

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Application to Assign Stations from Red River)	File Nos. 0000180629, 0000180630,
Broadcasting to Forum Communications)	0000180631, 0000180632
Company)	

**PETITION TO DENY AND COMMENTS OF
NTCA – THE RURAL BROADBAND ASSOCIATION**

The Federal Communications Commission (“FCC” or “Commission”) on January 25, 2022, released a Public Notice announcing that the applications for consent to the assignment of licenses and authorizations held by Red River Broadcast Co., LLC (“Red River”) and KQDS-TV Corp. (“KQS-TV”) to Forum Communications Company (“Forum,” and together with Red River and KQDS-TV, the “Applicants”) had been accepted for filing.¹ Through the proposed transaction, Red River and KQDS-TV seek to sell and assign certain broadcast assets, including the Commission licenses, to Forum. Red River and KQWDS-TV currently hold broadcast stations in the Fargo DMA and the Duluth-Superior DMA. Forum also owns a full-power television station and satellite television station, as well as radio station WDAY(AM) in the Fargo market. Were the Commission to approve this transaction, Forum would own two of the top-four stations in the Fargo DMA, WDAY-TV and KVRR(TV). Moreover, Forum would own four full-power satellite television stations in the Fargo DMA, WDAZ-TV, KJRR(TV), KNRR(TV), and KBRR(TV), as well as the market’s largest newspaper, *The Forum*. In addition,

¹ *Assignment of Authorization Forum Red River Broadcast Co., LLC to Forum Communications*, Public Notice, File Nos. 0000180629, 0000180630, 0000180631, and 0000180632 (January 25, 2022), *Application seeking Commission’s consent to the Assignment of licenses and authorizations held by Red River Broadcast Co., LLC and KQDS-TV Corp to Forum Communications Company, Comprehensive Exhibit*. (the “Application”)

just two companies, Forum and Gray Television, would own *all* the stations in the Fargo market affiliated with the Big Four Networks.

For the reasons set forth below, Applicants have failed to meet their burden to receive a waiver of the Top-Four Prohibition set forth in the Commission’s Local Television Ownership Rule. The Commission should not approve this transaction and NTCA - The Rural Broadband Association (“NTCA”) urges its denial.

I. STATEMENT OF INTEREST

NTCA is a national association of approximately 850 members. All of NTCA’s members are providers of broadband and voice services in rural America, and many also provide video and wireless services to their rural communities as well. Of particular relevance to the instant proceeding, several hundred of NTCA’s members operate as multichannel video programming distributors (“MVPDs”). MVPDs must rely on and pay for content, including broadcasting content, from content providers. The cost of the content is a primary driver in the cost of MVPD provided services. NTCA has member companies providing MVPD service in the Fargo DMA that is a subject of this transaction, and these members will suffer injury in the form of increased retransmission consent fees if the Commission were to approve the transaction, allowing Forum to own top of the top-four stations in the market. However, this injury would be prevented and thus redressed by the Commission denying the transaction.

II. LEGAL STANDARD

Under the Communications Act, the Commission will approve a proposed license transfer if it concludes that the transfer will serve “the public interest, convenience, and necessity.”²

² 47 U.S.C. § 310(d), *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131 ¶2 (2015).

Applicants bear the burden of demonstrating that the proposed transaction serves the public interest.³ Whether a transaction will create or enhance pricing power, leading to consumer price increases and related harms, is a “public interest harm” considered by the Commission.⁴

The Commission generally prohibits common ownership of two “Top-Four” stations in a market. As the Commission has previously observed, concerns with respect to Top-Four duopolies are long-standing and well understood:

The Commission has repeatedly concluded that the Top-Four Prohibition is necessary to promote competition in the local television marketplace. As the Commission has consistently found, there is generally a significant cushion of audience share percentage points that separates the top four stations from the fifth-ranked stations. In the Second Report and Order, the Commission found that this pattern has not changed. Thus, top-four combinations would generally result in a single firm's obtaining a significantly larger market share than other stations and reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares.⁵

However, the Commission may set aside the general prohibition if broadcasters makes a showing, on a case-by-case basis, that the public interest, convenience, and necessity would be served by allowing an entity to directly or indirectly own, operate, or control two top-four television stations licensed in the same DMA. Applicants seeking approval of such a transaction

³ *E.g.*, *AT&T-DIRECTV* ¶ 18 (“The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”).

⁴ *See, e.g.*, *EchoStar Commc'ns Corp., Gen. Motors Corp. and Hughes Elecs. Corp.*, 17 FCC Rcd. 20559, ¶ 169 (2002) (“*EchoStar HDO*”) (“[The evidence] strongly suggests that, in the absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices. Given this likelihood, we cannot find that the Applicants have met their burden of demonstrating that the proposed merger will produce merger-specific public interest benefits of the magnitude the Applicants allege.”); *XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd. 12348, ¶ 6 (2008) (“*XM Satellite-Sirius*”). (“We also conclude that, absent Applicants’ voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time.”).

