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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

MM Docket No. 91-221

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In the matter of	)
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Review of the Commission's	)
Regulations Governing	)
Television Broadcasting	)

Reply Comments of the Association of Independent Television Stations, Inc.

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The Association of Independent Television Stations, Inc. ("INTV") hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* [*sic*] in the above-captioned proceeding.[1]

The Commission's proposals generally enjoyed widespread support in the comments filed in this proceeding. In its comments, INTV favored an incremental approach to relaxation of the rules with a review scheduled in three years for most elements of the rules.[2] INTV's approach would enable stations to form beneficial combinations, but minimize the downside risk to competition and diversity. With few exceptions, other commenting parties also favored relaxation of the rules,

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[1]FCC 92-209 (released June 12, 1992) [hereinafter cited as *Notice*].

[2]Comments of INTV, MM Docket No. 91-221 (filed August 24, 1992) at 2-3.

although differing in some respects with the precise nature or scope of the relaxation.[3] Moreover, the parties agreed with the Commission that the video marketplace of 1992 varies significantly from the broadcast marketplace of 20 years ago in that it is far more competitive and provides the viewing public with far more choices of video programming than ever before. Furthermore, commenting parties agreed relaxation of each rule would permit licensees to take advantage of economies of scale, thereby strengthening their position and ability to provide quality service to the public.

INTV, therefore, directs these reply comments to comments urging a return to content regulation or differing in modest, but significant respects with certain essential elements of INTV's proposals.

I. PROPOSALS TO "REREGULATE" BROADCAST TELEVISION ARE OUT OF BOUNDS AND UTTERLY UNFOUNDED.

The Office of Communications of the United Church of Christ ("OC/UCC"), which purports to represent the views of the general public, devotes much of its comments to seeking reimposition of so-called "public interest program standards."[4] Such proposals must be rejected out of hand.

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[3] *See, e.g.*, Comments of the National Telecommunications and Information Administration, Comments of Abry Communications, Comments of ACT III Broadcasting, Inc., Comments of Fox, Inc., and Comments of CBS, Inc.

[4] Comments of OC/UCC (filed August 24, 1992) at i [hereinafter cited as "UCC"]. With due respect to OC/UCC, the public response to television is registered moment to moment in thousands of diaries and by thousands of meters placed by the rating services. Like any industry interested in

First, they fall well outside the scope of this proceeding. Therefore, the adoption of any such proposal in response to the pending Notice would be unlawful under the Administrative Procedure Act, 5 USC §553(b)(3). Second, they rest on a suspect premise, the alleged decline of "public interest" programming. The OC/UCC makes much of its survey ostensibly showing marginal declines in public interest programming, claiming that it "completely discredits the belief that 'increased economies of scale could permit the production of new and diverse, including locally-produced programming.'"[5]

Their analysis is myopic, dictated by preconception, and self-defeating. First, independent stations are providing commendable and increasing levels of news and public affairs programming.[6] Second, the television industry has undergone

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succeeding, broadcast television station operators strive to satisfy public demand by broadcasting programs viewers want to see -- irrespective of whether one interest group or another believes it is what the public should want. Suffice it to say, the noted British linguist and Christian apologist, C.S. Lewis, once observed (albeit in a different context) that:

> Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.

Lewis, C.S., "The Humanitarian Theory of Punishment," *God in the Dock (Essays on Theology and Ethics)* at 298.

[5]UCC at 3 *et seq.*

[6]*See* Excerpt from INTV Comments, MM Docket No. 90-4 (filed September 24, 1991), attached hereto as Exhibit 1.

drastic changes between 1974 and 1989, the OC/UCC survey period. No one can deny that the video marketplace has replaced the broadcast marketplace, that more channels are competing for viewer attention, and that the effect on television stations has been dramatic.[7] These changes and their effects on television stations have nothing to do with television deregulation or any previous relaxations of the ownership rules. They have everything to do with increased competition and the negative effects on television station revenues and profitability.

What OC/UCC fails to grasp is that the Commission's allegedly misplaced concern over the profitability of television stations really reflects the Commission's correct perception that the economic base of broadcast television has been eroded to a point that the quality and quantity of broadcast television service to the public may be in jeopardy. One obvious solution to this is to permit stations to operate more efficiently via taking advantage of new economies of scale. Thus, the FCC and the UC/UCC share the same goal. The Commission, however, offers realistic forward-looking solutions, while OC/UCC would retreat to disproven, outdated rules designed to force stations to do what OC/UCC wants, regardless of their economic ability to do with the verve and excellence which have characterized broadcast programming for decades.

