States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 18, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: March 21, 2014.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220, is amended by adding paragraphs (c)(332)(i)(B)(*4*) and (c)(429)(i)(A)(*2*) and (*3*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(332) * * *

(i) * * *

(B) * * *

(*4*) Rule 5, ''Effective Date,'' amended on April 13, 2004.

* * * * *

(429) * * *

(i) * * *

(A) * * *

(*2*) Rule 74.11.1, ''Large Water Heaters and Small Boilers,'' amended on September 11, 2012.

(*3*) Rule 74.15.1, ''Boilers, Steam Generators, and Process Heaters,'' amended on September 11, 2012.

* * * * *

[FR Doc. 2014–11430 Filed 5–16–14; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 10–71; FCC 14–29]

Retransmission Consent Negotiations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission (''Commission'') adopts a rule providing that it is a violation of the duty to negotiate retransmission consent in good faith for a television broadcast station that is ranked among the top four stations as measured by audience share to negotiate retransmission consent jointly with another such station, if the stations are not commonly owned and serve the same geographic market. The rule is intended to promote competition among Top Four broadcast stations for carriage of their signals by multichannel video programming distributors and facilitate the fair and effective completion of retransmission consent negotiations.

DATES: Effective June 18, 2014.

FOR FURTHER INFORMATION CONTACT: Raelynn Remy, *Raelynn.Remy@fcc.gov,* Diana Sokolow, *Diana.Sokolow@fcc.gov,* or Kathy Berthot, *Kathy.Berthot@fcc.gov,* Federal Communications Commission, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* FCC 14–29, adopted and released on March 31, 2014. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act of 1995 Analysis

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Synopsis

I. Introduction

In this Report and Order (''*Order*''), we revise our ''retransmission consent'' rules, which govern carriage negotiations between broadcast television stations and multichannel video programming distributors (''MVPDs''),[1] to provide that joint negotiation by stations that are ranked among the top four stations in a market as measured by audience share (''Top Four'' stations) and are not commonly owned constitutes a violation of the statutory duty to negotiate retransmission consent in good faith.[2] In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent. The Commission initiated this proceeding[3] and a robust record developed. Our action today addresses MVPDs' argument that competing broadcast television stations (''broadcast stations'' or ''stations'') obtain undue bargaining leverage by negotiating together when

[1] 47 U.S.C. 325(b)(1)(A).

[2] The statutory duty to negotiate retransmission consent in good faith applies to both broadcasters and MVPDs. *See* 47 U.S.C. 325(b)(3)(C).

[3] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 76 FR 17071 (2011) (''*NPRM*'').

they are not commonly owned. It is our intention that this action will facilitate the fair and effective completion of retransmission consent negotiations.[4] In addition, in the *Further Notice of Proposed Rulemaking* (''*FNPRM''*) published at 79 FR 19849, April 10, 2014, we seek comment on whether to modify or eliminate the Commission's network non-duplication and syndicated exclusivity rules in light of changes in the video marketplace since these rules were first adopted more than forty years ago.

II. Background

Congress created the retransmission consent regime in 1992. It stated that it intended ''to establish a marketplace for the disposition of the rights to retransmit broadcast signals,'' but not ''to dictate the outcome of the ensuing marketplace negotiations.'' In recent years, the marketplace has changed in two significant ways. First, broadcasters have increasingly sought and received monetary compensation in exchange for retransmission consent. Second, while consumers seeking to purchase video programming service typically formerly had only one option—a cable operator—today consumers may choose among several MVPDs. In addition to MVPD services, today's consumers also access video programming on the Internet. Against this backdrop, the petitioners filed the Petition, asking the Commission to impose mandatory interim carriage while retransmission consent disputes are pending, and to impose dispute resolution mechanisms. After stating that the Commission did ''not believe that [it has] authority to require either interim carriage requirements or mandatory binding dispute resolution procedures'' in light of ''the statutory mandate in section 325 and the restrictions imposed by the [Administrative Dispute Resolution Act],'' the *NPRM* sought comment ''on other ways the Commission can protect the public from, and decrease the frequency of, retransmission consent negotiation impasses within [its] existing statutory authority.''

Section 325 of the Act prohibits broadcast television stations and MVPDs from ''failing to negotiate [retransmission consent] in good faith,'' and it provides that entering ''into retransmission consent agreements containing different terms and conditions, including price terms'' is not a violation of the duty to negotiate in good faith ''if such different terms and conditions are based on competitive marketplace considerations.''[5] Beginning in 2000, the Commission implemented the good faith negotiation statutory provisions through a two-part framework for determining whether retransmission consent negotiations are conducted in good faith. First, the Commission established a list of seven objective good faith negotiation standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.[6] Second, even if the seven specific standards are met, the Commission may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[7]

In the *NPRM,* the Commission sought comment on potential revisions to the Commission's framework for evaluating whether parties negotiate retransmission consent in good faith. Specifically, the Commission sought comment on several specific ways it could strengthen the good faith negotiation requirement, including ''whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.'' The Commission's goal was to identify ways to ''increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses.''

In addition, the *NPRM* sought comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity. When a network provides a station with exclusive rights to the network's programming within a certain geographic area, the Commission's network non-duplication rules permit the station to assert those rights through certain notification procedures.[8] In such circumstances, the rules permit a station to assert its contractual rights to network exclusivity within a specific geographic zone to prevent a cable system from carrying the same network programming aired by another station. Similarly, the syndicated exclusivity rules permit a station to assert its contractual rights to exclusivity within a specific geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.[9] We refer to the network non-duplication and syndicated exclusivity rules collectively as the ''exclusivity rules.''

III. Discussion

We amend our rules to provide that it is a violation of the duty to negotiate in good faith under section 325(b)(3)(C)(ii) of the Communications Act of 1934, as amended, for a television broadcast station that is ranked among the top four stations as measured by audience share to negotiate retransmission consent jointly with another such station, if the stations are not commonly owned [10] and serve the same geographic market (''joint negotiation''). We conclude that adopting a prohibition on joint negotiation is authorized by section 325 of the Act and serves the public interest by promoting competition among Top Four broadcast stations for MVPD carriage of their signals and the associated retransmission consent revenues. For the purpose of applying this rule, we further: (i) Define ''joint negotiation'' to encompass specified coordinated activities related to negotiation for retransmission consent between or among Top Four stations; (ii) confirm that stations that are deemed to be ''commonly owned'' based on the Commission's attribution rules are permitted to negotiate jointly; (iii) deem that Top Four stations that are licensed to operate in the same Designated Market Area (''DMA'') [11] serve the same geographic market; and (iv) define Top Four stations consistently with how we define such stations in our local television ownership rule. In addition, we conclude that stations subject to this rule are prohibited from engaging in

[4] The *NPRM* sought comment on additional issues related to retransmission consent, including strengthening the *per se* good faith negotiation standards in other specific ways, clarifying the totality of the circumstances good faith negotiation standard, revising the notice requirements related to dropping carriage of a television station, and application of the sweeps prohibition to retransmission consent disputes. *See NPRM,* 76 FR 17071 (2011). This *Order* addresses only joint negotiation and the record remains open on the other issues discussed in the *NPRM.* We realize that the views of both broadcasters and MVPDs may have evolved since we last sought comment in 2011 and they are free to provide additional comment on the remaining issues to the extent they so desire.

[5] 47 U.S.C. 325(b)(3)(C).

[6] 47 CFR 76.65(b)(1).

[7] *See* 47 CFR 76.65(b)(2).

[8] *See* 47 CFR 76.92 *et seq.*

[9] *See* 47 CFR 76.101 *et seq.*

[10] We use the phrases ''separately owned'' and ''not commonly owned'' interchangeably in referring to television broadcast stations that are subject to the prohibition on joint negotiation we adopt in this *Order.* For ease of reference, we use these terms to refer to Top Four stations that are not commonly owned, operated, or controlled under the Commission's attribution rules. *See* 47 CFR 73.3555 Notes.

