Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application to Assign Stations from	)	File No. 0000180629
Red River Broadcast Co., LLC and	)	
KQDS-TV Corp. to	)	
Forum Communications Company	)	

REPLY OF NTCA – THE RURAL BROADBAND ASSOCIATION TO OPPOSITION TO PETITION TO DENY

NTCA – The Rural Broadband Association ("NTCA") submits this Reply in response to Forum Communications Company's ("Forum") Opposition and Comments[1] to NTCA's – The Rural Broadband Association's ("NTCA") Petition to Deny and Comments[2] and the Comments of the American Television Alliance[3] ("ATVA") (collectively "Commenters") regarding the above-captioned application (the "Application"). The proposed transaction cannot be approved absent a waiver of the Top-Four Prohibition set forth in the Commission's Local Television Ownership Rule. However, neither the Application nor Forum's Opposition address the transaction-specific harms of their proposal. Indeed, Forum largely ignores the specific facts regarding the Fargo market and this transaction that make this merger so problematic.[4] Applicants have failed to meet their burden to show that waiver of the Top-Four Prohibition for

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[1] Opposition to Petition to Deny and Reply to Comments of Forum Communications Company (filed March 7, 2022) ("Opposition").

[2] Petition to Deny and Comments of NTCA – The Rural Broadband Association (filed Feb. 24, 2022). ("NTCA Petition")

[3] Comments of the American Television Alliance (filed Feb. 24, 2022).

[4] *See infra* Section II.

this specific transaction would serve the public interest, convenience, and necessity, and the Commission should therefore deny the Application.

I. FORUM FAILS TO DEMONSTRATE THAT THE PROPOSED TRANSACTION WILL NOT LEAD TO INCREASED PRICES OR THAT THE HARM OF INCREASED PRICES IS OUTWEIGHED BY PUBLIC INTEREST BENEFITS

Forum argues, first, that Commenters raise generalized claims rather than transaction-specific ones.[5] It claims that Commenters ignore the instant transaction and Fargo viewers altogether.[6] This is simply wrong. Commenters have suggested that, according to the best evidence available to the Commission, *this transaction will raise prices in Fargo*. That is, since the Commission has found that combining two Top-Four stations "invariably tends" to raise consumer prices,[7] then the Commission can conclude that such a combination will do so in Fargo unless applicants either show why that is not so in Fargo or explain why other benefits outweigh this concern.

This does not, as Forum alleges, "turn the Commission's case-by-case analysis standard into a newly invented, bright-line test that requires applicants to make a specific showing related to a proposed transaction's impact on retransmission consent fees."[8] Rather, it is a straightforward application of the existing public interest test to the specific circumstances before the Commission and reflects clear claims of transaction-specific harms. It is also worth noting

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5 Opposition at 3.

6 *Id.* at 4.

7 *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 10 (2014) ("*Joint Negotiation Order*") ("[J]oint 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.").

8 Opposition at 5.

that *Applicants* bear the burden of convincing the Commission that the benefits of a proposed transaction outweigh the harms. Commenters contend that higher consumer prices constitute a harm;[9] that the best evidence indicates that *this* transaction will cause higher consumer prices; and so, the Applicants then bear the burden of addressing this harm in some form or fashion. Such an analysis would not bar "all" transactions related to duopolies, nor would it "repeal" the case-by-case rule in this proceeding.[10] Commenters simply point out that Applicants seeking to make case-by-case showings cannot ignore issues relevant to the discussion.

Forum also takes issue with the evidence cited for the proposition that duopolies lead to higher prices. It seems to suggest that the Commission's *Joint Negotiation Order* cannot apply here because it applied to joint negotiation by non-commonly owned parties, not common ownership itself.[11] This misconstrues ATVA's argument. Nobody has suggested that the *Joint Negotiation Order* controls here *legally*, where there is joint ownership instead of joint negotiation. Commenters have suggested, however, that the *harms* caused by joint negotiation and joint ownership of Top-Four stations are precisely the same. This should be self-evident: If a party can increase prices merely when it can negotiate on behalf of two non-commonly owned Top-Four stations in a market, there is even greater concern that it can increase prices when it actually owns two Top-Four stations in that market and negotiates for both. Again, therefore, the Commission's prior findings suggest that new duopolies will raise prices, absent evidence to the contrary.

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[9] Forum does not appear to disagree with this assertion.

[10] Opposition at 8.

[11] Opposition at 7.

II. FORUM FAILS TO ADDRESS TRANSACTION-SPECIFIC HARMS THAT DIFFERENTIATE THIS TRANSACTION FROM PREVIOUSLY APPROVED TRANSACTIONS

Forum argues that Commenters "offer no arguments . . . that are specific to the Fargo market." To the contrary, NTCA pointed out that if the subject transaction is approved the Commission would break new ground in permitting additional consolidation in local television markets.[12] While Forum points to language in an order granting a waiver in Sioux Falls, South Dakota as support for its assertion that the Commission has previously considered and rejected Commenters' arguments,[13] its rationalization is selective in its application. As NTCA explained, 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."[14] In Fargo, by contrast, the affiliates of ABC, CBS, NBC and FOX are not independently owned and operated. Gray Television already controls the NBC and CBS affiliations in Fargo. If this transaction is approved, only two companies would control the Big-Four Network affiliations in the Fargo DMA. In Sioux Falls, after the Commission granted the waiver, the Big-Four Network affiliations were still controlled by three companies. A waiver here would create greater consolidation than the Commission has previously permitted. Forum fails to address this fact or explain how the public interest benefit would outweigh this substantial harm.