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[7]OC/UCC also makes no mention of the public value of programming provided by non-broadcast video media.

II. THE DECLINE IN INDUSTRY PROFITABILITY HARDLY CAN BE TRACED TO THE FAILURE OF RELAXED OWNERSHIP RESTRICTIONS.

OC/UCC berates the Commission for proposing to raise the national ownership ceilings, pointing to industry data which "indicates that past increases in the ownership ceiling did not prevent the economic decline of large numbers of television stations."[8] Nothing short of the throttling of all competing video media would have prevented the change in the competitive/economic position of broadcast television. However, if anything, one must conclude -- as the Commission now has concluded -- that further relaxation of the ownership rules will provide some modest benefit to the operating efficiency of broadcast television.

III. RAISING THE OWNERSHIP CEILING WILL NOT "SUBSTANTIALLY CONTRIBUTE TO CONCENTRATION OF OWNERSHIP."

OC/UCC bemoans its findings that "twenty large group owners...control 96 TV stations...."[9] Last we looked, the Commission reported over 1000 operating television stations. Thus, 20 owners control less than 10% of the stations. This is an offensive level of concentration... NOT!

IV. THE OC/UCC SURVEY IS FLAWED IN ITS COMPARISON OF INDIVIDUAL VERSUS GROUP-OWNED STATIONS.

OC/UCC laments its conclusion that group owners broadcast less local news relative to their individually owned

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[8]UCC at 8.

[9]UCC at 10.

counterparts. INTV, like the Commission, says , "So what?" Indeed, their survey is flawed in that other station characteristics (*e.g.*, market size, station type, etc.) may have been the true cause of the disparity. Furthermore, such findings prove nothing about investment levels. Therefore, despite OC/UCC's protestations to the contrary, the OC/UCC survey in no way contradicts "the Commissions's belief that group owners invest savings from the economies of scale into locally produced programming."[10]

V. OC/UCC IS DEAD WRONG IN PREDICTING THE DEMISE OF INDEPENDENTLY OWNED STATIONS IF THE DUOPOLY RULE IS RELAXED.

OC/UCC proffers the dire prediction that any relaxation of the duopoly rule "will result in the fatality of small and individually owned stations."[11] According to OC/UCC, such stations would be placed at a competitive disadvantage.[12] This is speculation. An equally plausible result would be the strengthening of small stations and the elimination of the competitive disadvantage they may already face in many markets. In other words, the ability of a small owner to acquire another local or nearby station might place that owner in competitive parity with larger group owners with powerful

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[10]UCC at 10. Most telling from OC/UCC's Exhibit II is the *increase* in local and national public affairs programming between 1984 and 1989 across all station-ownership types. While OC/UCC flails about among the trees, the forest speaks for itself.

[11]*Id.* at 12-13.

[12]*Id.*

stations in the market. Similarly, two small owners might merge to enhance their competitive position vis-a-vis larger competitors in the market. Finally, failing stations might be rescued by either small or large owners, thereby preserving the current level of outlet diversity in a market.[13] Therefore, OC/UCC'S self-serving speculation neglects other potential outcomes which would benefit small owners.

VI. OC/UCC IS PREMATURE IN PROPOSING MORE INTENSE REGULATION OF TIME BROKERAGE AGREEMENTS.

OC/UCC has posited the need for more intrusive regulation of time brokerage agreements. Its concerns seem little more than hypothetical and are inadequate in any event to justify more regulation or safeguards. Insufficient experience exists in television time brokerage or local marketing agreements ("LMAs") to justify any tightening of the regulatory grip. Furthermore, even theoretical or hypothetical bases are lacking for Commission action.

