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

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

Ex Parte Submission of the United States Department of Justice

Executive Summary

In this filing, the Department of Justice's Antitrust Division describes its enforcement experience in the broadcast television and radio industries, including its experience analyzing a variety of cooperation or “sharing” agreements such as joint sales agreements (JSAs), shared services agreements (SSAs), and local news service (LNS) agreements. Such arrangements often confer influence or control of one broadcast competitor over another. Failure to account for the effects of such arrangements can create opportunities to circumvent FCC ownership limits and the goals those limits are intended to advance. As a consequence, the Department believes it is appropriate for the Commission’s ownership “attribution” rules to treat any two stations participating in a JSA (or agreement similar in substance to a JSA) as under common ownership. Furthermore, even where a sharing agreement does not create an attributable interest under the Commission’s bright-line rules, the Commission should scrutinize agreements on a case-by-case basis and take action where those agreements do not serve the public interest.

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I. Introduction

The United States Department of Justice ("DOJ" or "Department") provides this filing in response to a Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM" or "Notice"), published in the *Federal Register* on January 19, 2012.[1] The Notice requests comments to assist the FCC in its review of the Commission's attribution rules and how attribution should apply to various forms of "sharing" agreements between broadcast stations.[2] The Notice is part of the Commission's quadrennial review required by statute to determine whether its media ownership rules "are necessary in the public interest as the result of competition."[3] In reviewing and updating its ownership and attribution rules, the FCC considers its "fundamental goals" of "competition, localism, and diversity."[4] This filing is also responsive to other open Notices.[5]

DOJ's Antitrust Division is responsible for enforcing the antitrust laws and promoting competition. The Department has considerable experience over many years applying competition principles to the ownership and management of broadcast stations, including both

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[1] 2010 Quadrennial Regulatory Review, 77 Fed. Reg. 2,868 (proposed Jan. 19, 2012) (to be codified at 47 C.F.R. pt. 73), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-01-19/pdf/2012-148.pdf ("Notice").

[2] *Id.* at 2,900-01.

[3] 47 U.S.C. § 303, sec. 202(h).

[4] Notice, *supra* note 1, at 2,869.

[5] Promoting Diversification of Ownership in the Broadcasting Services, 76 Fed. Reg. 7,719 (proposed Feb. 11, 2011) (to be codified at 47 C.F.R. pt. 73), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-02-11/pdf/2011-3050.pdf; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, 69 Fed. Reg. 52,464 (proposed Aug. 26, 2004) (to be codified at 47 C.F.R. pt. 73), *available at* http://www.gpo.gov/fdsys/pkg/FR-2004-08-26/html/04-19468.htm.

broadcast television stations and broadcast radio stations.[6] The Department has participated in prior Commission proceedings on the role of competition in telecommunications and media, including on issues related to the FCC's attribution rules for broadcast stations.[7]

Broadcast stations[8] play distinct and important roles in programming distribution in the United States. They attract audiences through their programming, disseminated either over the air or retransmitted through programming distributors, such as cable companies or direct broadcast satellite providers. Broadcast stations earn the majority of their revenues through advertising sales that target potential customers primarily in specific geographic markets. Advertising on local broadcast stations has no close substitutes. In seeking advertising dollars, local television stations compete among each other on the pricing of advertising and the attractiveness of their programming. Strong programming also allows local television stations to negotiate attractive rates for the retransmission of their signals to cable subscribers – an increasingly important source of their revenue. Likewise, radio stations compete among themselves on advertising pricing and the attractiveness of their programming. Through this

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[6] *E.g.*, Complaint, United States v. Gannett Co., Inc., No. 13-01984 (D.D.C. Dec. 12, 2013); Complaint, United States v. Comcast Corp., No. 11-00106 (D.D.C. 2013); Complaint, United States v. Raycom Media, Inc., No. 08-01510 (D.D.C. 2008); Complaint, United States v. Univision Communications Inc., No. 03-00758 (D.D.C. 2003); Complaint, United States v. News Corp., Ltd., Fox Television Holdings Inc., No.01-00771 (D.D.C. 2001); Complaint, United States v. Jacor Communications, No.1-96-757 (S.D. Ohio 1996); Complaint, United States v. Clear Channel Communications, Inc., No. 0-02063 (D.D.C. 2000); United States v. American Radio Systems Corp., No. 96-2459 (D.D.C. 1996); United States v. Cumulus Media, Inc., No.: 1:11-cv-01619 (D.D.C. 2011).