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12 NTCA Petition at 7-8.

13 Opposition at 3-4.

14 *In the Matter of Consent to Assign Certain Licenses form Red River Broadcast Co., LLC to Gray Television Licensee, LLC,* Memorandum Opinion and Order, File No. BALCDT-20180516AAY ("*Sioux Falls Order").*

Furthermore, in Sioux Falls, the transaction was not likely to lead to the loss of an independent news outlet. That is because the parties there argued that absent the transaction, "it [was] only a matter of time" before the NBC affiliate in the market would be "forced to eliminate its local news."[15] Here, by contrast, Applicants have not asserted that any station involved in this transaction would be required to end its local news coverage were the transaction to be rejected. As a result, this transaction would unnecessarily lead to the elimination of an independent news department in the Fargo DMA, thus decreasing competition and diversity in the market.

Finally, Forum does not deny that if transaction is approved, it would own two of the top-four stations in the Fargo DMA—WDAY-TV and KVRR(TV)—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*. While Forum claims that any concerns related to viewpoint diversity are "misplaced" because the U.S. Supreme Court upheld the Commission's elimination of the newspaper-broadcast-cross-ownership rule,[16] Forum's facile response does not seriously engage with NTCA's argument. The Commission's elimination of the newspaper-broadcast-cross-ownership rule does not mean that, in conducting a case-by-case analysis of whether a single company should receive a waiver so that it can own two of the Top Four television stations in a market, the FCC must blind itself to the reality that the company in question also owns the major newspaper in the market. Rather, in assessing the specific characteristics of the market, newspaper ownership is a factor that the Commission should

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[15] *Sioux Falls Order, ¶ 14.*

[16] Opposition at 12, n.34.

consider, particularly in a transaction, such as this one, that would lead to the elimination of an independent news outlet.

III. FORUM'S SMALL SIZE RELATIVE TO THE NATIONAL MARKET IS IRRELEVANT IN CONSIDERING ITS NEGOTIATING POWER IN THE FARGO DMA

Forum attempts to negate the known harms of consolidation by claiming that it lacks leverage because it is small and some of its negotiating partners are large.[17] More specifically, Forum asserts that MVPDs have bargaining power, rather than Forum itself.[18] This, of course, is not so with respect to NTCA's members – each of which is a small, local business. And Forum nowhere states that its lack of size will prevent it from raising prices. Duopolies do not create bargaining power only for large station groups. Indeed, duopolies create leverage entirely separate from that attributable to the size of the station or the size of the MVPD. Duopolies create leverage because, as the Commission has found, network stations are "considered by an MVPD seeking carriage rights to be at least partial substitutes for one another."[19] So a station that controls, as Forum would, ABC and FOX programming in Fargo can command higher prices for ABC programing than that station could if it controlled only ABC programming. Nothing about Forum's relatively small size changes this – just because a duopolist may be small relative to operators in other markets does not change or mitigate the fact it is a duopolist in the relevant market. In short, Forum would hold outsized power in the relevant market, irrespective of its comparative national size.

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[17] Opposition. at 8.

[18] *Id.*

[19] *Joint Negotiation Order* ¶ 14 (emphasis added).

IV. CONCLUSION

For the forgoing reasons, the Commission should deny the requested exemption from the Top-Four Prohibition and thus reject the proposed merger. The Applicants have failed to demonstrate that the transaction-specific 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.

Respectfully submitted,

NTCA THE RURAL BROADBAND ASSOCIATION

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, herby certify that on March 14, 2022, I caused true and correct copies of the foregoing to be served by email and/or placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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

Mike Chappell
The American Television Alliance
1155 F Street, NW
Suite 950
Washington, DC 20004
mchappell@fiercegr.com

Michael Nilsson
Harris Wiltshire & Grannis LLP
1919 M Street, NW
Eighth Floor
Washington, DC 20036
mnilsson@hwglaw.com

Shiva Goel
Harris Wiltshire & Grannis LLP
1919 M Street, NW
Eighth Floor
Washington, DC 20036
sgoel@hwglaw.com

Barbara Kreisman
Chief, Video Division, Media Bureau FCC
Barbara.kreisman@fcc.gov

David Brown
Deputy Chief, Video Division, Media Bureau FCC
David.brown@fcc.gov

Chris Robbins
Video Division, Media Bureau FCC
Chris.robbins@fcc.gov

Charles Naftalin
Holland & Knight LLP
800 17th Street, NW
Washington, DC 2006
Charles.naftalin@hklaw.com

/s/
Jill Canfield