permission to own two top 4 stations in a market will be processed in a timely manner (e.g., by adopting a 90-day processing "shot clock" for unopposed applications.

- Modified Failing Station Waiver Test. The Commission permits otherwise prohibited local television station combinations when one of the stations is failed or failing. The "failing station" waiver test requires a showing that the failing station suffers from a low audience share of less than 4% of the market. To determine low audience share, however, the Commission considers only the hours of 9 a.m. to midnight. Using this daypart artificially deflates the audience share of news-producing stations that typically deliver significant amounts of highly-rated news programming before 9 a.m. and artificially inflates the share of weaker stations that generally do not produce such programming. The result can be that a weak station does not qualify for a failing station waiver and is forced to limp along providing substandard service to the public. Modifying the low-ratings prong of the failing station test to consider all day (midnight-to-midnight) audiences would both more accurately reflect the market performance of news-producing stations and lead to efficient local duopolies that would likely enhance overall news production in small markets.

- ***Exclude local news from 15% programming limitation for Local Marketing Agreements***. Under current rules, if a station provides more than 15% of the programming schedule (approximately 25 hours per week) broadcast by another in-market station, the programming supplier is deemed to own that station for purposes of the local television multiple ownership rule. This limitation should not count local news programming against the 15% cap. Excluding local news from this limitation would incentivize stronger stations to supply local news programming to weaker stations and increase the amount of local news content aired in the market.

- ***Expand Incubator Program to Television with Focus on Local News Production***. The radio incubator program, recently reinstated by the Supreme Court, offers temporary waivers of the local radio ownership rules in exchange for a station mentoring a new entrant or struggling station owner. The Commission should expand this program to television and include elements that would encourage the provision of local news by stations that partner with new entrants to the market.

Reducing Regulatory Burdens

- ***Issues and Programs List Safe Harbor***. All local television stations are required to maintain lists of issues of public concern in their communities and lists of programming responsive to those issues. The lists are kept in each stations' public file. This is an artificial requirement for local stations that air substantial amounts of local news. The Commission should adopt a safe harbor rule whereby stations may satisfy any local programming and recordkeeping obligations by airing at least 15 hours of local news per week of local news programming. Rather than maintaining issues and programs lists, they can simply put a certification that they broadcast at least 15 hours of local news in their public file. This safe harbor would create a presumption of compliance with the Commission's rules at license renewal and provide an incentive to air more local news.