[7] *See Ex Parte* Filing of the United States Department of Justice, *In re Review of the Commission's Regulations Governing Television Broadcasting*, FCC MM Docket No. 99-221 (May 8, 1997) ("1997 Comment").

[8] This comment is concerned with competition issues affecting both broadcast television stations and broadcast radio stations. As used herein, "broadcast stations" refers to both television and radio stations; where there are distinct issues or examples relating to each, the terminology "broadcast television" or "broadcast radio" is used to refer to the respective narrower categories.

competition, broadcast stations play a vital role in local communities of all sizes across the United States, disseminating market information, entertainment, and news.

Under its rules, the FCC limits the number of television stations and radio stations an entity can own in a local market.[9] The Commission also has broadcast attribution rules that define the financial and other interests that are deemed comparable to ownership and can trigger the Commission's broadcast ownership limits. For example, local marketing agreements (LMAs, also known as time brokerage agreements) can be attributable interests for both television and radio stations if station A provides programming for at least fifteen percent of station B's time and sells the advertising spots on the programming provided.[10] The Commission's attribution rules deem such an arrangement as equivalent to station A owning station B for purposes of the Commission's ownership limits. The FCC has enforced this rule as a bright line. Joint sales agreements (JSAs), in which station A sells (and determines the price for) some or all of the advertising time on station B, can also be attributable for radio stations, but currently not television stations.[11]

In its Notice, the Commission sets forth a series of important questions relating to its approach to attribution. The Notice highlights the concerns of third parties including recommendations that other agreements among local stations should be attributable, such as local news service (LNS) agreements, in which staff and equipment are coordinated in a joint news-gathering effort, and shared services agreements (SSAs), in which one station provides

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[9] Ownership limits include a Local Television Ownership Rule, a Local Radio Ownership Rule, and a Radio/Television Cross-Ownership Rule, among others. *See generally* Notice, *supra* note 1, at 2,871-91; CHARLES B. GOLDFARB, CONG. RESEARCH SERV., R42436, THE FCC'S BROADCAST MEDIA OWNERSHIP AND ATTRIBUTION RULES: THE CURRENT DEBATE 6-15 (2012) (describing existing media ownership rules and FCC proposals).

[10] *See* 47 C.F.R. § 73.3555 n.2(j).

[11] *See* 47 C.F.R. § 73.3555 n.2(k).

potentially wide-ranging operational support and programming for another station in its local market. The Commission asks what factors should distinguish or fail to distinguish LNS agreements and SSAs from other arrangements that confer the necessary "influence or control" to warrant attribution. The Commission also asks whether JSAs should be attributable for television stations, as they are already for radio stations.

The current articulation of the Horizontal Merger Guidelines, jointly issued by DOJ and the FTC in 2010, outlines the potential competitive concerns of both outright and partial acquisitions of another firm. Similarly, the Antitrust Guidelines for Collaborations Among Competitors ("Collaboration Guidelines") outline the potential competitive concerns of agreements or collaborations between competitors, which are governed by Section 1 of the Sherman Antitrust Act. Both sets of guidelines take a fact-specific, case-by-case approach to determining the effects of mergers and collaborations on competition. The Department utilizes a flexible approach that can apply to all industries in the U.S. economy and the diverse array of business arrangements whose competitive effects may not necessarily meet preset criteria. The Department applies these same principles when evaluating activities in television and radio broadcast markets.[12]

These principles also are reflected in the Division's 1997 comments to the FCC on attribution. Those comments advocated for FCC attribution rules that incorporate JSAs and LMAs, whose effects can be "competitively similar" to attributable interests such as common equity ownership, and for attribution rules that account for the potential influence and competitive effects of investors in nonvoting stock or debt. The 1997 comments noted the wide variety of relationships that can permit influence or control among competitors, highlighted the

[12] *See supra* note 6.

benefits of retaining flexibility to address other relationships, and expressed concerns that a failure to capture arrangements with competitively similar effects might create opportunities to circumvent FCC ownership limits and the goals those limits are intended to advance. As outlined below, the Department continues to believe today that attribution rules should take into account the likely competitive effects of specific ownership and management arrangements.