[11] A DMA is a local television market area designated by Nielsen Media Research. There are 210 DMAs in the United States. *See www.nielsenmedia.com* (visited on January 14, 2014).

joint negotiation as of the effective date of rules we adopt in this *Order,* regardless of whether they are subject to existing agreements, formal or informal, obligating them to negotiate retransmission consent jointly.[12]

The record in this proceeding reflects divergent views about whether a rule prohibiting joint negotiation advances the public interest. In general, parties supporting such a rule, principally MVPDs and consumer groups, assert that joint negotiation enables broadcast stations to charge supra-competitive retransmission consent fees to MVPDs which, in turn, are passed along to consumers in the form of higher rates for MVPD services. ACA argues that joint negotiation harms consumers in additional ways, such as by heightening the disruption caused by negotiating breakdowns and depleting capital that MVPDs otherwise could use to deploy broadband and other advanced services. Proponents of a prohibition also claim that joint negotiation is a widespread and growing industry practice that warrants immediate remedial action, and that the Commission is empowered under section 325 of the Act and its legislative history to bar joint negotiation to stem further harm to consumers.

Parties opposing a rule barring joint negotiation, principally broadcasters, generally argue that there is no sound legal or policy basis for prohibiting joint negotiation, and that doing so is beyond the Commission's statutory authority, inconsistent with congressional intent, and contrary to Commission precedent. In addition, parties opposing a joint negotiation prohibition argue that joint negotiation enhances efficiency and reduces transaction costs, thereby facilitating agreements and resulting in lower retransmission consent rates. These parties also contend, among other things, that: (i) Joint negotiation does not give broadcast stations undue negotiating leverage relative to MVPDs, which do have such leverage, and in fact helps small broadcasters to reduce their operating costs and devote more resources to local programming; (ii) a prohibition on joint negotiation would arbitrarily inflict greater harm on some broadcasters based on spectrum allocation and market size; (iii) barring joint negotiation by broadcasters while allowing MVPDs to coordinate their negotiations would be inconsistent and inequitable; (iv) a rule proscribing joint negotiation is unnecessary because joint negotiation does not result in negotiating delays or other complications; and (v) joint negotiation does not equate to collusive or anticompetitive conduct, and antitrust law is better suited to address any such concerns. In the paragraphs below, we discuss the need for the prohibition on joint negotiation that we adopt today and then discuss the various elements of the rule. In so doing, we explain why we reject the above assertions.

A. Need for the Prohibition on Joint Negotiation

Based on our review of the record,[13] and pursuant to our authority in section 325 of the Act,[14] we revise section 76.65(b) of our rules to provide that it is a violation of the section 325(b)(3)(C)(ii) duty to negotiate in good faith for a Top Four television broadcast station (as measured by audience share) to negotiate retransmission consent jointly with another such station if the stations serve the same geographic market and are not commonly owned. We find persuasive the arguments of MVPDs and public interest groups who uniformly assert that adopting a rule prohibiting joint negotiation is necessary to prevent the competitive harms resulting from such negotiation.

In the *NPRM,* the Commission broadly sought comment on whether it should be a violation for any television broadcast station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. However, the evidence in this proceeding persuades us to take a more limited approach, prohibiting outright only television broadcast stations that are ranked among the top four stations as measured by audience share from negotiating retransmission consent jointly with another such station, if the stations are not commonly owned and serve the same geographic market. Although economic theory supports a conclusion that joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees, the record amassed in this proceeding is centered largely around evidence regarding the impact of joint negotiation by Top Four broadcast stations. With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers. Because the record lacks similar evidence with respect to other stations, we decline to adopt a prohibition that applies to all separately owned broadcast stations serving the same geographic market (*i.e.,* regardless of market share).

Our decision to adopt a rule addressing joint negotiation by Top Four stations is consistent with the Commission's previous determination, in implementing section 325(b)(3)(C) of the Act, that agreements not to compete or to fix prices are ''inconsistent with competitive marketplace considerations and the good faith negotiation requirement.'' In the *Good Faith Order,* the Commission stated:

> It is implicit in section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.' Conduct that is violative of national policies favoring competition—that is, for example . . . an agreement not to compete or to fix prices * * * is not within the competitive

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[12] The rule does not apply to joint negotiation by same market, separately owned Top Four stations that has been completed prior to the effective date of the rules, and it does not invalidate retransmission consent agreements concluded through such negotiation.

[13] In this *Order,* we do not address arguments that are more appropriately considered in other Commission proceedings, such as those relating to possible attribution of agreements that provide for joint negotiation of retransmission consent under the Commission's ownership rules. *See 2014 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. 14–50, Further Notice of Proposed Rulemaking and Report and Order, FCC 14–28 (adopted Mar. 31, 2014).

[14] Section 325(b)(3)(C)(ii) of the Act, which imposes on television broadcast stations a duty to negotiate retransmission consent in good faith, provides, in relevant part, that:

> The Commission shall . . . revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent. . . . Such regulations shall . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

In addition, section 325(b)(3)(A) of the Act directs the Commission, among other things:

> to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent. . . . The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable.

marketplace considerations standard included in the statute.[15]

Although complaints about joint negotiation between or among same market, separately owned Top Four stations could be addressed under our existing rules pursuant to the ''totality of circumstances'' test, we believe that adopting a rule specifically directed at such negotiation is more effective in preventing the competitive harms derived therefrom than case-by-case adjudication, and is more administratively efficient—particularly because parties entering a negotiation will be advantaged by advance notice of the appropriate process for such negotiation.

We conclude that joint negotiation by same market, separately owned Top Four stations is not consistent with ''competitive marketplace considerations'' within the meaning of section 325(b)(3)(C) because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues.[16] Specifically, we find that joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently.[17] Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another,[18] their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down.[19] The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs.[20] This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.

We therefore disagree with assertions that joint negotiation does not result in increases in retransmission consent compensation paid by MVPDs. Analyses in the record draw on basic economic principles to explain why coordinated conduct such as joint negotiation results in higher retransmission consent fees:

> [I]f two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless the broadcaster is satisfied. * * * [I]t is the ability to threaten collective withdrawal that creates the power to raise retransmission consent fees.[21]

The proposition that, when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user, has been validated in other economic contexts.[22] This general proposition is also reflected in the Federal Trade Commission (''FTC'') and Department of Justice (''DoJ'') merger[23]

[15] *See Good Faith Order,* 64 FR 15559–02 (2000).

[16] Our decision to adopt a rule proscribing joint negotiation is not premised on a finding that joint negotiation by separately owned, same market Top Four stations could lead to negotiating delays and other complications, but rather on our conclusion that such negotiation diminishes competition and thus leads to supra-competitive increases in retransmission consent fees. Thus, we do not address the merits of arguments that joint negotiation does not result in negotiating delays or other complications.

[17] *See* Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees, William P. Rogerson, May 18, 2010, at 3 (attached to ACA's Comments in response to *PN*) (stating that, in a number of local television markets, multiple Top Four stations act as a single entity in retransmission consent negotiations because such stations enter into agreements to jointly negotiate retransmission consent, and that such coordinated activity permits broadcasters to negotiate higher retransmission consent fees) (''Rogerson Joint Control Analysis'').

[18] In this context, the term ''substitute'' means that ''the marginal value to the MVPD of either network is lower conditional on already carrying the other network.'' *See id.* at 7–8. In his analysis, Rogerson emphasizes that, even when this condition holds, the MVPD still would desire to carry both networks and would make higher profits from carriage of both. The numerical example proffered by Rogerson reflects this condition—the MVPD is assumed to earn a profit of $1.00 per subscriber if it carries only one of the two networks and a profit of $1.50 per subscriber if it carried both of the networks. Rogerson observes that ''[t]o the extent that customers appreciate and are willing to pay for increases in variety at a diminishing rate as variety increases, we would expect this condition to hold.'' *See id.* at 8–9. A good, although limited, example of partial substitution in this context would be local news and weather, which would typically be available on all Top Four broadcast stations in a market.

