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LAW OFFICES
KOTEEN & NAFTALIN
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036

BERNARD KOTEEN
ALAN Y. NAFTALIN
RAINER K. KRAUS
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
HERBERT D. MILLER, JR.
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN

M. ANNE SWANSON
OF COUNSEL

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915
CABLE ADDRESS
"KOBURT"

November 21, 1991

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Hand Delivered

Dear Ms. Searcy:

Transmitted herewith, on behalf of Great American Television and Radio Company, Inc., are an original and 11 copies of its "Comments" in MM Docket No. 91-221, In the Matter of Review of the Policy Implications of the Changing Video Marketplace.

In the event there are any questions, please communicate with this office.

Very truly yours,

Arthur B. Goodkind

Arthur B. Goodkind

enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Review of the Policy Implications) MM Docket No. 91-221
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COMMENTS OF GREAT AMERICAN TELEVISION AND RADIO COMPANY, INC.

Great American Television and Radio Company, Inc. (Great American), licensee of five network-affiliated television stations and proposed assignee of a sixth such license, files herewith, by its attorneys, its comments in response to the above-captioned Notice of Inquiry. Great American has been the licensee of its present five television stations since 1987. Under prior ownership, the same company and its predecessors have been television licensees since 1949.

INTRODUCTION

This proceeding differs from the usual FCC fact-gathering inquiry in that it follows a comprehensive FCC staff study that has already gathered a mass of data concerning the television industry. OPP Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, Report of FCC Office of Plans and Policy, released June 27, 1991 (the "FCC Staff Report"). The facts compiled in that report are essentially undisputed, and there is similarly no significant disagreement as to the most critical extrapolations for the future that may be made from the current facts. Under these circumstances, the focus on regulatory policy implications of the facts comes at an earlier point in this proceeding than would ordinarily be the case.

While many complex technological and business developments have occurred in the television industry over the past decade and continue to occur, there are three broad areas of change that are critical to this proceeding.

(1) <u>The Increase in Video Distribution Channels</u>. The number of separate channels by which video service is distributed both nationally and locally has increased dramatically and will continue to increase. This change is the aggregate result of numerous developments, most of which are technology based. These developments include: (1) an increase in the number and percentage of U.S. homes having access to cable, (2) steady growth in the percentage of homes subscribing to cable, (3) an increase in the number of channels typically offered to cable subscribers, (4) still further dramatic increases in video distribution channels anticipated in the near future as both cable systems and other distributors of video signals employ new signal compression techniques and/or the use of fiber optic cable, (5) the growth of direct satellite-to-home broadcasting, (6) an increase (substantial during the 1980's but now apparently halted) in the number of conventional off-air television

stations, (7) the development of wireless cable systems and SMATV systems, and (8) the widespread use in television homes of VCR's and video disk players.

(2) Increase in Programming Choices. The increase in video distribution channels described above has produced a parallel if less extensive increase in the number of program and other video choices available to viewers both from nationally distributed and locally originated sources. Many of these new services are advertiser supported in whole or in part, while others are supported directly by viewer payments made either on a per-channel or per-program basis or as components of basic cable charges.

(3) The Advent of the Multichannel Video Service Provider. The two changes described above have given rise to another phenomenon that is new in the history of television -- the advent of single entity national and/or local multichannel service providers. In the past, television was delivered nationally by networks, each restricted by the FCC's rules to a single national service, by program syndicators whose offerings in any one market were limited by the availability of non-network time on a limited number of television stations, and by local stations, all of which were under separate ownership in any given market. Within each market, a closely interdependent relationship between national networks and their affiliates provided reasonable assurance that neither would dominate the other, and thus assured

that viewers would receive an optimum balance of nationally and locally originated programming.