II. Television and Radio Broadcasters Compete on Several Dimensions, and this Competition Benefits Society in Many Ways.

In the Department's experience, broadcasters compete with one another along a variety of dimensions. For example, broadcasters compete in the sale of spot advertising. Since different programming and forms of media attract distinct audiences and have unique advantages and disadvantages for conveying various messages, advertising on two different forms of media may or may not be substitutes, and to varying degrees. For instance, the Department has consistently found that radio spot advertising constitutes a separate product market because advertisers view advertising on radio stations as sufficiently distinct from advertising on other forms of media.[13] Similarly, the Department has repeatedly concluded that the purchase of broadcast television spot advertising constitutes a relevant antitrust product market because advertisers view spot advertising on broadcast television stations as sufficiently distinct from advertising on other media (such as radio and newspaper).[14] Therefore, vigorous rivalry between multiple

[13] *See, e.g.*, Complaint, United States v. Bain Capital, LLC, et al., No. 08-cv-00245 (D.D.C. 2008); Complaint, United States v. Clear Channel Communications, Inc., No. 0-02063 (D.D.C. 2000); United States v. American Radio Systems Corp., No. 96-2459 (D.D.C. 1996).

[14] *See, e.g.*, Competitive Impact Statement at 4-5, U.S. v. Gannett Co., Inc., No. 13-01984 (D.D.C. Dec. 16, 2013).

independently controlled broadcast stations in each local radio and television market ensures that businesses, charities, and advocacy groups can reach their desired audiences at competitive rates.

Broadcasters also compete to produce and provide programming that will attract a larger audience, which in turn allows broadcasters to earn more advertising revenues. Perhaps most prominently, many television stations produce local news broadcasts. Although audience members may not directly pay to watch these local news broadcasts, competition between the stations to attract the largest audience (and therefore, more advertising revenues) drives each station to invest in newsgathering and to produce quality news programming.

Popular programming and a loyal audience also allows television broadcasters to negotiate higher fees for the retransmission of their programs on cable and satellite. Although many millions of Americans continue to receive their television programming over-the-air, the majority of Americans who watch television today subscribe to a multichannel video programming distributor ("MVPD"), such as a cable company or direct broadcast satellite provider. These MVPDs typically pay per-subscriber fees to retransmit the broadcaster's signal, known as retransmission consent fees. The size of these fees affects the rates that consumers are charged for an MVPD subscription. Although MVPDs may carry hundreds of channels altogether, the local broadcast television stations usually have the highest viewership. Thus, advertisers still covet spots on broadcast television stations because they have the largest audience and can reach all the television viewers in an area – those who either use an antenna or subscribe to an MVPD.

III. In the Department's Experience, Cooperative Agreements Between Broadcast Stations Can Harm Competition.

The Notice seeks comment on the Commission's regulatory treatment of a variety of "sharing" agreements, including LNS agreements, SSAs, and JSAs. In the course of its enforcement activities in the broadcast area, the Department has analyzed these various forms of agreements among broadcast stations, as well as other agreements that are similar in function but are styled differently.[15]

1. Cooperative Agreements Between Broadcast Stations Can Have Economic Effects Similar to a Merger of those Stations.

Where a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them for a sufficiently lengthy period of time, the Department analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled, though Section 1 of the Sherman Act also typically continues to apply.[16] The Horizontal Merger Guidelines set forth the analytic framework used by the DOJ

[15] Since the Department filed its 1997 Comment on the broadcast ownership rules, the Department has analyzed extensively the competitive effects of mergers involving broadcast television stations operating in the same local market. Specifically, the Department has taken enforcement actions in several broadcast television mergers and has taken enforcement action against one non-merger agreement between broadcast stations, and has also gained extensive experience in this industry from numerous other merger and non-merger investigations that did not ultimately result in an enforcement action. *See, e.g.*, Complaint, United States v. Gannett Co., Inc., No. 13-01984 (D.D.C. Dec. 12, 2013); Complaint, United States v. Raycom Media, Inc., No. 08-01510 (D.D.C. 2008); Complaint, United States v. News Corp., Ltd., Fox Television Holdings Inc., No.01-00771 (D.D.C. 2001); Complaint, United States v. Texas Television, Inc., No. C-96-64 (S.D. Tex. 1996); *cf. also* 1997 Comment, *supra* note 1, at 4.