[19] *See* An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime, Michael L. Katz, *et al.*, Nov. 12, 2009, at 26–29, paras 38–43 (asserting that, ''to the extent broadcast stations entering into local marketing agreements are substitutes, such agreements eliminate competition and raise stations' bargaining power, which result in higher fees and harm consumers'') (''Katz Analysis of Consumer Harm''); Economic Analysis of Broadcasters' Brinksmanship and Bargaining Advantages in Retransmission Consent Negotiations, Steven C. Salop, *et al.,* June 3, 2010, at 53, para 108 (''[J]oint negotiation eliminates competition between [local broadcast stations serving the same market], and the MVPD is unable to gain a bargaining advantage by playing one broadcaster off against another.'') (''Salop Brinksmanship Analysis'').

[20] *See* Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, William P. Rogerson, May 27, 2011, at 11 (attached to ACA's Comments in response to *NPRM*) (''Rogerson Coordinated Negotiation Analysis''). A 2007 Congressional Research Service report on retransmission consent made a similar observation with regard to top network affiliates:

> [W]here a broadcaster * * * controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor * * * in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.

See ACA Comments at 9, citing Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress,* at CRS–70 (July 9, 2007), available at *http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.*

[21] *See* Rogerson Coordinated Negotiation Analysis at 3, 11. *See also* ACA Comments at 9, citing 2010 Rogerson Joint Control Analysis at 7–8. In his analyses, Rogerson presents a bilateral bargaining model to analyze the impact of joint negotiation on retransmission consent fees. The model considers a hypothetical example of two television broadcast stations negotiating for carriage with a cable operator, and compares the outcomes on the assumption of separate negotiations and on the assumption of joint negotiation. The model, illustrated by a numerical example, reflects the assumption that the two stations are partial substitutes. *See* Rogerson Joint Control Analysis at 7–8. *See also* Aviv Nevo, Deputy Assistant Att'y Gen. for Economics, Antitrust Div., Dep't of Justice, Remarks at the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries: Mergers that Increase Bargaining Leverage 3–5 (Jan. 22, 2014) (employing a similar model and assumptions to support an assertion that joint negotiation by two input providers leads to increases in the prices paid by a distributor).

[22] The quintessential example of joint negotiation by input providers is collective bargaining by union members. A paper by Horn and Wolinsky addresses the question whether, if a firm employs workers of two types, it is better for the workers to form two separate unions or one ''encompassing'' union. *See* Henrik Horn & Asher Wolinsky, *Worker Substitutability and Patterns of Unionisation,* 98 The Economic Journal 484–497 (1988). The paper ''developed a bargaining model for the case in which two groups of workers face a single employer . . . [and] pointed out a fairly general principle whose implication . . . was that, when the two types of workers are substitute factors, they would benefit from coordinating their bargaining with the employer.'' *Id.* at 496. The paper begins with a bargaining model that involves two workers (one of each type) who negotiate with a single employer. The model shows that, when the workers are substitutes, total wages are higher if they negotiate jointly. The paper goes on to extend the model to the case of two groups of workers, with analogous results, but the base model has the same structure as that in the Rogerson Joint Control Analysis.

[23] *See* U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines,* issued August 19, 2010 (available at *http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.*) (''Merger Guidelines'').

and collaboration[24] guidelines. DoJ has recognized that collaboration by competing broadcast stations could ''harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another.''[25]

In its review of the Comcast-NBCU transaction, the Commission stated that this theory of harm ''is a well-established concern in antitrust enforcement'' and concluded that coordinated negotiations of carriage rights for two blocks of ''must have'' programming (in that case, an NBC owned and operated station (O&O) and a Comcast Regional Sports Network (''RSN'')) would give increased bargaining leverage to the programmer and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly desirable signals if negotiations failed to yield an agreement.[26] In particular, the Commission found that common ''ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the RSN relative to what would be observed if the RSN and local broadcast affiliate were separately-owned.'' Although the Commission in that context was considering the competitive effects of combining a broadcast network and an RSN, we believe that two (or more) broadcast stations that are ranked among the top four stations in a market by audience share offer at least a comparable level of substitution to an MVPD bargaining for carriage rights.[27] Furthermore, Rogerson's bargaining model suggests that the more valuable the stations' programming is, the greater is the increase in retransmission consent fees resulting from joint negotiation.[28] We thus find it reasonable to infer that the magnitude of fee increases derived from joint negotiation is larger for Top Four station combinations than for other stations.

Empirical data in the record lends support to the theory that joint negotiation by Top Four stations leads to increases in retransmission consent fees. In particular, ACA references an example indicating that, where a single entity controls retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees paid for such stations was more than twenty percent higher than the fees paid for other Top Four stations in those same markets.[29] Data filed in the record from three cable operators also lends support to our conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees.[30] We find these empirical data to be persuasive evidence of how joint negotiation can affect the level of retransmission consent fees in cases involving Top Four stations operating in the same market. In view of the apparent widespread nature of joint negotiation involving Top Four stations[31] and the expected growth of retransmission consent fees,[32] we find that the record provides ample support for our decision to adopt a rule barring joint negotiation

Section 6.2 of the Merger Guidelines reads, in pertinent part:

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. * * * A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.

Id. at 22. The Merger Guidelines note that the mechanism and the magnitude of the effect on price can vary with certain structural characteristics, and the specific discussion refers to situations when the products are complete substitutes, *e.g.,* the buyer would not necessarily purchase from both providers separately. Nevertheless, the ''collective withdrawal'' mechanism of the Rogerson model is analogous to the ability of two merged, formerly competing sellers to prevent a buyer from playing one against the other. And the result is the same as in the Rogerson model—enhanced ability and incentive of the merged entity ''to obtain a result more favorable to it, and less favorable to the buyer.'' *Id.* Thus, the cited proposition from the Merger Guidelines also applies to joint negotiation by entities that are not seeking to merge. In a recent *ex parte* filing in the Quadrennial Review proceeding, DoJ stated that, ''[w]here a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them . . ., [DoJ] analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled. . . .'' *See Ex Parte* Filing of the Department of Justice, MB Docket Nos. 09–182, 07–294, 04–256, February 20, 2014, at 10 (''DoJ Feb. 20, 2014 *Ex Parte* filing'').

[24] *See* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000) (available at *http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.*) (''Collaboration Guidelines''). The Collaboration Guidelines state, in relevant part, that:

Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Id. at 14.

[25] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 17.

[26] *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4294 paras 135–136 (2011) (''Comcast-NBCU Order''). The Commission stated:

If failing to reach an agreement with the seller will result in a worse outcome for the buyer—if its alternatives are less attractive than they were before the transaction—then the buyer's bargaining position is weakened and it can expect to pay more for the products. * * * If not carrying either the NBC [O&O] or the RSN places the MVPD is a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates.

The Commission employed the type of bargaining model proposed by Rogerson to analyze this situation and then validated its theoretical analysis by examining the impact of the integration of a Fox O&O station with a Fox RSN. Using a control group of Fox RSNs not jointly owned with a local television station, the empirical analysis indicated that integration allowed Fox to charge a higher price for the RSN than it could have realized without the integration. *Id.* at 4398, Appendix B,—54. The Commission approved the transaction, but only on the condition that the newly combined entity not discriminate against competitor MVPDs or raise their costs by charging them higher programming fees. The Commission also imposed a ''baseball-style'' arbitration to enforce this non-discrimination requirement. *Id.* at 4259–50.

[27] We thus disagree with NAB's suggestion that same market, separately owned Top Four stations are not substitutes for one another.

[28] Because Rogerson's model assumes that the percentage split between the broadcast stations and the MVPD of the joint profits of carriage does not vary as the value of the stations' programming increases, it follows as a matter of arithmetic that as the value of the stations' programming increases, so does the magnitude of the retransmission consent fee.

[29] Rogerson Joint Control Analysis at 11–12, citing *Ex Parte* Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, *Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant,* CSR No. 8233–C, 8234–M, at 5.