That situation is now greatly changed, at least with respect to video services provided by means other than conventional off-air broadcasting. Individual entities own all or parts of multiple national cable networks, and that ownership is frequently integrated with ownership of the cable systems that decide which networks to offer their subscribers. In virtually every community in the United States, a single local cable operator owns and is able to determine the content of every cable channel received by every cable subscriber. Cable channels now number more than 100 in some instances, with that number to increase sharply in the near future through use of signal compression techniques. With the growth of DBS service, individual DBS operations will similarly be able to determine the content of all of the multiple channels delivered to each subscriber.

The sum result of the changes described above is that every off-air television station is now confronted with vastly increased and still increasing competition for desirable television programming, for the attention of television viewers, and for advertising dollars.[1] To the extent this has occurred

[1]As the Commission found more than three years ago in its Report and Order adopting new syndicated exclusivity rules for cable, cable systems have long since lost their status as entities that were primarily antenna systems ancillary to broadcasting and are now in direct competition with television

simply as a result of developing technology, television broadcasters must necessarily accept the new multichannel universe and must seek to adapt to it. Great American seeks no protection from legitimate and fair competition or from new technology. But increasingly, regulatory constraints that apply solely to broadcasters, together with other inequities in the present regulatory scheme, have left individual stations and individual broadcast companies in an untenable position in seeking to compete with much larger entities in the television industry, many of which are multichannel providers. That is a problem that the Commission can and must address.

As noted more specifically below, broadcast ownership limitations that were originally designed to increase competition and program diversity in an era in which frequency scarcity permitted few potential competitors now serve to restrain competition in an era of channel abundance. Conversely, regulations that were designed to promote the development of competing video delivery services in their early stages -- the treatment of cable under the copyright and retransmission consent laws is a prime example -- now serve to distort competition between television stations and other video service providers and to constrict viewers' ability to obtain the programs they most prefer.

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stations for audience, for programming, and for revenues. Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, 5304-05 (1988).

The FCC Staff Report shows clearly that television broadcasters are greatly handicapped in the new multichannel universe by their restriction to a single, advertiser-supported program delivery channel in each market, and by their inability even to control the use of the programs they produce or purchase for distribution on that single channel. These handicaps bear directly on the Commission's public interest responsibilities under the Communications Act. For the substantial minority of television viewers throughout the United States who are not reached by cable or who choose not to subscribe or cannot afford to subscribe to cable or to wireless cable or to DBS service, off-air broadcasting remains the only source of television. If off-air stations disappear or are forced to reduce the quality of their services, all those who depend on free television will suffer an irreparable loss. Even the majority of viewers who do subscribe to a non-broadcast delivery service face the same loss because local stations are usually the only sources of local television news and information. And in the case of those few cable systems that do originate local news, local television stations provide the only competing local television news and information services not controlled by the single local cable operator.

The provision of diverse, locally oriented news and information services has always been a prime goal of the Commission pursuant to Section 307 of the Communications Act. Indeed, every station's "renewal expectancy" is grounded on the provision of "issue-responsive" and children's programming for its community. See Deregulation of Commercial Television, 56 RR 2d 1005, 1018-1021 (1984); Children's Television Programming, 68 RR 2d 1615 (1991). Cable operators and DBS providers, on the other hand, have no such obligations.

The Commission is now at a point at which it must explicitly confront its future vision of television in America. The issue posed is whether off-air television will exist in the future simply as a disadvantaged competitor providing a lifeline service for disadvantaged viewers, or whether off-air television will continue to play a vital role as a robust provider of local news, sports, information and entertainment in each community. If the Commission's future regulatory scheme simply perpetuates conditions that contribute to off-air television's current gross economic decline, television licensees will be able to offer only a bare bones service, increasingly keyed to lowest common denominator programming. Quality entertainment programming, major sports events, and significant local television news will simply be unavailable to American television viewers who cannot pay for them.

The urgency of the current situation cannot be overemphasized. The trends described in the FCC Staff Report are not only continuing but are accelerating. Because the current outmoded regulatory scheme imperils the ability of broadcasters to carry out their special role, Great American urges the

Commission to move promptly to initiate the regulatory changes set out below.

