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Federal Communications Commission
Office of the Secretary

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	MM Docket No. 91-221
Review of the Policy Implications	)	
of the Changing Video Marketplace	)	

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

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December 19, 1991

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To: The Commission

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Reply Comments in the above-entitled proceeding. In these Reply Comments, we will respond to the position taken by The Association of Independent Television Stations, Inc. (INTV), The Network Affiliated Stations Alliance (NASA) and The National Association of Broadcasters (NAB) that the Commission regulation banning cross-ownership of national networks and cable systems[1] should be retained.

In view of the Commission's recent announcement that it will adopt a Second Further Notice of Proposed Rule Making inviting additional comment on proposals to eliminate or modify this rule, our brief comments will be limited to an analysis of what we believe is the distorted view of regulation on which those comments are based. In essence,

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[1] 47 C.F.R § 76.501(a)(1)

these Commenters seek regulatory support to "freeze" the current business of network companies in a rapidly changing video communications marketplace and ultimately paralyze their efforts to diversify in order to strengthen their core businesses, including broadcasting. Their arguments, which presuppose irrational behavior on the part of network companies, are based upon nothing more than highly speculative assertions that certain abuses would flow inexorably from network-cable ownership.[2] In fact, these Commenters are not able to articulate any direct connection between those potential abuses and network ownership of cable systems.

For example, NASA and NAB both assert that cable companies have market power in local markets and thus act anticompetitively with respect to other market participants, including local broadcasters. Allowing a network to combine with any of these cable companies, they argue, would increase the incentive and power of cable operators to behave in an anticompetitive manner and thus exacerbate an already "difficult" situation.[3] This argument, at its core, takes

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[2] Many of the specific points raised by these Commenters have already been addressed by our initial Comments. For example, we have demonstrated that fears of discrimination against non-affiliated broadcast stations, distortion of network-affiliate relations, and affiliate by-pass make no business or economic sense. If regulatory safeguards are viewed as a desirable prophylactic measure, however, we do not oppose them. Indeed, we have volunteered that safeguards be imposed. They protect against conduct in which we have no desire to engage. Comments of Capital Cities/ABC at 10-19.

[3] NASA Comments at 2, NAB Comments at 36-41.

issue with the extent of vertical and horizontal concentration in the cable industry. What it fails to do, however, is to explain why such concerns justify a cross-ownership ban directed at one narrow class of potential entrants, the national networks.

Similarly, NAB's argument regarding preferential treatment of cable services has little if anything to do with cable ownership by networks. NAB asserts that a network cable owner would favor its cable services in acquiring programming:

> A blockbuster series, movie or sport package becomes available. Does an MSO that owns cable systems, a network and cable programming services, or a network that owns cable systems and cable program services bid for it on behalf of its network or one of its cable programming services? Would not the incentive and opportunity for greater profits from pay tiers and pay per view prompt future cable/network conglomerates increasingly to siphon such premier programming away from the free over-the-air broadcast system? Such cable/network conglomerates could adopt a strategy to have their network only acquire second rate programming and watch its affiliates who are competitors with many of their local cable systems shrivel and slowly die on the vine.[4]

This argument not only assumes that a network company would irrationally undermine its major financial stake in its network system, it also completely ignores the fact that siphoning from the network would shrink the profitability of a network's owned station affiliates. Capital Cities/ABC owns eight television stations, five of which are in the top five ADI markets. We have no desire to watch those stations

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[4] NAB Comments at 42.

"shrivel and slowly die on the vine." In any case, this argument constitutes an objection to network entry into the provision of cable programming -- not to cable system ownership. Network companies are currently free to own cable programming services. In fact, Capital Cities/ABC has significant ownership interests in ESPN, Lifetime and A&E,[5] each of which is widely available on cable systems throughout the United States.[6] If favoring cable services in acquiring programming were a viable business strategy, network companies involved in cable programming would have already pursued it.

As we stated in our initial Comments, the function of regulation is not to provide protective assurances or to remove all risk for one group of market participants, but to promote free and robust competition among all competitors.[7]

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[5] NASA describes NBC and Capital Cities/ABC as "among the largest and most aggressive cable programmers in the business." NASA Comments at 33.

[6] ESPN is in 99% of all US cable homes; Lifetime is in 91% of all US cable homes; and A&E is in 88% of all US cable homes. Source: NTI October 1991.