[30] *See* Letter from Scott Ulsaker, Pioneer Telephone Cooperative, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 20, 2014); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, at 1–2 (Feb. 20, 2014); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, at 1 (Feb. 24, 2014).

[31] *See* ACA Comments at 7; ACA Reply at 33–35; Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 20, 2012). *See also* DIRECTV Dec. 6, 2013 *Ex Parte* Letter and Attachment.

[32] *See* Rogerson Coordinated Negotiation Analysis at 23; Salop Brinksmanship Analysis at 16–18.

by same market, separately owned Top Four stations.

We believe that a rule barring joint negotiation may, by preventing supra-competitive increases in retransmission consent fees, tend to limit any resulting pressure for retail price increases for subscription video services.[33] While there is an argument that at least a part of retransmission fee increases likely will be passed on to consumers, our decision to adopt a prohibition on joint negotiation is not premised on rate increases at the retail level. Cable operators are not required to pass through any savings derived from lower retransmission consent fees, and fee increases resulting from joint negotiation may not compare in magnitude to other costs that MVPDs incur. But artificially higher retransmission rates do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution. Nor is the possibility that supra-competitive retransmission consent fees derived from joint negotiation might enable broadcasters to invest in higher quality programming, as some parties assert, a valid basis for permitting an anticompetitive arrangement that generates those fees. We reject the suggestion that the public interest is served merely because an arrangement generally increases the funds available to broadcasters, if that arrangement otherwise is anticompetitive and potentially harmful to consumers.

We are not persuaded by opponents of a prohibition on joint negotiation who argue that joint negotiation promotes efficiency by reducing transaction costs, and that the cost savings, in turn, lead to lower retransmission consent rates. NAB further asserts that, to the extent joint negotiation lowers transaction costs, broadcasters are able to devote resources to programming and services that more directly serve the viewing public. Moreover, NAB asserts that joint negotiation permits retransmission consent agreements to be completed expeditiously by reducing the total number of agreements that must be negotiated, thus decreasing the administrative burdens for both broadcast stations and MVPDs. The claimed efficiencies are not ongoing operational efficiencies, but rather asserted savings of transaction costs in connection with isolated transactions that occur for any broadcaster at three-year or even longer intervals.[34] We therefore believe that any such efficiencies are likely to be modest and outweighed by the harm from an anticompetitive practice that the record indicates generates supra-competitive retransmission consent fees.

Sinclair contends that prohibiting joint negotiation would arbitrarily harm certain broadcasters based on spectrum allocation and market size. In particular, Sinclair asserts that, because common ownership is permitted in markets with a sufficient number of stations (thereby allowing a broadcaster to negotiate on behalf of two co-owned stations), a ban on joint negotiation would unfairly single out broadcasters located in markets having too few broadcast stations to permit common ownership under the Commission's rules. We find that unpersuasive. We note that the local television ownership rule prohibits Top Four stations from being commonly owned in markets of any size. Therefore, the rule that we adopt today will not, as Sinclair suggests, have a disparate adverse impact on separately owned Top Four stations in small markets.

We reject assertions that the Commission should permit joint negotiation because it promotes a level playing field for stations in small and medium sized markets where an MVPD has significant bargaining leverage. The size and bargaining power of individual broadcasters and MVPDs vary significantly from market to market, depending on market size, concentration, popularity of programming, and many other factors. We do not consider it the Commission's role in the retransmission consent process to adjust bargaining power between suppliers and their customers by countenancing anti-competitive practices. But we do see it as our role to prohibit arrangements among competitors that eliminate competition among them and thereby generate supra-competitive retransmission consent fees, because ''any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement'' imposed by Congress.

We disagree with NAB's assertion that the Commission previously has found that joint negotiation is consistent with competitive marketplace considerations. In particular, NAB contends that adopting a prohibition on joint negotiation is inconsistent with the Commission's statement in the *Good Faith Order* that ''[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market'' are ''presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement.'' However, the cited language in the *Good Faith Order* can reasonably be read to address the issue of whether broadcasters may lawfully seek in-kind retransmission consent compensation in the form of carriage of other programming owned by the broadcaster itself, not programming owned by other entities. Interpreting that language to permit a broadcast station to tie carriage of its signal to carriage of a signal transmitted by a separately owned broadcast station in the same market would be at odds with the Commission's statement later in the *Good Faith Order* that ''an agreement not to compete or to fix prices . . . is not within the competitive marketplace considerations standard included in the statute.'' We thus reject NAB's reading of the *Good Faith Order.*

We believe that prohibiting joint negotiation is harmonious with antitrust law, which generally prohibits contracts or combinations in restraint of trade.[35]

[33] *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 9.

[34] As ACA notes, the costs that are spared by allowing stations to engage in joint negotiation likely are limited to the cost of hiring a negotiator and related administrative expenses. *See* ACA Reply at 36. In addition, these costs are borne by stations relatively infrequently because retransmission consent negotiations typically occur only every three years. Rogerson Coordinated Negotiation Analysis at 18.

[35] Section 1 of the Sherman Act prohibits ''[e]very contract, combination . . . or conspiracy, in restraint of trade,'' including price fixing and collusive arrangements. *See* 15 U.S.C. 1. We note that DoJ has brought one antitrust action based on the theory that joint negotiation results in anticompetitive increases in retransmission consent fees. In *U.S.* v. *Texas Television, Inc., et al.,* DoJ alleged that the ABC, NBC and CBS affiliates operating in the Corpus Christi, Texas market violated section 1 of the Sherman Act by entering into ''combinations and conspiracies in unreasonable restraint of interstate trade and commerce'' that consisted of ''agreements, understandings and concerted actions . . . to increase the price of retransmission rights to cable companies.'' *See* Complaint, *U.S.* v. *Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C–96–64 (S.D. Texas, 1996) at 5, *available at http://www.justice.gov/atr/cases/f0700/0745.htm.* The court appended to its final judgment DoJ's Competitive Impact Statement, which identified alleged harms resulting from the defendants' joint negotiation. *See U.S.* v. *Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C–96–64, 1996 WL 859988 at *5 (S.D. Texas, Feb. 15, 1996). The Competitive Impact Statement stated:

> The Supreme Court has long recognized that certain types of concerted refusals to deal or group boycotts [are] *per se* violations of the Sherman Act, even when they fall short of outright price-fixing. The agreements between the broadcasters fell into this category because they had the purpose and effect of raising the price of retransmission rights.* * * Moreover, the Supreme Court has held that an agreement between rival companies that restrains competition between them is illegal when it lacks, as did the agreements among these broadcasters, any pro-competitive justification. Although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of

In particular, we find that joint negotiation between or among Top Four stations that are not commonly owned and that serve the same market is akin to the type of coordinated conduct disfavored by antitrust law because, as discussed above, the stations negotiating jointly are programming inputs for an MVPD that are at least partially substitutable. In other words, absent their coordination, such stations would compete head-to-head for distribution on MVPD systems and the associated retransmission consent revenues.

The Commission on multiple occasions has drawn on antitrust principles in exercising its responsibility under the Act to regulate broadcasting in the public interest. Indeed, the Commission's authority under Title III of the Act to regulate broadcasting in the public interest empowers us to prescribe regulation that not only prevents anticompetitive practices, but also affirmatively promotes competition. And we have concluded that conduct that violates our national policies favoring competition is ''not within the competitive marketplace considerations standard'' set forth in section 325(b)(3)(C) of the Act.

B. Elements of the Prohibition on Joint Negotiation

Stations Not ''Commonly Owned.'' We conclude that we should apply the rule prohibiting joint negotiation only to same market, Top Four broadcast stations that are not ''commonly owned'' [36] and that we will base the determination regarding whether stations are commonly owned on the Commission's broadcast attribution rules. Although those rules do not define the phrase ''commonly owned'' or similar phrases, they identify the interests that are deemed to be attributable for purposes of applying the Commission's media ownership restrictions.[37] Stations that are not subject to the prohibition on joint negotiation thus include Top Four stations that are deemed to be under common ownership, operation or control pursuant to section 73.3555 of the Commission's rules.[38] No party has suggested in this proceeding that, in applying a rule barring joint negotiation, we should define common ownership in a way that is different from how the concept currently is defined in our attribution rules.