⁵ *Id.*

“must demonstrate that the benefits of the proposed transaction would outweigh the harms,” and that the application of the Top-Four Prohibition is not in the public interest with respect to the specific transaction “because the reduction in competition is minimal and is outweighed by public interest benefits.”⁶ The Commission pledged that it would “undertake a careful review of such showings in light of the record with respect to each such application.”⁷ In its *Local Ownership Reconsideration Order*, the Commission listed information that applicants can provide, including specifically, retransmission consent fees.⁸

III. APPROVAL OF THE TRANSACTION IS NOT IN THE PUBLIC INTEREST

Applicants claim that approval of the applications will further localism and promote competition, outweighing “theoretical” harms.⁹ Similar to previous applications to permit Top-Four duopolies, Applicants claim that common ownership of two Top-Four stations will result in cost savings and increased revenues, which will enable the stations to better serve their communities. However, Applicants do not make any attempt to address the harms the transaction may cause, including those to distributors of content, determining the review unnecessary for Commission approval.¹⁰

⁶ *In re 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*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9839 (2017) (“*Local Ownership Reconsideration Order*”).

⁷ *Id.* at 9837, n. 230 (citations omitted).

⁸ *Local Ownership Reconsideration Order*, ¶ 82.

⁹ Application, p. 1.

¹⁰ Application p. 9, fn 20.

The Commission – and Congress – have determined that allowing two Top Four stations jointly to negotiate retransmission consent agreements generally increases the costs of acquiring such content in an anticompetitive manner that harms consumers. As the Commission explained,

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.¹¹

When Congress extended the statutory ban on joint negotiation for retransmission consent to any non-commonly owned stations in a market (not only Top-Four stations), it agreed that “such arrangements could give broadcasters an unfair advantage in negotiations, because a negotiating impasse would result in the loss of two local programming streams rather than one and may give the broadcaster the ability to demand retransmission fees above the market value each broadcaster could command alone.”¹²

If the Commission intended that the Top-Four prohibition could be overcome merely by showing cost savings and increased revenues and promising new or better programming, no company would fail to show it was entitled to an exception. A more critical and thoughtful analysis of the harms of the transaction must be considered such that only in particularly compelling circumstances should the Commission waive the Top-Four prohibition. There is

¹¹ *In re Amendment of the Commission's Rules - Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3358 (2014).

¹² H.R. Rep. No. 113-518, 113th Cong., 2d Sess. 5-6 (2014).

ample evidence that entities controlling more than one of the top network affiliates in a single market can, and do, increase prices.¹³

Seeking apparently to sidestep such concerns, Applicants focus on only one factor discussed in the *Local Ownership Reconsideration Order* – specifically, that the merged entity will not hold outsized market share compared to other broadcasters.¹⁴ They further opine that retransmission consent revenues are irrelevant to consideration of the instant transaction because the Commission previously approved transactions without such data and because estimates of retransmission consent revenues are “unreliable.”¹⁵ However, the *Local Ownership Reconsideration Order* contemplates that applicants demonstrate that *all* of the benefits of a Top-Four duopoly outweigh *all* of the harms. By attempting to confine the analysis to a single factor that holds true in many markets, Applicants seek to have the Commission’s exception to the Top-Four prohibition swallow the rule.

This particular transaction gives rise to particular concerns. If approved, not only would one owner hold two of the Top-Four broadcast stations in the Fargo DMA, two owners would control all four of the Top-Four stations. In reviewing this proposal, it cannot be overlooked that Gray purchased all four of the top performing stations in the state of North Dakota across two DMAs and consolidated their operations four years ago – NBC and Fox in the East DMA and NBC and CBS in the West DMA. It is known that previous mergers have resulted in increased

¹³ See, e.g., Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216, *et.al*, (filed Oct. 25), See also, *In the Matter of Application to Assign Stations from Red River Broadcast Co., LLC to Gray Television Licensee, LLC*, File No, BALCDT-20180516AAY, Comments of The American Television Alliance, p. 8-9 (July 9, 2018).

¹⁴ Application, pp. 7, 15-16.

¹⁵ Application, p. 9, fn 20.

retransmission consent fees.¹⁶ The proposed transaction will exacerbate the pressure on MVPDs in negotiating retransmission consent and the harm of the market duopoly on consumers.

Further, by granting Applicants a waiver of the Top-Four Prohibition, the Commission would break new ground in permitting additional consolidation in local television markets, going far beyond the Media Bureau’s 2019 waiver grant in the Sioux Falls DMA.¹⁷ Most importantly, in the *Sioux Falls Order*, the Bureau relied on the fact that “Sioux Falls [was] the only television market in the United States smaller than DMA #100 that ha[d] four or more full-power stations where one of those stations earn[ed] a majority of advertising revenue and where the affiliates of ABC, CBS, NBC, and FOX [were] independently owned and operated.”¹⁸ In Fargo, by contrast, the affiliates of ABC, CBS, NBC, and FOX are not independently owned and operated. Rather, Gray Television already controls the NBC and CBS affiliations. As a result, were this transaction to be approved, only two companies would control the Big-Four Network affiliations in the Fargo DMA, whereas after the grant of the Sioux Falls waiver, the Big-Four affiliations in that market were still controlled by three companies. Moreover, in the Sioux Falls case, the Applicants argued that absent the transaction, “it [was] only a matter of time” before the NBC