[16] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 5 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("COMPETITOR COLLABORATION GUIDELINES") ("Nonetheless, in some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the

and the FTC to assess whether a merger may lead to a substantial lessening of competition and thus is prohibited under the Clayton Act.[17]

Cooperative arrangements that should be analyzed like mergers have become relatively common in the broadcast television industry. There has been a pronounced trend toward one station controlling another station that is nominally owned by a separate entity, often called a "sidecar." In practice, our investigations have revealed that these "sidecars" often exercise little or no competitive independence from the other station. Indeed, the extent of cooperation and integration with "sidecars" is so extensive that some television station ownership groups even consolidate the financials of affiliated "sidecars" in their securities filings.[18]

JSAs are often a key component of such arrangements. As the Department observed in 1997, "Since JSAs place pricing and output decisions for the affected stations under the control of a single firm, competitive rivalry between or among those stations is eliminated, just as it

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collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate…"). Notably, just because a series of agreements between two competitors may have competitive *effects analogous to* a merger does not alter the fact that the competitors have *not* in fact merged and may remain economically distinct entities, and accordingly may be subject to antitrust prohibitions on per se illegal collusion between horizontal competitors. For example, joint pricing between broadcast stations would be treated as per se illegal under the antitrust laws if it is not reasonably necessary to an efficiency-enhancing integration of economic activity between the parties. *See* note 26 *infra*.

[17] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf ("MERGER GUIDELINES").

[18] Sinclair Broadcast Group, Inc., Annual Report at 10 (Form 10-Q) (Nov. 12, 2012), *available at* http://sbgi.edgarpro.com/redirect_frames.asp?filename=0001104659%2D13%2D083562%2Etxt&filepath=%5C2013%5C11%5C12%5C&cols=0%2C3%2C4%2C7%2C8&SortBy=receivedate&AD=D&startrec=11&res=10&pdf=0; Nexstar Broadcasting Group, Inc., Annual Report at 35 (Form 10-K) (Mar. 15, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1142417/000114241713000006/nxst201210k.htm.

would be in a merger."[19] This remains true today. Thus, for the purposes of analyzing market concentration and predicting the likely competitive effects of mergers under Section 7 of the Clayton Act, the Department generally treats stations in a local market that are participating together in a JSA (or functionally similar arrangement) as if they were proposing to formally merge their operations.[20]

Of course, just because the Department might evaluate a series of agreements between two broadcast stations as it would a merger of the stations does not mean that the agreements necessarily violate the antitrust laws. Just as many mergers are not likely to harm competition, some de facto mergers of broadcast stations may not harm competition either.[21] But where a merger of two stations would violate the Clayton Act, those two stations cannot save such a combination merely by leaving one station independent in name only.

The Department's case-by-case focus on the function of agreements over their form is evident in its enforcement actions in acquisitions involving broadcast television stations. Most recently, the Department required the divestiture of a station in the St. Louis designated market area before Gannett Co., Inc. ("Gannett") was permitted to acquire television stations owned by Belo Corp. Even though the St. Louis station, KMOV-TV, was to have a legally separate owner, Sander Media LLC ("Sander"), the Department concluded that a series of side agreements would

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[19] 1997 Comments, *supra* note 1, at 9.

[20] *See id.* The Department uses this same approach in both radio and television mergers.

[21] Indeed, all else equal, a JSA may be *more* likely to be acceptable if it is coupled with more extensive integration of the two stations equivalent to a merger of the stations. *See infra* note 26 (explaining that the Department has challenged a number of JSAs as per se illegal when they are unconnected to any other integration of the stations).

leave Gannett with “significant influence over Sander and Sander’s operation of KMOV-TV.”[22] The entanglements between Gannett and Sander would have included an assignable purchase option, a financing guarantee, and a comprehensive shared services agreement.[23] Recognizing the potential for sharing agreements to replicate the competitive harm that the divestiture was meant to avoid, the Department’s consent decree explicitly forbids Gannett and KMOV-TV from “enter[ing] into any local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement, or conduct other business negotiations jointly.”[24] This protection is consistent with conditions included in other Department consent decrees requiring divestitures of broadcast stations.[25]

2. The Department Utilizes a Case-by-Case Framework for Analyzing the Likely Competitive Effects of Collaborations Between Broadcast Competitors.