PROPOSED REGULATORY CHANGES

The profound industry changes described above and in the FCC Staff Report require bold new actions that will enable off-air television stations to compete on a more equal basis with today's and tomorrow's new generation of multichannel providers. Great American supports five specific actions.

(1) Modification of the TV Duopoly Rule. Approximately 60% of television homes already subscribe to cable, with a 70% mark now being confidently predicted. An additional 3% of all TV homes already receive multiple video channels directly from satellites, and that percentage is certain to increase sharply in the near future with the advent of higher powered direct broadcast satellites. More than half of all U.S. TV homes are in markets in which there are 10 or more off-air television signals.[2] Given the increasing abundance of television signals now available to most viewers, the present duoply rule that restricts television broadcasters from owning stations with overlapping Grade B contours materially impairs the ability of broadcast licensees to compete with other multichannel providers.

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[2]All of these figures are set out in the FCC Staff Report.

Great American therefore urges the Commission to begin a proceeding looking toward a phased elimination of the television duoply rule, at least in larger markets having more than a specified minimum number of off-air signals. The modified rule should initially permit ownership of two television stations per market, with a sunset of all restrictions after a specified number of years. Following full repeal of the rule, local television ownership would continue to be limited by the same antitrust laws that limit mergers and acquisitions in any other line of business.

Whether or not the Commission proposes an immediate change to a "two-per-market" rule, the Commission should promote strong local and regional television news services by proposing modification of the present TV duopoly rule so that it would apply only with respect to stations that are (a) in the same Arbitron-defined Area of Dominant Influence and (b) whose City Grade contours overlap. A rule with such parameters would have no material effect on competition or diversity in any television market, since stations compete primarily with other stations or video channels in the same market and only marginally with stations in separate adjacent markets. The rule change suggested here would, however, enable licensees unable to serve a geographically large market adequately with a single transmitter to provide a strong, competitive broadcast service with two separate transmitting stations without the necessity of proving (as is now the case under current satellite station policy) that it would be impossible for one of the stations to survive on a separately owned basis. The rule change would also permit stations in different adjoining markets to provide strong regional news and information services notwithstanding contour overlap at the outer reaches of the stations' service areas.

(2) Joint Operating Arrangements. As an additional way to enhance the ability of off-air broadcasters to compete with multichannel providers, the Commission should adopt a permissive policy with respect to joint operating arrangements between different television stations in the same market, again subject to normal antitrust constraints. While such arrangements preserve the independent status of each licensee, they would permit broadcasters to enter into mutually beneficial agreements that would result in a net improvement of television service to the public. At the present time, for example, arrangements exist in several markets under which stations with special expertise in local news production broadcast news programs during limited time periods obtained on a brokered or bartered basis from other stations in the same markets. Such arrangements increase the quality, amount and time diversity of local television news available to viewers in such markets, and enable the stations that are parties to the arrangements to offer services that compete more effectively with cable operators and other multichannel providers.

In today's depressed television environment, the Commission should not discourage similar or more extensive joint operating arrangements among separately owned stations in the same markets or in adjacent markets. At the least, this issue should be fully explored in a rule making proceeding.

(3) Access to Viewers and Ability of Stations to Control Use of Their Signals. No off-air station can compete with other stations or with other program services offered by cable, wireless cable or satellite if the off-air station cannot be received in local television homes. Cable operators are in a position to deny such viewer access, since most cable subscribers disconnect and take down off-air receiving antennas when they connect to cable. Indeed, in many rented apartments, condominiums and similar developments, external antennas are not even permitted. In those circumstances, any station not carried by cable is effectively denied access to the vast majority of cable subscribers.

Denial of access is, however, only one side of a two-sided problem. The carriage of popular local television stations has historically been the means by which cable systems have built a subscriber base necessary to permit systems to obtain and offer additional non-broadcast cable services. Local broadcast stations receive no compensation for the use of their signals in this manner, and have no ability to negotiate for such compensation owing to cable's compulsory license under the 1976 Copyright Act.