Stations that Serve the Same Geographic Market. For the purpose of applying the rule prohibiting joint negotiation, we also conclude that broadcast stations are deemed to serve the same geographic market if they operate in the same DMA.[39] Because a broadcast station that enters into a retransmission consent agreement with an MVPD is entitled to carriage of its signal within the DMA it serves, broadcast stations are considered to be programming substitutes for an MVPD only if they operate in the same DMA. In addition, section 76.55(e)(2) of the Commission's rules provides that ''a commercial broadcast television station's market . . . shall be defined as its [DMA] . . . as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.'' Defining the relevant geographic market as the DMA is consistent with our local television ownership rule, which, as noted above, prohibits an entity from owning, operating, or controlling two stations licensed in the same DMA, with certain exceptions. Parties that support a prohibition on joint negotiation generally seem to agree that the DMA is the relevant geographic market for purposes of a rule barring joint negotiation, and no party has suggested that the geographic market should be defined differently.

''Top Four'' Station. For the purpose of applying the rule prohibiting joint negotiation, we conclude that a station is deemed to be a Top Four station if it is ranked among the top four stations in a 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. Defining Top Four stations in this manner is consistent with our local television ownership rule.

C. Prohibited Practices

For the purpose of applying the rule barring joint negotiation, we define ''joint negotiation'' to encompass specified coordinated activities relating to retransmission consent between or among separately owned Top Four stations serving the same DMA. In the NPRM, we sought comment on ''whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.'' We agree with parties asserting that a prohibition on joint negotiation must be crafted broadly enough to target collusive behavior effectively. For example, ACA argues that, although much of the existing coordination occurs among broadcast stations under the rubric of formal agreements, a prohibition should apply not only to agreements that are legally binding, but also to less formal methods of coordination, *e.g.,* where broadcasters communicate with each other and follow a collective course of action that maximizes their joint profits, but where the arrangement is not enforceable through a legally binding agreement. We share ACA's concern that, even if coordination is currently accomplished largely through legally binding agreements, broadcast stations could readily switch to non-binding forms of collaboration if a rule prohibited only those that were legally binding. Thus,

their television signals, the antitrust laws require that such rights be exercised individually and independently by broadcasters. When 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.

Id. at 6–8. While *Texas Television* addressed a specific factual scenario that is not before us here, DoJ's action supports our conclusion that joint negotiation by Top Four stations not commonly owned is harmful to competition. As noted above, DoJ, in its *ex parte* filing in the Quadrennial Review proceeding, reinforced this conclusion. *See* DoJ Feb. 20, 2014 *Ex Parte* filing at 14–15. Thus, antitrust principles point in the same direction as the prohibition we adopt today although, of course, our authority under section 325 is not limited to the prohibition of conduct that falls within the scope of the Sherman Act and a showing that, in a particular case, joint negotiation would not be actionable under section 1 of the Sherman Act would not defeat the exercise of the statutory power that Congress separately and specifically has provided to the Commission. Although DoJ's action was targeted at coordinated behavior by broadcast stations with significant market share like the rule we adopt here, we find that the adoption of targeted, prescriptive rules is more efficient and effective in preventing the competitive harms derived from joint negotiation than case-by-case antitrust litigation, which Sinclair has suggested. *See* Sinclair Comments at 23.

[36] We do not apply the rule to stations that are commonly owned because we find that joint negotiation by such stations does not present the same competitive concerns as joint negotiation by separately owned stations. In cases of common ownership, the local television ownership rule has permitted a combination of interests that is consistent with the rule's goal of ensuring competition among television broadcast stations in a given local television market.

[37] Such interests are not limited to equity interests in a broadcast licensee. *See* 47 CFR 73.3555 Notes.

[38] *See* 47 CFR 73.3555 Notes. For example, Top Four stations that the Commission has permitted to be commonly owned, operated, or controlled pursuant to a waiver of the local television ownership rule will be permitted to engage in joint negotiation.

[39] Although we proposed to adopt a rule that was not limited in application to stations serving the same geographic market, we adopt a rule that is more narrow in scope because we conclude that the competitive concerns discussed above are present only in cases where joint negotiation involves stations that, absent such negotiation, would compete directly for retransmission consent revenues. Such stations are those that compete for carriage on MVPD systems in the same DMA.

consistent with antitrust precedent and ACA's suggestions,[40] we conclude that joint negotiation includes the following activities:

(i) Delegation of authority to negotiate or approve a retransmission consent agreement by one Top Four broadcast television station (or its representative) to another such station (or its representative) that is not commonly owned and that serves the same DMA;

(ii) delegation of authority to negotiate or approve a retransmission consent agreement by two or more Top Four broadcast television stations that are not commonly owned and that serve the same DMA (or their representatives) to a common third party;

(iii) any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among Top Four broadcast television stations that are not commonly owned and that serve the same DMA. This provision shall not be interpreted to apply to disclosures otherwise required by law or authorized under a Commission or judicial protective order.

We believe that defining joint negotiation to encompass the practices above likely would cover all forms of joint negotiation agreements, whether legally binding or not. We note that the Commission, in another context, has adopted anti-collusion rules that proscribe a variety of coordinated activities, not merely those resulting from binding contracts. Although the criteria we adopt for defining joint negotiation are similar to those proposed by ACA, we find the fourth prong of ACA's proposed language to be overly broad in that it could be read to cover legally required disclosures and disclosures of information that is not competitively sensitive and would not facilitate collusion on the terms of retransmission consent. Instead, we adopt the third category of proscribed activities noted above relating to covert collaboration such as price signaling, which deviates from ACA's proposal, and which generally is consistent with antitrust precedent. Moreover, our definition of joint negotiation generally is consistent with the *Texas Television* decision, in which the court imposed restrictions on the defendant stations that were similarly broad in scope.[41] No party in this proceeding specifically addressed the merits of ACA's proposed list of prohibited activities or suggested alternative criteria.

D. Authority To Adopt the Prohibition on Joint Negotiation

We conclude that we are authorized under section 325 of the Act to adopt a rule barring joint negotiation by separately owned Top Four stations serving the same market. Some commenters assert that the Commission lacks authority to adopt a rule barring joint negotiation and that such a prohibition is inconsistent with congressional intent. For example, NAB argues that, when section 325 was enacted, operating agreements among separately owned broadcast stations were commonplace. According to NAB, the fact that Congress declined to establish any limitations on the number of markets, systems, stations or programming streams that could be addressed simultaneously in retransmission consent negotiations evinces its intent to permit joint negotiation. LIN points to language in section 325's legislative history that provides that ''[i]t 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 * * * to dictate the outcome of the ensuing marketplace negotiations,'' as evincing Congress's intent not to bar joint negotiation. Some parties assert that restricting joint negotiation would impose a bargaining limitation on broadcasters while allowing MVPDs to enter into similar relationships, and thus would be at odds with Congress's desire to make the good faith bargaining obligations reciprocal.

We find these arguments to be unpersuasive. As noted above, section 325(b)(3)(A) of the Act directs the Commission ''to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent.'' We conclude that this provision grants the Commission authority to adopt rules governing retransmission consent negotiations, including the rule barring joint negotiation we adopt in this *Order.* Moreover, we conclude that section 325(b)(3)(C)(ii) of the Act provides an independent statutory basis for our rule. As noted, section 325(b)(3)(C)(ii) directs the Commission to adopt rules that ''prohibit a television broadcast station that provides retransmission consent from * * * failing to negotiate in good faith,'' and provides that ''it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.'' Because, as discussed above, joint negotiation undermines competition among Top Four, same market broadcast stations that otherwise would compete for carriage on MVPD systems, the terms and conditions resulting from such negotiation are not based on competitive marketplace considerations. Accordingly, we find that adopting a rule barring such practices is well within our authority under this provision.