[7] As the Commission has stated, "[a]n important advantage of competition over regulation is that there is no need to forecast or prejudge which suppliers or which particular methods of supply will best serve the public interest. Different program suppliers compete for customers on the basis of their particular skills and advantages, and success in the marketplace is tied to success in meeting consumer demands. Under otherwise competitive conditions, a regulatory framework that limits the ability of some competitors to compete on the same terms as other competitors introduces a bias into the market process. With this bias, success in the marketplace becomes an artifact of regulation rather than an indicator that the successful competitor is meeting consumer demands efficiently." <u>Program Exclusivity in the Cable and Broadcast Industries</u>, 64 Rad. Reg. 2d (P&F) 1818, 1822 (1988). In contrast, these Commenters appear to be looking for <u>guarantees</u> that

In the last analysis, NAB's and NASA's concerns about network cable ownership reflect an underlying uneasiness with the prospect that broadcast affiliates' principal program suppliers might possess an interest potentially in conflict with theirs. But there is nothing inherently unlawful or undesirable in such a situation. Affiliates and their networks have strong common interests, but there are areas in which their interests may differ -- including, under present regulation, the ownership of local cable systems by owners of network affiliates.[8] Program producers and syndicators such as Westinghouse, Viacom and Paramount have interests in the success of their programs that may sometimes conflict with their interests as station operators. Requiring every player in the video marketplace to avoid all conceivable conflicts of interest is neither feasible nor desirable, and regulation eliminating such conflicts is warranted (if at all) only where there is a real and unavoidable risk of serious public harm. Affiliate uneasiness and concern do not constitute a showing of any such risk.

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this regulation will protect them completely (e.g., "the only way genuinely to assure that affiliates maintain sufficient autonomy ..."; "must carry, channel-positioning and by-pass protections ... would not assure that a local affiliate would be immune from coercion by its cable network." NASA Comments at 21, 39 -- emphasis supplied).

[8] Companies or individuals with ownership interests in at least 50 of ABC's 228 primary affiliates also have some degree of ownership interest in local cable systems. ABC Survey based on TV Station & Cable Ownership Directory, Spring 1991 (Warren Publishing, Inc.).

Nor should regulation prevent evolution and change in the business market. The increase in the number of broadcast stations, the growth of cable, the competition from videocassette recorders and the potential competition from new media such as pay-per-view and direct broadcast satellite distribution are changes in business realities which network companies must confront if they are to be financially healthy. Network companies such as Capital Cities/ABC, with a major financial stake in owned television stations, have their fortunes fundamentally tied to over-the-air broadcasting. As the OPP Paper[9] amply demonstrates, however, the irreversible and structural changes in the marketplace leave fewer sources of stable revenue and therefore magnify the risks for a network company that confines itself to broadcasting activities. We have therefore chosen a different strategy: to pursue strength through diversification. That is why we have made investments in other media businesses, including cable programming services. As Chairman Sikes has recently noted:

> Some network affiliates ... say that letting [the national networks invest in the cable facilities business] could lead to their commercial lifeblood -- network programming -- bypassing local broadcast stations. I would contend, however, that allowing the networks more options could also strengthen them. And, it is better to be in a large, healthy family, than to be the only child in a dysfunctional

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[9] Office of Plans and Policy Working Paper #26. Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991).

situation.[10]

No regulation can force a company to stay in a business, such as the network business, or to mandate what resources a company must devote to that business.[11] Our ability to devote resources to the network business depends on the strength of the advertising revenue we are able to generate from programming that attracts and holds national audiences. That ability is not improved by regulation that forecloses other lines of business investment. Properly done, investment in the cable business should provide a more stable source of revenue than the volatile network business and contribute to the overall financial health of the company.

In the end, all that these Commenters can hope to achieve is to place unnecessary regulatory obstacles in the path of a diversification strategy that a network company might otherwise adopt as a prudent and intelligent response to a changed, and changing, video marketplace. This is not a proper use for regulation. Their efforts should be rejected.

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[10] Remarks of Alfred C. Sikes, Chairman, Federal Communications Commission, Before the International Radio & Television Society, September 19, 1991.

[11] <u>See</u> Comments of Group One Broadcasters at 11: "A restriction such as the network/cable cross-ownership prohibition may keep the television networks out of the cable business, but it also threatens to force the networks, and their affiliates, out of the network and local broadcasting businesses as they currently exist."

Respectfully submitted,

By: ______________________________

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