Great American urges the Commission to support legislation that would address both aspects of this problem. Legislation should be adopted that would either provide broadcasters with the right to grant or withhold consent to the carriage of their signals on a basis to be negotiated with cable operators, or that would repeal cable's compulsory copyright license. At the same time, cable operators should not be permitted to deny local television stations access to viewer homes.[3] If a cable system does not choose voluntarily to carry a local station whose licensee seeks carriage with no charge to the cable system, the station should be entitled by law to carriage without charge to it. Such carriage rights are necessary in order to preserve the local broadcast service mandated by Section 307 of the Communications Act. So long as cable systems continue to be local monopolies, they cannot be permitted to use their bottleneck positions to eliminate their off-air broadcast competition.[4]

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[3]Access denial occurs if a cable system fails to carry a local station, or carries it on a channel that cannot be received by all cable subscribers, or carries it on an unfavorable channel position that in and of itself will result lower levels of viewership.

[4]Should television companies be permitted to provide video service to the home under the Commission's "video dial tone" proposal in CC Docket No. 87-266, the special role of local off-air television should continue to be recognized by rules requiring carriage of local stations without payment of tariff charges.

(4) <u>The Availability of Leased Cable Channels to Other Providers of Commercial Services</u>. A regulatory scheme such as that described above would assure local stations the right to control use of their own signals and would assure stations access to all viewers in their markets. A cable operator would, however, still be the only entity in each community with the ability to control the content of multiple video channels and to derive revenues from these multiple channels both through the sale of advertising and from direct subscriber payments.

To permit genuine competition in multichannel service offerings, Great American urges the Commission to support modification of Section 612 of the Communications Act so that the cable channels required to be made available for "commercial use" under that section be offered on a first-come, first-served common carrier basis under rates ultimately subject to common carrier regulation. Such legislative changes would go one step beyond those previously recommended to Congress by the Commission in its 1990 report concerning cable regulation, but would be fully consistent with the Commission's more recent proposal in CC Docket 87-266 that telephone companies be permitted to provide television service to homes on a "video dial tone" basis.[5]

(5) <u>Modification of Television Multiple Ownership Rules</u>. So that broadcast companies may compete more effectively on a

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[5] <u>Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service</u>, Report in MM Docket No. 89-600, 67 RR 2d 1771, 1810-1812 (1990).

national basis with networks and with other national program suppliers, the Commission should initiate rule making proceeding looking toward repeal of the twelve station numerical limitation on television station ownership, with retention, however, of the present 25% national coverage limitation. Any entity seeking to offer programming on a nationally distributed basis is greatly advantaged to the extent that it is able to start with stations serving a substantial portion of the country as outlets for the programs or guaranteed cable carriage in a substantial portion of the country. Under the present twelve station rule, this advantage is held only by a small number of entities owning stations in the very largest markets and by a small number of cable network owners that also have widespread cable system ownership. The effect of a rule tied solely to national coverage would be to equalize competitive conditions among station owners and would increase the likelihood that more broadcast licensees, separately or jointly will seek to offer programs for national distribution.

CONCLUSION

This proceeding is a particularly urgent one. It comes at a point when the continued existence of many television stations is imperiled by their inability to compete effectively as single channel providers that are supported solely by advertising revenues and that lack ultimate control over use of their own signals. Great American urges the Commission to move forward with the regulatory changes outlined above so that today's television broadcasters may continue to participate in a truly competitive multichannel system.

Respectfully submitted,

GREAT AMERICAN TELEVISION AND
RADIO COMPANY, INC.

Bernard Koteen

By /s/ Bernard Koteen
Bernard Koteen

Arthur B. Goodkind

By /s/ Arthur B. Goodkind
Arthur B. Goodkind

KOTEEN & NAFTALIN
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 467-5700

Its Attorneys

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