We find nothing in the legislative history of section 325 to support assertions that the Commission lacks authority to establish rules prohibiting joint negotiation. First, even if we were to credit NAB's assertion that Congress was aware of sharing agreements (including those providing for joint negotiation) when it enacted section 325, we are not persuaded that Congress's decision not to expressly bar such agreements in the statute indicates that it intended to require the Commission to permit them. Where, as here, Congress has granted the Commission broad discretion to adopt rules implementing section 325, including rules defining the scope of the good faith obligation, we find it reasonable to conclude that Congress did not identify in the statute every practice or arrangement that might violate that obligation, and instead relied on the Commission to make such determinations.

Contrary to the assertions of LIN and Journal, we also do not believe that establishing a rule addressing joint negotiation by Top Four stations is inconsistent with Congress's desire in section 325 merely to establish a marketplace for the rights to retransmit

[40] The Commission also has recognized that collusive behavior can take various forms and is not limited to formal agreements between or among market participants.

[41] In particular, the court prohibited each defendant from: (1) Directly or indirectly entering into, adhering to, maintaining, soliciting, or knowingly performing any act in furtherance of any contract, agreement, understanding or plan with any television broadcaster not affiliated with that defendant relating to retransmission consent or retransmission consent negotiations; (2) directly or indirectly communicating to any television broadcaster not affiliated with that defendant: (i) any information relating to retransmission consent or retransmission consent negotiations, including, but not limited to, the negotiating strategy of any television broadcaster, or the type or value of any consideration sought by any television broadcaster; or (ii) any information relating to the negotiating strategy of any television broadcaster, or to the type or value of any consideration sought by any television broadcaster relating to any actual or proposed transaction with any MVPD. *See* Final Judgment, *U.S.* v. *Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.,* Civil Action No. C–96–64 (S.D. Texas, 1996) at 2, *available at http://www.justice.gov/atr/cases/f0700/0748.htm.*

broadcast signals. Rather, we believe that Congress's goal of a competitive marketplace is directly furthered by this rule, which is precisely designed to prevent a Top Four television broadcast station from obtaining undue leverage in its retransmission consent negotiations by virtue of an arrangement with a competing Top Four station. Thus, rather than ''dictating the outcome'' of the negotiation, our rule simply addresses the process of retransmission consent negotiations in a manner that protects the competitive working of the marketplace in which retransmission consent is negotiated. The rule neither compels negotiating parties to reach agreement nor prescribes the terms and conditions under which MVPDs may retransmit broadcast signals.

We disagree with assertions that prohibiting joint negotiation by broadcasters without addressing joint negotiation by MVPDs is inconsistent with Congress's decision to impose a good faith bargaining obligation on both broadcast stations and MVPDs. MVPDs are obligated by the statute to negotiate retransmission consent in good faith. Where MVPDs that serve the same geographic market jointly negotiate for the right to retransmit broadcast signals, they may be subject to a complaint under the totality of circumstances test for a violation of that reciprocal duty and we may give close scrutiny to such joint negotiation. But although some commenters have provided anecdotal evidence of joint negotiation by MVPDs, the record does not establish that this is a widespread practice or the extent to which such joint negotiation affects retransmission consent fees obtained by broadcasters. Therefore, we decline to address at this time whether joint negotiation by same market MVPDs should be considered a violation of the duty to negotiate retransmission consent in good faith. Of course, should circumstances warrant, this issue can be considered by the Commission in the future as it protects and promotes competition.

E. Effect on Existing Agreements

We conclude that Top Four stations subject to the rule prohibiting joint negotiation are barred from engaging in such negotiation as of the effective date of the rules we adopt in this *Order,* regardless of whether the stations are subject to existing agreements, formal or informal, written or oral, that obligate them to negotiate retransmission consent jointly. On the other hand, the rule does not apply to joint negotiation by same market, separately owned Top Four stations that has been completed prior to the effective date of the rules, and it does not invalidate retransmission consent agreements concluded through such negotiation. Thus, an MVPD that files a complaint pursuant to the rule would need to demonstrate that the alleged good faith violation occurred after the effective date of the rule. Applying the rule to existing agreements in this limited manner is not impermissibly retroactive because, simply put, the rule has no retroactive effect. Given the potential harm to competition and consumers that we have found stems from joint negotiation, we find that the public interest will be served by barring enforcement of agreements to negotiate jointly between or among separately owned Top Four stations serving the same DMA as of the effective date of rules adopted in this *Order.* As we have noted in other contexts, the law affords us broad authority to establish new rules prohibiting future conduct, including conduct pursuant to a pre-existing contract, where the public interest so requires.

We conclude that the Takings Clause of the Fifth Amendment presents no obstacle to barring enforcement of existing agreements to negotiate jointly by separately owned Top Four stations that serve the same DMA. First, this action does not involve the permanent condemnation of physical property and thus does not constitute a *per se* taking.

It also is not a regulatory taking. The Supreme Court has outlined the framework for evaluating regulatory takings claims as first established in *Penn Central Transportation Co.* v. *New York City:*

> In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) The economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[42]

The Court has stated that a party challenging the governmental action bears a substantial burden because not every destruction or injury to property that results from economic regulation effects an unconstitutional taking. Rather, a regulation's constitutionality is evaluated ''by examining the governmental action's 'justice and fairness.' ''

The above factors counsel against finding a regulatory taking here. First, prohibiting the enforcement of agreements that contemplate joint negotiation by same market, separately owned Top Four stations would impact those stations economically only by denying them the supra-competitive retransmission consent fees such joint negotiation might yield and whatever efficiencies joint negotiation might entail, which efficiencies we have found would likely be slight. As noted above, the rule we adopt is targeted only at coordinated activities among competitors that we find are harmful to competition and consumers. The fact that regulation might prevent the most profitable use of property is not dispositive of whether such regulation effects an unconstitutional taking. Thus, under the first prong of the takings analysis, any economic impact on stations subject to the rule is outweighed by our public interest objectives of promoting competition in local television markets and protecting consumers.

Second, applying the rule only to prohibit future joint negotiation under existing agreements does not improperly interfere with distinct investment-backed expectations. As early as 2000, when the Commission initially adopted rules to implement section 325(b)(3)(C)(ii) of the Act, it concluded that ''[p]roposals that result from agreements not to compete or to fix prices'' are ''examples of bargaining proposals [that] presumptively are not consistent with competitive marketplace considerations and the good faith negotiation requirement.'' Several years prior to that, DoJ brought its antitrust suit against the top broadcast stations in the Corpus Christi, Texas, market, which led to the settlement in the *Texas Television* decision. In 2010, the Commission, in its Quadrennial Review proceeding, raised questions about the impact of broadcast sharing agreements on retransmission consent negotiations. In 2011, the Commission issued the NPRM in this proceeding, which proposed to adopt a prohibition targeted specifically at joint negotiation of retransmission consent. Thus, for many years now, stations subject to the rule prohibiting joint negotiation have been on notice that coordinated negotiation of retransmission consent is of concern to the Commission, and that any related investments had the potential to be affected by rules addressing such conduct. More fundamentally, the provisions of section 325 signal Congress's express authorization for the

[42] *See MDU Order,* 73 FR 1080–01 (2008) (quoting *Connolly* v. *Pension Ben. Guaranty Corp.,* 475 U.S. 211, 224–25 (1986) (citations and internal quotation marks omitted)).

Commission to scrutinize marketplace conduct and adopt proscriptive rules to safeguard competition in the marketplace. Consistent with our finding in *MDU Order,* we conclude that stations subject to the rule do not have a legitimate investment-backed expectation in profits to be obtained from future anticompetitive behavior. We thus believe that any investment-backed expectations that same market, separately owned Top Four stations may have had are unreasonable and do not satisfy the second prong of the test above.

Finally, with respect to the character of governmental action, the rule we adopt in this *Order* substantially advances the legitimate government interests in preserving competition in local television markets and preventing supra-competitive increases in retransmission consent fees. The rule proscribing joint negotiation also advances Congress's statutory objective to ensure that any terms and conditions for retransmission consent are ''based on competitive marketplace considerations.'' As noted above, the rule is grounded in our assessment of the relative harms and benefits of agreements among Top Four stations in the same market that provide for joint negotiation and is carefully tailored to promote Congress's objectives in section 325.