Indeed, the future use of LMAs depends in great part on the Commission's ultimate actions in response to the *Notice*. Meaningful relaxation of the ownership rules, as proposed by INTV, would obviate the need for extensive use of LMAs. On the other hand, more modest relaxation of the duopoly rule in particular would maintain the opportunity for sensible

[13]Under INTV's proposal, local concentration would be limited because no single owner could control more than two stations.

employment of LMAs.[14] Only if the opportunity remains for extensive use of LMAs will the Commission be in a position to evaluate whether additional safeguards are in order.[15]

VII. A "MINIMUM VOICE" TEST IS POINTLESS, DANGEROUS, AND WOULD GUT THE UTILITY OF A RELAXED DUOPOLY RULE.

The Commission has raised the possibility of a "minimum voice" test as part of a relaxed duopoly rule, and some parties have supported the concept.[16] However, as INTV pointed out in its comments, such a limitation on the utility of a relaxed duopoly rule would be counterproductive.

First, in an age when the vast majority of homes are passed by cable, which offers programs from different sources, or can receive a diverse array of satellite signals with a backyard dish, a broadcast-only voice test loses much of its meaning. Whatever the marginal decrease in the number of broadcast voices may be, it must be viewed in this newly-diverse and competitive environment, not the broadcast marketplace of 20 years ago.

Second, a voice test could an unfair situation in some markets. Some stations would have merged prior to the closing

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[14]As INTV has urged, LMAs should be governed by the same standards applicable to attributable ownership interests only if the ownership rules are relaxed in the manner suggested by INTV. INTV Comments at 27.

[15]Also, as INTV noted in its comments, "Permitting LMAs out-of-synch with the duopoly rule would enable the Commission to gain a better appreciation of some of the costs and benefits of common operation of two stations." INTV Comments at 28, n.39.

[16]*See, e.g.*, Comments of Fox, Inc., at 9.

of the window when the minimum voice level had been reached.[17] The rest of the stations might forever remain shackled by the voice test and unable to take advantage of the rule. A voice test would soon freeze some stations into permanent single station status, regardless of what would make most sense for their business and the for the public.

Third, as noted in INTV's comments, the number of markets where combinations would be possible plummets with a voice test. Even if a four voice test were employed, INTV finds only 86 markets where at least one combination could be formed (versus 38 with a six voice test).[18] Finally, INTV has proposed limiting ownership to two stations. This will prevent undue concentration.[19]

VIII. IF THE COMMISSION IS HESITANT TO RELAX THE DUOPOLY RULE ITSELF, A MORE LENIENT AND REALISTIC CONTOUR AND WAIVER STANDARD SHOULD BE ADOPTED.

If the Commission determines to retain the duopoly rule in substantially its present form, then it at least should administer it in a sound and sensible way. The Commission's present duopoly rule produces arbitrary, if not bizarre, results. It has prevented the common ownership, for example,

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[17]The Commission also would invite a land rush approach to mergers and combinations, a process which might short-circuit sound business judgments or eclipse them with defensive business plans.

[18]*See* INTV Comments (filed November 21, 1991), Exhibit 1.

[19]Concern about smaller markets, where the number of stations is limited, should be mitigated by the fact that cable has been an integral part of the market for a long time. Cable, after all, got its start in just such markets.

of WUTV, Buffalo, and WUHF-TV, Rochester, in light of a negligible grade B contour overlap.[20] Such overzealous application of the rule underscores the need to clarify and rationalize its administration.

First, as INTV already has proposed, the relevant overlap contour should be changed to the grade A contour.[21] Second, waivers ought be granted liberally to permit common ownership of stations assigned to different ADI's.[22] Third, INTV concurs with Act III that the *de minimis* standard be clarified and based on fixed population and service availability standards.

IX. CONCLUSION

In view of the above, INTV urges the Commission to proceed expeditiously to relax the television ownership rules substantially.

Respectfully submitted,

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September 23, 1992

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[20] *See* Comments of Act III Broadcasting, Inc. (filed August 24, 1992); *Notice* at n.32. INTV fully supports the Commission's tolling the divestiture requirement for WUHF/WUTV pending its decision in this proceeding.

[21] INTV Comments at 19.

[22] Cf., Comments of Fox, Inc., (filed August 24, 1992) at 7-8.