Cooperative agreements between broadcasters may also raise other substantial competitive concerns. Cooperative agreements can include joint marketing, joint production, joint research and development, and/or other joint activities. Depending on their details, such agreements may be competitively benign or they may be even more likely to cause harm than mergers.

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[22] Competitive Impact Statement at 7, U.S. v. Gannett Co., Inc., No. 13-01984 (D.D.C. Dec. 16, 2013).

[23] *Id.*

[24] Proposed Final Judgment §XI, U.S. v. Gannett Co., Inc. et al, No. 13-01984 (D.D.C. Dec. 16, 2013).

[25] *See* Final Judgment §XI, United States v. Raycom Media, Inc., No. 08-01510 (D.D.C. 2008); Final Judgment §X, United States v. News Corporation Ltd., et al., No. 1:01-00771 (D.D.C. 2001).

Under antitrust law, such competitor collaborations are analyzed under one of two analytical frameworks: the per se rule or the rule of reason. Agreements among competitors that horizontally fix price, rig bids, or divide markets – if not reasonably necessary to achieve an "efficiency-enhancing integration of economic activity" – are challenged as per se illegal because they are "of a type that always or almost always tend to raise price or reduce output."[26] Other collaborations are analyzed under the rule of reason, which considers the overall likely effects of the collaboration on competition. Simply labeling an arrangement as a joint venture or claiming a theoretical efficiency that is not plausible in the context of a particular collaboration will not protect an anticompetitive arrangement.[27]

The cooperative agreements between broadcast stations highlighted in the Commission's Notice may fit into either the per se or rule of reason category. The Department has challenged a number of JSA agreements that permit one station to determine the advertising prices charged by another competing station as per se illegal.[28] To escape such per se treatment, it is not sufficient for joint activity to be merely coincident with some other efficiency-enhancing integration; rule of reason analysis is appropriate only where the joint activity is reasonably necessary to achieve efficiency-enhancing integration. For example, an agreement between two television stations to

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[26] COMPETITOR COLLABORATION GUIDELINES, *supra* note 16, at 3-4.

[27] *Id.* at 9 ("The nature of the conduct, not its designation, is determinative.").

[28] *See, e.g.*, United States et al. v. American Radio Systems Corp., No. 96-2459 (D.D.C. 1996); United States v. Citadel Comm'n Corp., Civ. No. 99-01043 (D.D.C. 1997). The Department also challenged as per se illegal a series of agreements between television stations in Corpus Christi designed to raise the price of retransmission rights for cable companies. In that case, all the television stations in the local market agreed not to enter into a retransmission consent agreement with any cable company until that cable company had reached an agreement with all stations. Complaint ¶18-19, United States v. Texas Television, Inc., No. C-96-64 (S.D. Tex. 1996); *cf. also* COMPETITOR COLLABORATION GUIDELINES, *supra* note 16, at 30, example 4 (indicating that a hypothetical agreement between two competitors to merge sales forces could be per se illegal).

share the cost and use of expensive infrastructure like a news helicopter might create benefits for consumers if, without the cooperation, neither station would have been able to afford its own helicopter and television viewers might be denied the benefit of the breaking news coverage supplied by the helicopter. Thus, joint purchase and operation of a helicopter is a kind of agreement that would ordinarily be subject to rule of reason analysis. However, if the two stations added to their helicopter-sharing agreement an agreement also to set advertising prices jointly – even those that are unrelated to the helicopter news segments – the advertising agreement would likely be deemed per se illegal because joint pricing is not reasonably necessary to realize the benefits of sharing the helicopter. Instead, to avoid being deemed per se illegal, activities such as joint advertising sales or joint retransmission negotiations would have to be shown to be reasonably necessary to some other efficiency-enhancing combination of the operations of the stations.

IV. Attribution is Appropriate for JSAs and Substantively Similar Agreements, and the Commission Should Also Scrutinize the Competitive Effects of Other Agreements Between Broadcast Stations on a Case-by-Case Basis.

To the extent the Commission's ownership rules focus on protecting competition, the rules can better serve that goal by accounting for those agreements that harm competition among broadcast stations. Nevertheless, the Department recognizes that the Commission's ownership rules are also motivated in part by the need to promote localism and diversity, and that those concerns may call for somewhat different analysis than is used by the Department.