IV. Procedural Matters

A. Regulatory Flexibility Act

Final Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''),[43] the Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated into the Notice of Proposed Rulemaking (''NPRM'') in this proceeding. The Federal Communications Commission (''Commission'') sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.[44]

1. Need for, and Objectives of, the Report and Order

In the Report and Order (''*Order''*), we revise our ''retransmission consent'' rules, which govern carriage negotiations between broadcast television stations and multichannel video programming distributors (''MVPDs''). In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent. The Commission initiated this proceeding and a robust record developed. The action we take in this *Order* will help to ensure the successful completion of negotiations between broadcast stations and MVPDs. Specifically, we address MVPDs' argument that competing broadcast television stations (''broadcast stations'' or ''stations'') obtain undue bargaining leverage by negotiating together when they are not commonly owned. In the *Order,* we conclude that such joint negotiation by stations that are ranked among the top four stations in a market as measured by audience share (''Top Four'' stations) and are not commonly owned constitutes a violation of the statutory duty to negotiate retransmission consent in good faith. It is our intention that this action will facilitate the fair and effective completion of retransmission consent negotiations.

2. Legal Basis

The action in this *Order* is authorized pursuant to sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, and 534.

3. Summary of Significant Issues Raised in Response to the IRFA

While several parties filed comments describing the impact of the current retransmission consent rules on small businesses, and the potential impact of several proposed rules on small businesses, only the U.S. Small Business Administration Office of Advocacy (''SBA'') commented specifically with the RFA process in mind. Noting that part of its role is ''to monitor agency compliance with the RFA,'' the SBA filed comments describing the impact of the current rules on small MVPDs.[45] On balance, we believe that the rules adopted in this *Order* will encourage parties to reach agreements, thus benefiting small businesses including the small MVPDs on whose behalf SBA commented. SBA specifically urged the Commission to adopt proposals that the Commission concluded in the *NPRM* were beyond its authority to adopt, including interim carriage in the event of a retransmission consent impasse as well as a dispute resolution process. The *NPRM* sought comment on that conclusion but we note here that such proposals are beyond the scope of this *Order.* To the extent the Commission addresses these issues in the future, SBA's comments will be fully considered.[46]

Without mentioning the IRFA, a couple of parties commented on the impact of the specific rules adopted in this *Order* on small entities. For example, parties representing small MVPDs were generally in favor of a joint negotiation ban, arguing that joint negotiation enables broadcast stations to charge supra-competitive retransmission consent fees to MVPDs which, in turn, are passed along to consumers in the form of higher rates for MVPD services, and that joint negotiation heightens the disruption caused by negotiating breakdowns and depletes capital that MVPDs otherwise could use to deploy broadband and other advanced services. Parties representing broadcasters generally argued that the joint negotiation enhances efficiency and reduces transaction costs, thereby facilitating agreements and resulting in lower retransmission consent rates. These parties also contend that joint negotiation helps small broadcasters to reduce their operating costs and devote more resources to local programming; and that a prohibition on joint negotiation would arbitrarily inflict greater harm on some broadcasters based on spectrum allocation and market size.

4. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Order.*[47] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[48] In addition, the term

[43] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), Pub. L. 104–121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (''CWAAA'').

[44] *See* 5 U.S.C. 604.

[45] Comments of Office of Advocacy, U.S. Small Business Administration Comments at 2, 3–4 (''SBA Comments'').

[46] The final regulatory flexibility analysis must contain ''the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and a detailed statement if the SBA comment causes a change from the proposed rule to the final rule.'' 5 U.S.C. 604(a)(3). We emphasize that the SBA comments in this proceeding were silent on the proposals actually adopted. Should the Commission in the future address the issues on which SBA commented, it will fully consider SBA's position.

[47] 5 U.S.C. 603(b)(3).

[48] 5 U.S.C. 601(6).

''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[49] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[50] Below are descriptions of the small entities that are directly affected by the rules adopted in the *Order,* including, where feasible, an estimate of the number of such small entities.

Wired Telecommunications Carriers. The 2007 North American Industry Classification System (''NAICS'') defines ''Wired Telecommunications Carriers'' as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' [51] The SBA has developed a small business size standard for wireline firms within the broad economic census category, ''Wired Telecommunications Carriers.'' [52] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[53] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[54] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[55] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[56] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[57] Industry data shows that there were 1,141 cable companies at the end of June 2012.[58] Of this total, all but 10 incumbent cable companies are small under this size standard.[59] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[60] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[61] Thus, under this standard, most cable systems are small.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [62] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[63] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[64] Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.[65] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[66] Although it

[49] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[50] 15 U.S.C. 632.

[51] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers''; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[52] 13 CFR 121.201 (NAICS code 517110).

[53] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[54] *Id.*

[55] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[56] *Id.*

[57] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 60 FR 35854–01 (1995).

[58] NCTA, Industry Data, Number of Cable Operating Companies (June 2012), *http://www.ncta.com/Statistics.aspx* (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* MB Docket No. 12–203, Fifteenth Report, FCC 13–99 at—24 (rel. July 22, 2013) (''*15th Annual Competition Report*'').

[59] *See* SNL Kagan, ''Top Cable MSOs—12/12 Q''; available at *http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc.* We note that, when applied to an MVPD operator, under this size standard (*i.e.,* 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act,* MB Docket No. 11–93, Report and Order, 77 FR 40276 (2012) (''*CALM Act Report and Order*'') (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[60] 47 CFR 76.901(c).

[61] Television and Cable Factbook 2006, at F–2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[62] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[63] *See* NCTA, Industry Data, Cable Video Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013).

[64] 47 CFR 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[65] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013).

[66] The Commission does receive such information on a case-by-case basis if a cable operator appeals

Continued

seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Direct Broadcast Satellite (''DBS'') Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' [67] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[68] Census data for 2007 shows that there were 31,996 establishments that operated that year.[69] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[70] Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled ''Cable and Other Program Distribution.'' The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[71] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network. Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' [72] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[73] Census data for 2007 shows that there were 31,996 establishments that operated that year.[74] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[75] Therefore, under this size standard, the majority of such businesses can be considered small.

Home Satellite Dish (''HSD'') Service. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[76] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[77] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[78] Therefore, under this size standard, the majority of such businesses can be considered small.

Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[79] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[80] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of

a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.901(f).

[67] *See* 13 CFR 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of ''Wired Telecommunications Carriers'' is in paragraph 7, above.

[68] 13 CFR 121.201, NAICS code 517110 (2007).

[69] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[70] *Id.*

[71] 13 CFR 121.201; NAICS code 517510 (2002).

[72] *See* 13 CFR 121.201, NAICS code 517110 (2007).

[73] 13 CFR 121.201, NAICS code 517110 (2007).

[74] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[75] *Id.*

[76] 13 CFR 121.201, NAICS code 517110 (2007).

[77] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[78] *Id.*

[79] 47 CFR 21.961(b)(1).

[80] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[81] Auction 86 concluded in 2009 with the sale of 61 licenses. Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based EBS. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.'' [82] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[83] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[84] Therefore, under this size standard, the majority of such businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that, as of September 2012, there are 2,241 active EBS licenses.[85] The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[86]

Fixed Microwave Services. Microwave services include common carrier,[87] private-operational fixed,[88] and broadcast auxiliary radio services.[89] They also include the Local Multipoint Distribution Service (LMDS),[90] the Digital Electronic Message Service (DEMS),[91] and the 24 GHz Service,[92] where licensees can choose between common carrier and non-common carrier status.[93] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons.[94] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[95] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 11,163 firms that operated that year.[96] Of those, 10,791 had fewer than 1000 employees, and 372 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

Open Video Systems. The open video system (''OVS'') framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[97] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[98] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [99] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[100] Of this total, 30,178

[81] *Id.* at 8296.