¹⁶ See, e.g., , *Gray Television, Inc Investor Presentation, Gray to Acquire Meredith Corporation’s Local Media Group and Become the Second Largest TV Broadcast Group*, (May 3, 2021) at 7, showing expected net retransmission revenue of \$25 million due to contracted “step-up” of RemainCo’s subscribers to Gray’s retransmission rates. https://gray.tv/uploads/documents/presentations/Gray_Investor_Presentation_on_Meredith_May_2021.pdf; See also, *Gray Television, Inc, Investor Presentation NYSE:GTN* (November 2018), citing increased revenue due to contracted “step-up” of Raycom subscribers to Gray’s retransmission rates at p. 10, and “strong growth in net retrans and increasing leverage with MVPDs and Networks” at p. 14. [https://gray.tv/uploads/documents/presentations/Gray_Investor_Presentation_Nov_2018_\(VF\).pdf](https://gray.tv/uploads/documents/presentations/Gray_Investor_Presentation_Nov_2018_(VF).pdf).

¹⁷ *In the Matter of Consent to Assign Certain Licenses from Red River Broadcast co., LLC to Gray Television Licensee, LLC*, Memorandum Opinion and Order, File No. BALCDT-20180516AAY. (“*Sioux Falls Order*”)

¹⁸ *Id.*, ¶ 13.

affiliate in the market would be “forced to eliminate its local news.”¹⁹ Here, by contrast, Applicants do not assert that any station involved in this transaction would be required to end its local news coverage were the transaction to be rejected.

In sum, granting a waiver in this case would permit greater consolidation in the Fargo DMA than the Commission allowed in the Sioux Falls DMA in exchange for less potential benefit.

IV. APPLICANTS HAVE NOT DEMONSTRATED THAT THE BENEFITS OF THIS TRANSACTION WILL OUTWEIGH THE HARMS

Applicants claim that their proposed duopoly will result in a number of public-interest benefits that would outweigh any “theoretical” harms.²⁰ While the so-called benefits are not transaction specific or verifiable, the harms are well-known.

Applicants assert that the proposed transaction’s “most notable” public interest benefit is increased localism.²¹ In support of this claim, they recite a list of past accomplishments and offer promises to increase local news and sports programming. These unenforceable promises about future services do not count as public interest benefits. The Commission should not rely on “mere speculation and promises about post-merger behavior,” as a potential ameliorating factor to harm.²²

¹⁹ *Sioux Falls Order*, ¶ 14.

²⁰ Application, p. 23.

²¹ *Id.*, p. 17.

²² *Echo Star Commc’ns Corp.*, 17 FCC Rcd. 20559, ¶ 102 (2002) (“Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.”) (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21(D.C. Cir. 2001)).

In addition to the very real harm to retransmission consent negotiations and the consolidation in the market as described above, Forum owns a major newspaper in Fargo – and if this transaction is approved, not only would Forum control two of the Top-Four broadcast stations, it would also control four full-power satellite stations in the market. In addition to the very real harm to retransmission consent negotiations, this transaction would therefore reduce viewpoint diversity in the market, which would not be in the public interest.

V. CONCLUSION

For the forgoing reasons, the Commission should deny the requested exemption from the Top-Four Prohibition and the proposed merger. The Applicants have failed to demonstrate that the harms associated with increased consolidation in the Fargo television market are outweighed by any real-world benefits of this transaction or that there are exceptional circumstances that justify its approval. Rather, approving this transaction would open the door to the Top-Four prohibition being waived in virtually any television market in the nation.

Respectfully submitted,



By: /s/ Jill Canfield
General Counsel, VP of Policy

/s/ Michael Romano
Senior Vice President –
Industry Affairs & Business Development

NTCA – The Rural Broadband Association
4121 Wilson Blvd, Ste. 10000
Arlington, VA 22203
(703)351-2000

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CERTIFICATE OF SERVICE

I, Jill Canfield, hereby certify that on February 24, 2022, I caused true and correct copies for the foregoing to be served by first class, postage prepaid and electronic mail upon the following:

For Assignor:

Kathy M Lau
Red River Broadcast Co, LLC
P.O. Box 9115
Fargo, ND 58106
klau@kvrr.com

Charles R Naftalin, Esq.
Holland & Knight, LLP
800 17th Street, N.W.
Suite 1100
Washington, DC 20006
CharlesNaftalin@hklaw.com

For Assignee:

Tim Nelson
Brooks, Pierce, et.al
150 Fayetteville St
Suite 1700
Raleigh, NC 27601
tnelson@brookspierce.com

Elizabeth E. Spainhour
Brooks Pierce, et.al.
150 Fayetteville St.
Suite 1700
Raleigh, NC 27601
espainhour@brookspierce.com

/s/

Jill Canfield
NTCA – The Rural Broadband Association