Given the extensive control over pricing decisions inherent in JSAs, the Department has previously explained that those agreements should be considered attributable, and maintains that position today in light of its continued experience in the industry. Specifically, the Department's 1997 Comments suggested that attribution of radio JSAs was appropriate, but noted that at the time the Department had less experience with television JSAs.[29] As discussed herein, the Department's recent experience in broadcast television investigations confirms that attribution of television stations is also appropriate, for reasons similar to those expressed in support of attribution of radio JSAs in 1997. Moreover, any agreement that confers similar control over pricing and sales, even if not titled a "JSA" by the participants, should also be considered attributable.[30] Indeed, failure to treat JSAs and similar arrangements as attributable interests "could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits."[31]

To avoid such circumvention, the Commission's analysis should seek to identify the full range of collaborations between broadcast stations that may harm competition, even when such agreements do not run afoul of the bright-line attribution rules. Indeed, combinations of SSAs, LNS agreements, purchase options, substantial loan guarantees, or other entanglements can confer similar degrees of control as JSAs, or may preserve some competition between the participants, depending on their precise terms. Hence, like the Department, the Commission should analyze such agreements on a case-by-case basis.

As a first step, more transparency would be useful and could be accomplished by requiring broadcasters to file all such agreements with the Commission. Information from these filings could help inform the Commission as it analyzes the likely competitive effects of these

[29] *See* 1997 Comments, *supra* note 1, at 5 n. 2.

[30] *Cf.* COMPETITOR COLLABORATION GUIDELINES, *supra* note 16, at 9 ("The nature of the conduct, not its designation, is determinative.").

[31] 1997 Comments, *supra* note 1, at 2.

agreements. Such analyses should consider whether collaborations will 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. Collaborations could achieve this result by linking the financial interests of rival firms, providing direct influence over a rival firm, or providing access to competitively sensitive information. For instance, in the Gannett transaction mentioned above, Gannett did not enter into a JSA with Sander in St. Louis. Nevertheless, the Department concluded that the combination of the assignable purchase option, financing guarantee, and comprehensive shared services agreement limited the incentive of Sander and Gannett to compete with each other.

Such a functional, flexible approach to reviewing collaborations between broadcast stations is fully consistent with the Commission's approach when reviewing transactions in other industries. The Commission's broadcast license transfer decisions have long noted the need for a "case-by-case" review, most recently in the Media Bureau's own order approving the Gannett-Belo transactions subject to the Department's consent decree.[32] When reviewing proposed transactions in the wireless, wireline, and satellite industries, the Commission's review often closely follows established antitrust principles in employing a functional approach to analyzing the competitive effect of agreements between competitors. For instance, when analyzing a recent joint venture between wireless providers in Alaska, the Commission acknowledged that

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[32] *In re Applications for Consent to Transfer Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, FCC MB Docket No. 13-189 (rel. Dec. 20, 2013), at ¶ 29-30.

even though the two companies would remain nominally independent, the collaboration could reduce the parties' incentives to compete and could produce price increases.[33]

Similarly, after Liberty Media Corporation acquired DirecTV, the Commission found a potential for competitive harm because Liberty Media had some common owners and directors with the incumbent cable provider in Puerto Rico. The Commission noted that "determining whether a particular interest is attributable is a fact-intensive inquiry, and, even where an interest may appear non-attributable under the bright-line attribution rules, the Commission retains the discretion to review individual cases that present unusual issues."[34] The Commission ordered changes to remove the competitive overlap.[35]

V. Conclusion

The Notice reaffirms the Commission's strong commitment to crafting broadcast ownership rules that promote vigorous competition. The Department strongly supports this effort. Regardless of the outcome of this proceeding, the Department will continue to monitor developments in the broadcast industry and ensure that transactions and agreements between broadcast stations do not deprive advertisers and viewers of the benefits of competition. The Department looks forward to continuing to work closely with the Commission in pursuit of this objective.

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[33] *In re Applications of GCI Communication Corp. et al.*, Memorandum Opinion and Order, FCC WT Docket No. 12-187 (rel. July 16, 2013), at ¶ 44-50 (citing the *Horizontal Merger Guidelines* and the *Competitor Collaboration Guidelines*).

[34] *In re News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee,* Memorandum Opinion and Order, FCC MB Docket No. 07-18, 23 FCC Rcd. 3268, 3294 ¶ 63, n. 193 (2008).

[35] *Id.*

Respectfully submitted,

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