Before the
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In the matter of	)	
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Reexamination of the Effective	)	
Competition Standard for the	)	
Regulation of Cable Television	)	MM Docket No. 90-4
Basic Service Rates	)	MM Docket No. 84-1296
	)	
Carriage of Television	)	
Broadcast Signals by Cable	)	
Television Systems	)	

COMMENTS OF THE

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

EXCERPT

Independent television stations more than fulfill their obligations to provide news and issue-oriented programming responsive to their communities -- contrary to the views of the Commission's staff.[23] Independent stations are making a significant contribution to the discussion of public issues in their local communities. A recent survey of INTV members reveals that 96% of the stations responding had *regularly scheduled weekly* public affairs programs. These programs are aimed directly at the local audience. Indeed, 92% of these programs were locally produced. Eighty percent were half-hour programs and 17.8% of the shows were an hour in length.

Apart from regularly scheduled weekly programs, 79% of the respondents broadcast specials or documentaries on a regular basis. Approximately 43% of these specials were half-hour shows and 57% were one-hour shows.

The list of topics covered ranged from the homeless, local politics, and the environment to crime and a host of other critical community issues.... Indeed, the examples cited above are just the tip of the iceberg. For example, KSCH-TV, Channel 58 in Rancho Cardova, California, broadcasts a 90 minute, commercial free, memorial to fallen war dead in its area every Memorial Day. For an hour and a half, KSCH presents on the screen the names, ranks and service branch of

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[23] "Independent stations also provide some local programming, including news....However, as we shall see below, independents as a group provide much less of such programming than so affiliates." OPP at 31.

the fallen war dead for the station's 18 county viewing area. The scroll of names covers World War II, Korea, Vietnam and this year, the Gulf War. This program received an unprecedented response from the community. The most touching letter received was from Esther T. Dominguez, now almost 70 years old, who saw the name of a former boyfriend listed. Her letter reads in part:

> I was so touched. I will soon be 70 years old, and it brought tears to my eyes to remember old friends of the past that gave their lives so that we might enjoy the peace, and also the love we feel for our country.
>
> I even saw the name of an old beau I had during the pre-war period of World War II. Since I never heard from him again, now after 49-50 years, my suspicions became true. Somehow, I always wished that he just didn't care anymore, but deep inside me, I knew that wasn't so. At last I know that just a couple of months of overseas service, my pilot was killed in action. May his soul rest in peace.

The survey of INTV members also showed a considerable number of stations providing news, especially when taking into account the cost of producing news and the cash flow of the average independent station. Approximately 78% of the respondents broadcast or are planning to broadcast regularly scheduled weekday news -- 58% of the respondents currently air news while 20% are planning to do so. Weekend coverage also is expanding as 62% of the respondents reported that they currently broadcast or plan to air weekend news. Approximately 40% of the respondents currently air a regularly scheduled weekend newscast with 22% planning to initiate weekend news in the next two years.

Most of these newscasts -- 66% -- are produced locally. Additionally, 70% of stations use a national news service. Nonetheless, the vast majority of the news is locally produced.

These figures are especially important when compared to total stations expenses. Approximately 46% of the respondents' news departments account for 10-30% of a stations expenses. Largely for that reason, many independents are relatively new to the news business. Forty-five percent of the respondents have been broadcasting news for less than five years. Approximately 24% of the respondents have broadcast news for 5-10 years and 31% have done so for more than 10 years.

These figures roughly correspond to a survey conducted by Seltel which found that the number of independent stations with newscasts has doubled since 1982.[24] Ironically while some of the "Big 3" network affiliates are abandoning the 11:00 PM news, independent stations, including Fox affiliated stations are expanding their new operations. The *Wall Street Journal* reported recently that WKXT, Knoxville, Tennessee (CBS); WMGT, Macon Ga (NBC); WLVA Baton Rouge (NBC); WNWO, Toledo Ohio

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[24]Seltel's analysis was limited to prime time and measured the years 1982-1989. The study found that in November 1982, 21 independent stations aired local newscasts. This number increased to 40 as of May 1989. Seltel, *What New's, Local Independent Newscasts 1982-1989*. (May 1990).

(ABC) had abandoned their 11 PM news.[25] At the same time, however, independent stations such as KCAL, Los Angeles, has expanded its evening newscast to three hours. Moreover, Fox stations such as WNYW, New York, and WTTG, Washington, D.C., have expanded their news operations to include locally based morning newscasts that compete successfully with the Big 3 networks morning shows.

In sum, independent television stations provide a truly locally-oriented and locally-responsive service.

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[25] *Wall Street Journal*, May 22, 1991, at B1.