[82] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers,'' (partial definition), *www.census.gov/naics/2007/def/ND517110.HTM#N517110.* Examples of this category are: broadband Internet service providers (*e.g.,* cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (''CCTV'') services; VoIP providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (''DTH'') services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (''MMDS'').

[83] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[84] *Id.*

[85] *http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp.*

[86] The term ''small entity'' within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6).

[87] *See* 47 CFR Part 101, Subparts C and I.

[88] *See* 47 CFR Part 101, Subparts C and H.

[89] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[90] *See* 47 CFR Part 101, Subpart L.

[91] *See* 47 CFR Part 101, Subpart G.

[92] *See id.*

[93] *See* 47 CFR 101.533, 101.1017.

[94] 13 CFR 121.201, NAICS code 517210.

[95] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[96] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[97] 47 U.S.C. 571(a)(3)–(4). *See 13th Annual Report,* 24 FCC Rcd at 606,—135.

[98] *See* 47 U.S.C. 573.

[99] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers''; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[100] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code

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establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[101] Therefore, under this size standard, the majority of such businesses can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[102] Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

Cable and Other Subscription Programming. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' [103] The SBA has developed a small business size standard for this category, which is: all such businesses having $35.5 million dollars or less in annual revenues.[104] Census data for 2007 show that there were 659 establishments that operated that year.[105] Of that number, 462 operated with annual revenues of less than $10 million and 197 operated with annual revenues of between $10 million and $100 million or more.[106] Thus, under this size standard, the majority of such businesses can be considered small entities.

Small Incumbent Local Exchange Carriers. We have included small incumbent local exchange carriers in this present RFA analysis. A ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [107] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[108] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

Incumbent Local Exchange Carriers (''ILECs''). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[109] Census data for 2007 shows that there were 31,996 establishments that operated that year.[110] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[111] Therefore, under this size standard, the majority of such businesses can be considered small entities.

Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.'' Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[112] Census data for 2007 shows that there were 31,996 establishments that operated that year.[113] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[114] Therefore, under this size standard, the majority of such businesses can be considered small entities.

Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than $35.5 million in annual receipts.[115] Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' [116] The 2007 U.S. Census indicates that 2,076 television stations operated in that year. Of that number, 1,515 had annual receipts of $10,000,000 dollars or less, and 561 had annual receipts of more than $10,000,000. Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded $35.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388.[117] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television* Database, as of March 28, 2012, about 950 of an

517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[101] *Id.*

[102] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[103] U.S. Census Bureau, 2007 NAICS Definitions, ''515210 Cable and Other Subscription Programming''; *http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.*

[104] 13 CFR 121.210; 2012 NAICS code 515210.

[105] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[106] *Id.*

[107] 15 U.S.C. 632.

[108] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[109] 13 CFR 121.201 (2007 NAICS code 517110).

[110] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[111] *Id.*

[112] 13 CFR 121.201 (2007 NAICS code 517110).

[113] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[114] *Id.*

[115] *See* 13 CFR 121.201, 2012 NAICS code 515120.

[116] *Id.* This category description continues, ''These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.'' Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[117] *See Broadcast Station Totals as of December 31, 2013,* Press Release (MB rel. Jan. 8, 2014) (''*Jan. 8, 2014 Broadcast Station Totals Press Release*''), *https://www.fcc.gov/document/broadcast-station-totals-december-31-2013.*

estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[118] We therefore estimate that the majority of commercial television broadcasters are small entities.

We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [119] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent.

In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[120] These stations are non-profit, and therefore considered to be small entities.[121]

5. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

Reporting Requirements. The *Order* does not adopt reporting requirements.

Recordkeeping Requirements. The *Order* does not adopt recordkeeping requirements.

Compliance Requirements. Under the joint negotiation ban, a Top Four station will be prohibited from negotiating jointly with another Top Four station that is not commonly owned and that serves the same market.

6. Steps Taken To Minimize Economic Impact on Small Entities and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[122] The IRFA invited comment on issues that had the potential to have a significant impact on some small entities.[123]

In the *NPRM,* we sought comment on any potential alternatives we should consider to our proposals that would minimize any adverse impact on small entities while maintaining the benefits of our proposals.[124] Our goal in the *Order* is for the joint negotiation ban to facilitate the fair and effective completion of retransmission consent negotiations. The joint negotiation rules will serve the public interest by promoting competition among Top Four broadcast stations for MVPD carriage of their signals and the associated retransmission consent revenues.

As required by the Regulatory Flexibility Act, we have considered alternatives to minimize the impact on small entities.[125] Some parties opposing a joint negotiation prohibition argued it would decrease efficiency and increase transaction costs, because non-commonly owned broadcast stations in the same market must conduct negotiations separately. We note that since small MVPDs supported adoption of this ban, no further analysis of alternatives on their behalf is necessary. With respect to small broadcasters, we have sought to limit the economic impact on such entities by applying the prohibition on joint negotiation only to situations involving two or more separately owned Top Four stations in the same market.

7. Report to Congress

The Commission will send a copy of the *Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[126] In addition, the Commission will send a copy of the *Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.[127]

B. Paperwork Reduction Act

This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

The Commission will send a copy of the *Order* in MB Docket No. 10–71 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

D. Additional Information

For additional information on this proceeding, contact Raelynn Remy, *Raelynn.Remy@fcc.gov,* Diana Sokolow, *Diana.Sokolow@fcc.gov,* or Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2120.

V. Ordering Clauses

Accordingly, *it is ordered* that, pursuant to the authority found in sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 339(b), 340, 614, and 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 339(b), 340, 534, and 573(b), this *Report and Order is adopted,* effective thirty (30) days after the date of publication in the **Federal Register**.

It is ordered that, pursuant to the authority found in sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, and 534, the Commission's rules *are hereby amended* as set forth below.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Report and Order* in MB Docket No. 10–71, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

It is further ordered that the Commission *shall send* a copy of this *Report and Order* in MB Docket No. 10–71 in a report to be sent to Congress and the Government Accountability Office

[118] We recognize that this total differs slightly from that contained in *Jan. 8, 2014 Broadcast Station Totals Press Release;* however, we are using BIA's estimate for purposes of this revenue comparison.

[119] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 121.103(a)(1).

[120] See Jan. 8, 2014 Broadcast Station Totals Press Release.

[121] *See generally* 5 U.S.C. 601(4), (6).

[122] 5 U.S.C. 603(a)(6).

[123] *IRFA,* 26 FCC Rcd at 2762,—27.

[124] *Id.* We received no proposed alternatives for small business pertaining to the changes adopted in the *Order.*

[125] 5 U.S.C. 603(a)(6).

[126] *See* 5 U.S.C. 801(a)(1)(A).

[127] *See id.* § 604(b).

pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.65 as follows:
■ a. Remove the word ''and'' from the end of paragraph (b)(1)(vi);
■ b. Remove the period and add ''; and'' to the end of paragraph (b)(1)(vii).
■ c. Add paragraph (b)(1)(viii).

The addition reads as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) * * *

(1) * * *

(viii) *Joint negotiation.* (A) Joint negotiation includes the following activities:

(*1*) Delegation of authority to negotiate or approve a retransmission consent agreement by one Top Four broadcast television station (or its representative) to another such station (or its representative) that is not commonly owned, operated, or controlled, and that serves the same designated market area (''DMA'');

(*2*) Delegation of authority to negotiate or approve a retransmission consent agreement by two or more Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA (or their representatives), to a common third party;

(*3*) Any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA. This provision shall not be interpreted to apply to disclosures otherwise required by law or authorized under a Commission or judicial protective order.

(B) For the purpose of applying this paragraph (b)(1)(viii):

(*1*) Whether a station is not commonly owned, operated, or controlled is determined based on the Commission's broadcast attribution rules. *See* the Notes to 47 CFR 73.3555.

(*2*) A station is deemed to be a Top Four station if it is ranked among the top four stations in a 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; and

(*3*) DMA is determined by Nielsen Media Research or any successor entity.

* * * * *

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